

*Saffer v. Willoughby**

In 1978, the New Jersey Supreme Court created a system whereby clients could elect to arbitrate any fee disputes with their attorneys.¹ This system was designed solely to cover issues relating to fee disputes; it was never intended to handle legal malpractice claims. This interplay between fee disputes arbitration and malpractice was the subject of *Saffer v. Willoughby*, a recent New Jersey Supreme Court case.

It should be of no surprise that attorney malpractice and fee disputes are often found lurking in the same lair. In both malpractice and fee disputes, the client believes that he did not get what he paid for.² Attorneys probably suspect that at some time during a fee dispute, the client will entertain the possibility that his attorney committed malpractice.³

How should the relationship between fee disputes and malpractice be reflected in procedural rules governing attorney fee arbitration? As demonstrated in *Saffer v. Willoughby*, this issue becomes important when clients file separate actions for malpractice and for a fee dispute. When one of the actions is filed in court and one before an arbitral Fee Committee, the relationship between the two bodies and their overlapping jurisdiction can affect the remedies available to the client.⁴

* 670 A.2d 527 (N.J. 1996).

¹ Although fee arbitration is voluntary for the client, the attorney must participate in fee arbitration if the client so elects. For further discussion of this process, see *In the Matter of the Application of Philip J. Livolsi*, 428 A.2d 1268 (N.J. 1981).

² See generally Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005 (1993).

³ A malpractice claim may precede or follow a fee dispute. For example, receiving the attorney's bill may be the "last straw" which causes the client to file a malpractice action regarding an unsatisfactory result in his case. Or the client may first be shocked by the amount of the bill, file a fee dispute, then as facts to substantiate the fee dispute are discovered, the client may later find reasons to believe that the attorney did not perform competently and file a malpractice action. See Rau, *supra* note 2, at 2005-2006.

⁴ Issues of collateral estoppel and res judicata could also be present when a client files separate actions for malpractice and for a fee dispute. For a brief discussion of these issues, see Rau, *supra* note 2, at 2048-2050.

A client with a fee dispute may perceive his attorney as having committed malpractice⁵ regardless of whether there is a colorable claim. In reality, a fee dispute may or may not involve incompetent lawyering. On the one hand, the attorney and the client may disagree solely about the basis of the fee. Or the client may intuitively believe that the amount of the bill should always be proportionate to the success of his case. In such cases, malpractice is not part of a fee dispute.

On the other hand, some fee disputes inherently involve malpractice and the violation of one of the Rules of Professional Conduct (RPC). For example, if a client believes the attorney's bill is excessive because the attorney billed for what he did not do ("bill padding"), clearly the underlying cause of the fee dispute is malpractice and involves a violation of an RPC.

In New Jersey, fee arbitration was instituted to provide a less cumbersome alternative to clients with claims against their attorneys.⁶ Both attorneys and clients benefit from fee arbitration by avoiding publicity and legal fees. Attorneys get the additional benefit of not having clients complain about the attorney's services in open court.

Saffer v. Willoughby illustrates the inherent difficulties encountered in a fee arbitration system when a disgruntled client also alleges malpractice. The *Saffer* court had to determine how New Jersey's system of fee arbitration should operate in order to ensure fairness to the client, the attorney and the members of the arbitral Fee Committee. In the process of deciding this issue, the court needed to define the jurisdiction of the Fee Committee when a malpractice complaint is filed.

In *Saffer*, William W. Willoughby, Jr., the disgruntled client, refused to pay the fees of Mr. Saffer, the attorney.⁷ Subsequently, the attorney filed a request for fee arbitration. After the arbitration began, the client's new attorney discovered evidence that the first attorney had committed

⁵ Legal malpractice "[c]onsists of failure of an attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performance of tasks which they undertake, and when such failure proximately causes damage it gives rise to an action in tort." BLACKS'S LAW DICTIONARY 662 (abr. 6th ed. 1991).

⁶ See *infra* note 18 and accompanying text.

⁷ Mr. Willoughby was a professional basketball player and had hired Mr. Saffer to bring suit against his former agent, Jerry Davis. Although Mr. Saffer filed a counterclaim against Mr. Davis, Mr. Saffer failed to implead Lewis Scheffel, Mr. Willoughby's former business manager. After a verdict for Mr. Willoughby, Mr. Davis filed for bankruptcy, allowing Mr. Willoughby to collect only \$150,000 of a \$750,047.84 judgment. (Although the jury originally awarded \$768,047.84, the Appellate Division reduced the award to \$750,957.78.) See *Saffer*, 670 A.2d at 529-531.

malpractice.⁸ In addition to submitting evidence of the alleged malpractice at the arbitration, Mr. Willoughby's new attorney filed a legal malpractice complaint.

The New Jersey Fee Arbitration Committee ruled that the first attorney had met his burden per Rule 1.5 of the Rules of Professional Conduct⁹ and was entitled to his fee.¹⁰ The Law Division confirmed the award, which was later affirmed by the Appellate Division. The court ruled that under New Jersey law a pending malpractice action was not a valid reason to vacate an arbitration award.¹¹ Mr. Willoughby appealed to the Supreme Court of New Jersey.

The first and second issues for the *Saffer* court were jurisdictional: (1) whether the Fee Committee had jurisdiction to decide a legal malpractice claim; and (2) whether the arbitral Fee Committee should be deprived of jurisdiction to decide a *fee dispute* when, after arbitration had already begun, a legal malpractice action was filed.

Regarding to the first question, the New Jersey Supreme Court held that New Jersey's Arbitration Rules did not allow the Fee Committee to take jurisdiction over legal malpractice cases.¹² The *Saffer* court explained that the jurisdiction of the New Jersey Fee Committee was very narrowly limited to fee disputes, for two important reasons. First, the limited jurisdiction allowed the committee to process disputes in a timely manner.¹³ Second, because the Committee's decisions are almost unappealable,¹⁴ the

⁸ Because Mr. Saffer had refused to implead Lewis Scheffel, Mr. Willoughby's new attorney alleged that Mr. Saffer had negligently or intentionally precluded Mr. Willoughby from trying to collect a larger portion of the \$750,957.78 award. Mr. Willoughby's new attorney filed a legal malpractice complaint in May of 1993. *See id.* at 529-530.

⁹ Under the ABA Rule of Professional Conduct 1.5, the attorney has the burden of proving the reasonableness of his fee according to eight specific factors. *See id.* at 530.

¹⁰ \$103,510 of the \$120,000 fee awarded remained unpaid. *See id.*

¹¹ *See id.* (citing N.J. STAT. ANN. § 2A:24-8 (West 1987)).

¹² The court based its ruling on the court-established rules for the Fee Committee. Under those rules, the Fee Committee must refuse to hear a case "in which the primary issues in dispute raise substantial legal questions in addition to the basic fee disputes . . ." *Id.* at 531 (quoting N.J. R. CT. 1:20A-2(b)(3)).

¹³ "Fee Committees are primarily created to render fair and fast decisions. They are not designed to hear two-week long cases where the client's defense to a \$40,000 fee is that the lawyer is guilty of malpractice, a substantial legal issue." *Id.* at 531-532 (quoting Office of Attorney Ethics of the Supreme Court of New Jersey, District Fee Arbitration Committee Manual for Committees Appointed by the Supreme Court of New Jersey 26 (1993)).

¹⁴ An important question for the legislature is whether the decisions of arbitral fee committees should be appealable. If such decisions were appealable, then courts could allow the committee to hear malpractice cases as well. This would save judicial resources because

malpractice plaintiff might not be able to get reconsideration of his claim. The court saw this as unfair in a legal malpractice claim and thus held that the Fee Committee did not have jurisdiction over legal malpractice claims.

In answering the second jurisdictional question, the court held that the Fee Committee retained jurisdiction over the fee dispute when the malpractice suit was filed. Thus, the *Saffer* court protected the jurisdiction of the Fee Committee and prevented the volunteer Fee Committee members from wasting their time and efforts by preparing a case, only to have a client find evidence of malpractice days before the arbitration and take the case from the arbitral committee.

The final holding of the court was that, even though Mr. Willoughby had continued in arbitration after filing the malpractice claim, the court could stay the arbitration award pending the outcome of the malpractice case in court. In future actions, if a client discovered evidence of malpractice, the client would have a new thirty-day window during which he may withdraw his request for arbitration.¹⁵

From the client's point of view, the court's decision applies common sense. If an attorney has committed malpractice, the client should not have to pay for the attorney's services until it is determined that he did not commit malpractice, regardless of whether arbitration has begun. After all, as the *Saffer* court discussed, fee arbitration is to provide a "swift, fair and inexpensive method of resolving fee disputes."¹⁶ Making a client pay an arbitral award for services which may later be found to have been performed incompetently would subvert the good will intended by creating the arbitral forum.

To attorneys, however, allowing clients to withdraw from fee arbitration is giving clients "two bites at the apple." Clients may be tempted to request fee arbitration to delay paying the attorney. Then, if the arbitration does not proceed to his satisfaction, the client can reveal evidence of legal malpractice previously withheld and get a new thirty-day window to withdraw the request. Although this scenario presupposes the client's willingness to deceive the arbitration panel and the court, the scenario may make such deceit temptingly tailored for the dishonest client. Also, as discussed by the *Saffer* court, allowing clients to withdraw from arbitration would potentially waste the time and efforts of a fee committee.¹⁷

many of the issues of malpractice and fee disputes are intertwined.

¹⁵ See 670 A.2d at 532-533.

¹⁶ *Id.* at 531 (quoting *In re Livolsi*, 428 A.2d 1268, 1281 (N.J. 1981)) (emphasis added).

¹⁷ New Jersey's Fee Arbitration Rules originally provided that a client could withdraw from fee arbitration up until the arbitration actually began. The 1995 amendment provides that

Although the *Saffer* court is probably correct to protect the client from having to pay the fee before a malpractice action is decided, some protection is needed to ensure that a client is not filing for fee arbitration in order to delay paying the attorney. The New Jersey Supreme Court should amend the rules governing fee arbitration so that clients must bear the burden of proving their good faith in applying for fee arbitration. To help guide clients through the process of choosing a forum and ensure that burdensome hurdles do not take away the benefits conferred by fee arbitration, fee committees could provide a screening service to clients, educating them about whether they have a malpractice case or a simple fee dispute. The court rules governing arbitral fee committees could specify that, because malpractice is often intertwined with fee disputes, a client must first go through a screening interview. During the interview, the screener could determine if the client is likely to have a future malpractice claim. For example, if the client's fee dispute centered mainly around a misunderstanding about the basis for the fee and did not center on any malpractice issues, the client might be sent on to fee arbitration. If, however, the client talked about issues which might involve violations of an RPC, such as billing fraud, the client would be educated about how fee arbitration might affect his remedies for malpractice. Making it harder for fee committees to exercise jurisdiction over a fee dispute in the first place is one way to prevent clients from abusing the privilege of arbitration in order to get "two bites at the apple."

Educating the client about the relationship between malpractice actions and fee disputes would need to be delicately handled in order to avoid the attorney's objection that the client is being pushed into filing a malpractice action. Most attorneys would probably prefer that the client possibly get "two bites at the apple" rather than having an arbitration screener educate them about malpractice! Despite attorneys' nervousness, educating the client means simply explaining the elements of malpractice in comparison to those of a fee dispute and the consequences of filing one or both. The client could evaluate his situation before initiating a fee dispute arbitration before a committee whose jurisdiction is very limited. This would avoid wasting judicial and arbitral resources and would give the legal community another chance to be of service to a disgruntled client.

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the client is prohibited from withdrawing from fee arbitration once it is docketed. *See* N.J. R. Ct. 1:20A-3(b)(1). According to the court, this restriction was designed to prevent clients from filing a claim for the sole purpose of delaying payment of the attorney, thereby causing the Fee Committee's volunteer members to waste time preparing for a case that is never heard. *See Saffer*, 670 A.2d at 531.

