VOICE OF THE BAR

'Innes' and the Continued Degradation of the 'American Rule'

Bennett Wasserman's recent article ("The 'Innes' Case: Another Reason to Keep 'Saffer v. Willoughby' Alive," May 16) seizes upon the recent New Jersey Supreme Court decision in *Innes v. Marzano-Lesnevich*, in yet another self-serving attempt to justify the unjustifiable: the continuance of fee shifting in favor of prevailing plaintiffs in claims against attorneys, but no other licensed professionals. In referencing the story of Chicken Little, Mr. Wasserman appears to have perhaps too accurately revealed his true feelings towards this state's legal practitioners by disparagingly referencing supporters of the New Jersey State Bar Association, and its recent well-attended convention in Atlantic City, as "barnyard friends."

Mr. Wasserman advances the fundamentally flawed premise that the *Innes* decision is unrelated and independent of the judicially created deviation from the "American rule" in attorney negligence case, which was announced by this state's Supreme Court in *Saffer v. Willoughby*. In *Innes*, the New Jersey Supreme Court directly considered the Appellate Division's holding that "*Saffer* fees" applied in a suit asserted against an attorney by a nonclient. The *Innes* court also relied upon a subsequent expansion of this doctrine in *Packard-Bamberger & Co. v. Collier*, which authorized fee shifting in claims arising from intentional attorney misconduct matters. The *Innes* majority reasoned that, based upon *Saffer* and its progeny, fee shifting is proper where an attorney is determined to have intentionally breached a fiduciary duty owed to a nonclient. The decision was justified based upon the fiduciary relationship as opposed to an attorney-client relationship, and a plain reading of the decision suggests that the same rationale could be expanded to nonattorney or nonprofession fiduciary relationships. This would represent further degradation of the American rule that requires each litigant to pay his or her own litigation costs. The ultimate holding in *Saffer* represents a reaffirmation and potential expansion of the troublesome judicially created deviation from the American rule.

By way of background, in *Saffer*, the New Jersey Supreme Court created a "carefully limited" exception to the American rule, reasoning that legal fees incurred as a result of an attorney's negligence, including reasonable legal fees incurred prosecuting the malpractice case, are recoverable as "consequential damages" by a successful legal malpractice plaintiff. At first blush, this logic seems justifiable, but when it is considered that legal fees incurred in the prosecution of a claim are not considered as consequential damages in any other type of litigation, including negligence claims against other licensed professionals, the wobbly premise underlying this justification becomes apparent. If this reasoning were taken to its logical extension—or even applied in other contexts—it would represent the complete evisceration of the American rule.

Although largely unstated by the court in *Saffer*, the justification for fee shifting against attorneys invariably, yet implicitly, arises from the special and unique relationship between an attorney and his client. The fees incurred to prosecute virtually any litigation could be proximately traced back to the actions alleged in the complaint, yet fee shifting only attaches to claims against attorneys. Following *Saffer*'s announcement by the New Jersey Supreme Court in 1996, no other jurisdiction has seen fit to adopt the mandatory fee shifting in favor of successful legal malpractice litigants, whether by judicial interpretation or legislative action.

The New Jersey State Bar Association has remained critical of the *Saffer* decision since its inception for a variety of oft-repeated reasons, which Mr. Wasserman largely ignores. First, there is no logical reason why attorneys should be the only licensed professionals against whom mandatory fee shifting applies. The connection between an attorney and his or her client is not necessarily stronger or more unique than that of other licensed professionals, including doctors or accountants.

Second, the mandatory nature of the award of *Saffer* fees often represents a double recovery for prevailing plaintiffs. Normatively, the threat of such fees often unjustifiably shifts the balance of settlement negotiations in favor of the plaintiff, which is particularly troubling considering the low percentage of cases which actually proceed to trial.

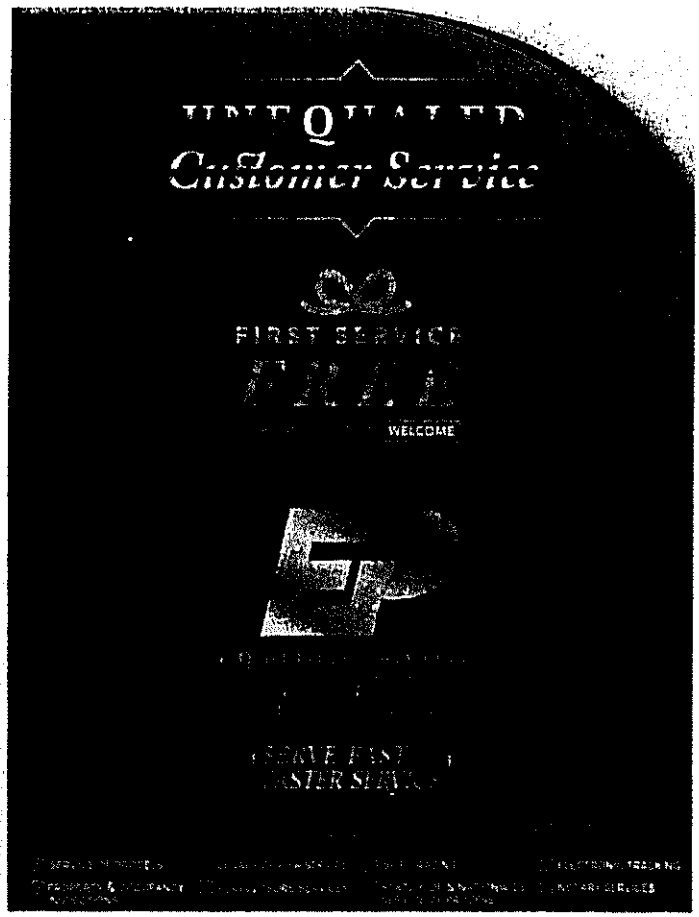
Third, *Saffer* has opened the floodgates for litigation against attorneys; many of these suits are frivolous or non-meritorious claims, which are in part motivated by the hope and threat of fee shifting.

Fourth, the very notion that legal fees are "incurred" by the legal malpractice plaintiff is essentially a legal fiction, as the balance of legal malpractice claims are brought on a contingent fee basis and the plaintiff is not actually incurring any costs to file or proceed with the litigation.

Mr. Wasserman's two stated justifications for the continuance of *Saffer* fee shifting do not stand up to careful examination. First, Mr. Wasserman suggests that "special damages" (including cost of treatment resulting from the malpractice, lost wages and loss of future earnings) which are recoverable in medical malpractice, are comparable to the award of *Saffer* fees. Mr. Wasserman conveniently ignores that: (1) the attorney's fees incurred by a medical malpractice plaintiff are not considered compensatory damages and are not awarded to a prevailing medical malpractice plaintiff; and (2) the special damages awarded to a medical malpractice plaintiff are not akin to fee shifting as they must be proven and established by the plaintiff at trial as part of his or her case in chief. Special damages do not represent an additional bonus for prevailing at trial. Finally, if special damages are to be compared to *Saffer* fees, they are far more analogous to legal fees incurred by subsequent counsel to correct the negligent attorney's actions in the underlying action or transaction, as opposed to fee shifting in the professional malpractice action, which deviates from the America rule.

Secondly, the notion that *Saffer* fees are somehow beneficial to attorneys because carriers will be inclined to settle malpractice suits instead of letting such cases proceed to trial is logically unsound and uninformed from a practical perspective. Mr. Wasserman ignores that due to increasing insurance rates, many firms and practitioners are forced to purchase insurance policies which require the payment of a sizable deductible in connection with the settlement of any claim. Further, Mr. Wasserman ignores the rising cost of renewals resulting from settled claims, including non-meritorious claims which are settled to avoid the crushing blow of *Saffer* fees. Finally, this suggestion entirely contradicts the very basis of the American rule that requires parties to pay their own litigation costs—and the notion that this foundational element of our legal system should not apply to attorneys is problematic to say the least.

Mr. Wasserman also uses the *Innes* decision as a bullhorn to tout his self-serving opposition to another provision of the discussed reform bill that would bring the statute of limitations for legal malpractice claims from the current six years to two years, in keeping with claims against doctors in this state. Mr. Wasserman's chief objection to a reduction of the statute of limitations is that it will cause an increase in the filing of legal malpractice claims. Ignoring the basis of this logically questionable notion, Mr. Wasserman's selective concern for attorneys falls on deaf ears, as the remainder of his commentary argues for keeping *Saffer* alive, which specifically incentivizes claims against attorneys. Mr. Wasserman's suggestion that this bill will make us resemble the allegedly "worse" jurisdictions of New York and Pennsylvania is also misleading because neither state has recently reduced its statute of limitations and any intimation of causation is simply overreaching and speculation. Mr. Wasserman also ignores that the very purpose of a statute of limitations is to ensure that cases are litigated while they are fresh and there is easy access to the information and individuals needed for litigation and trial.



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is valid is a question of law. *In Re Six Months Extension of NJAC* 5:91-1, 372 N.J.Super. 61 (App. Div. 2004)

4. Prerogative Writs—Jurisdiction in Both Law Division and Appellate Division

A prerogative writ is an order from one branch of government (typically the judiciary) compelling another branch of government (typically the executive although occasionally the legislature) to either take or refrain from taking a particular action. Unlike the appeal of an agency's final judgment (which may be filed only in the Appellate Division), both the law division and the Appellate Division have jurisdiction regarding prerogative writs. The only exception here is that if the defendant is a state agency, then the plaintiff should proceed in the Appellate Division, not in the Law Division. *Marranca v. Harbo*, 76 N.J.Super. 429 (Law Div. 1962).

5. Core Arguments for Challenging an Agency's Final Judgment

In a challenge to the administrative agency's determination of its own implementing statute, policies or its regulations, the Superior Court is prohibited from substituting its own judgment for that of the agency's head. Rather, if the Court finds the agency's decision inappropriate, the proper remedy is for the Appellate Division to reverse the agency. Where there is substantial evidence to support the agency's determination, the courts should refrain from disturbing the agency's final determination. The great deference provided to administrative agencies arises from the proposition that an administrative agency is presumed to be knowledgeable of the area it regulates, and, further, there is a presumption that the administrative agency's actions and interpretation of its own regulations are reasonable.

The administrative agency is on far weaker grounds, however, where it is in essence ruling upon areas that are outside the agency's competency. In addition, the administrative agency is not entitled to deference where it rules upon areas that are properly the purview of the Superior Court (such as whether an agency rule comports with the United States or state constitution). If the agency's final judgment is clearly against logic, the effects of that judgment are unreasonable, arbitrary or capricious, then it is the court's duty to reverse. *Elizabeth Lodge v. Legalized Games of Chance Commission*, 67 N.J. Super. 239 (App. Div. 1961). ■

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Limiting legal malpractice cases to the same two-year period applied to medical professionals would be the efficient and cost-sensitive approach, since in a legal malpractice matter the events giving rise to the underling trial, claim or transaction may already be a memory. The discovery rule would remain unchanged and serve to protect the claims of clients of less than forthright attorneys who engage in nefarious methods to cover their tracks.

Mr. Wasserman's recitation of and reliance upon the specific facts of *Innes* are also less than forthright. Mr. Wasserman ignores that the *Innes* court ultimately remanded the case to the Law Division so that a determination can be made as to whether the defendant attorney's conduct was intentional. Under the facts of the case, the defendant attorney was recently retained and the issue of intentional conduct was not presented to the jury. Finally, yes it is a horrible tragedy, that an infant was removed from the country by one parent in contravention of the well-guided orders of the New Jersey Family Part. However, tragic personal and professional events s erve as the underpinning of a significant number of cases filed in New Jersey. The specific reliance upon the facts of this personal tragedy does not advance Mr. Wasserman's cause, justify the expansion of mandatory fee shifting in favor of successful claimants in actions against attorneys or the continued erosion of the American rule. ■

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— Dennis J. Drasco and Arthur Owens, *Lum Drasco & Positan*