# The 'Jaundiced Eye' and the Fight to Prevent Inherent Speculation in Legal Malpractice Cases

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*The Legal Intelligencer*
October 6, 2022
By Charlene S. Seibert

Early in my career, I frequently received a surprising response when I told people that I defended lawyers in legal malpractice lawsuits: "I didn't know you could sue lawyers." Indeed you can, of course, as with any professional. Yet that sentiment does not ring true in today's environment, where legal malpractice claims are much more commonplace and litigants are all too happy to point the finger at their lawyers for the frustrating woes that often come with the vagaries of litigation (and its results).

In an article published in the American Bar Association Journal in 1982, then-U.S. Supreme Court Chief Justice Warren Burger was quoted saying that "it appears that people tend to be less satisfied with one round of litigation and are demanding a 'second bite of the apple' far more than in earlier times." It was this quotation that later made its way into the hotly controversial opinion of *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (1991), wherein Pennsylvania Supreme Court Chief Justice Ralph Cappy observed:

> Particularly troublesome to the efficacy of the courts are these "second bite" cases; they require twice the resources as a single case, yet resolve only a single litigant's claims—thus denying access to the courts to litigants who have never had a single resolution of their dispute. For that reason, henceforth we should view "litigation concerning litigation" cases with a jaundiced eye.

That legal malpractice cases should be viewed with a jaundiced eye has a been a hallmark phrase for defense attorneys since the *Muhammad* opinion. Recently, however, the phrase has been met with some backlash by Judge David Wecht in his now well-known concurring opinion in *Khalil v. Williams*, 278 A.3d 859 (Pa. July 20, 2022). The *Khalil* court declined the opportunity to revisit *Muhammad's* ruling that, absent fraud, litigants who settle their underlying litigation are precluded from pursuing legal action against their attorney arising from an inadequate settlement amount. Wecht offered what cannot be characterized as anything but a

scathing criticism of the *Muhammad* ruling, a topic upon which many practitioners have written about and scrutinized on both sides of the aisle.

More subtle, however, was the quiet (or not so quiet) undertone of Wecht's concurrence that legal malpractice cases should not be viewed as "second bite" cases at all, observing that such cases involve a wholly independent wrong, against a wholly distinct tortfeasor, for a wholly distinct harm. According to Judge Wecht, to view such cases with skepticism, or with the so-called jaundiced eye, is not warranted.

It is true, as Wecht points out, that the lawyer-tortfeasor is a distinct party against whom an independent breach must be proved, but this just adds a different layer of litigation. More often than not, these cases come down to the merits of the underlying litigation, requiring the lawyer to essentially "stand in the shoes" of the underlying defendant. And, as our jurisprudence in Pennsylvania makes clear, the plaintiff must prove that "but for" the conduct of the lawyer, the plaintiff would have received a judgment in the underlying litigation, with the measure of damages constituting the amount of the "lost judgment." *See Kituskie v. Corbman*, 682 A.2d 378, 381 (Pa. Super. 1996). This is indeed the precise injury in the underlying action, and thus requires re-litigation of the case, but this time with a different lawyer, judge and jury. The circumstances of re-trying the case within a case naturally lends itself to disgruntled litigants attempting to take a second bite.

But perhaps jaundiced was never the right word. It is not that the legal malpractice case should be immediately met with skepticism. Indeed, no one would dispute that lawyers—like any other professional—make mistakes for which they should be held responsible to their client for resulting harm. Rather, it is that the legal malpractice case should be met with the appreciation that they often follow a complete or largely complete record, including deposition testimony, answers to discovery, document production requests and in some cases, trial transcripts and appellate records. It is the appreciation that the law is not a science and that, as a trial lawyer, no two lawyers will try the same case the same way, just as no two juries will look at the same facts and come to the identical conclusion. It is the appreciation that as wronged as some litigants feel, sometimes they just lose their case for reasons that can never be determined, but the lawyer is the natural target for the disgruntled litigant.

Speculative second bite cases do arise and we need to be wary of them. Many times, lawyers are met with a complaint presenting a litany of alleged failures, but without the facts to support that such failures actually caused any harm. Too often, trial courts allow speculative and conclusory contentions of harm to slide into discovery. For example, the plaintiff may plead that the lawyer failed to adduce sufficient "evidence" to support the underlying action, yet the complaint will have no description of the "evidence" that actually exists that would have been garnered through proper discovery. Some plaintiffs attempt to use the legal malpractice case to 'find' the evidence they believe must be there, but don't really know.

The risk of allowing these cases to slide into discovery is evident—it encourages a follow-on legal malpractice lawsuit for the disgruntled litigant who loses their case, giving that litigant a second bite at an entirely new (and often lengthy) discovery process.

Fortunately, the Pennsylvania Superior Court continues to remind us that it is the burden of the plaintiff to properly plead actual loss or harm, and this burden cannot be met with only conclusory assertions. In an unpublished decision, *Pecina v. Law Offices of Joel Sansone*, 901 WDA 2019 (Pa. Super. Ct. 2020), the court held that the plaintiff was required to allege facts in the complaint to support his claim of damages, i.e., that a job as a plumber actually existed, that this job was available for the plaintiff, and that he would have been rehired for that available job, absent the alleged malpractice. The important point here is this: whether a job existed for the plaintiff was not something to be investigated in discovery—it was a matter of proper fact-pleading in the complaint. Likewise, in *Bassaro v. deLevie*, 236 A.3d 1069 (Pa. Super. Ct. 2020), the Superior Court emphasized that it was not enough for the plaintiff to simply identify an entity who may have had liability to the plaintiff who wasn't sued. The plaintiff was required to plead the specific cause of action upon which the plaintiff would have succeeded, and the specific facts pertaining to each element to establish how that entity would have been liable.

Notably, Wecht acknowledges the causation element of legal malpractice cases in his concurrence as the appropriate tether to prevent speculative claims. However, he alters our jurisprudence by positing that causation may be established, not just by proving the plaintiff would have won the underlying trial, but by proving the plaintiff would have "negotiated a better settlement."

This concept has been rejected in Pennsylvania—long before *Muhammad*—as inherently speculative, and Wecht's concurrence should not be misconstrued as creating another avenue of proof of harm. Take, for example, the *Mariscotti* case, where the wife in a divorce action alleged her attorney advised her that her husband's stock was worthless when, in fact, the stock did have value. Although the wife acknowledged the stock was in her husband's name and thus she had no right to it, she claimed that knowing the stock's value would have put her "in a better bargaining position" in negotiating her property settlement. The court held that this was far too speculative to be left to the surmise of the jury. *See Mariscotti v. Tinari*, 458 A.2d 56 (Pa. Super. 1986). In *McCartney v. Dunn & Conner*, 563 A.2d 565 (Pa. Super. 1989), the court echoed that sentiment, observing that it would be purely speculative to guess whether the litigation opponent would have settled for something less than what the jury awarded, and proclaiming that Pennsylvania "has not allowed legal malpractice actions based upon speculations regarding settlement negotiations."

The proposition makes sense. Settlements are achieved to mitigate the risks that are natural to the litigation process and to avoid what can be substantial legal fees and time. As most litigators know, putting the plaintiff to their burden of proof is not always a quick process. Nonmeritorious lawsuits are settled all the time, for a

variety of reasons, including concerns over insurance coverage, reputation, time commitments, etc., none of which deal with the actual merits of the case. To prevail on a legal malpractice case speculating that the plaintiff could have strong-armed his opponent into settling a case that the plaintiff may have lost at trial would fly directly in the face of Pennsylvania law requiring the measure of damages to be determined by the "lost judgment."

In the end, it is the strict adherence to the plaintiff's burden of proof—by the litigants, their attorneys and the trial courts—at every step of the litigation process (including, and perhaps especially, pleading) that allows us to strike the proper balance, distinguishing between a legitimate legal malpractice case and the disgruntled litigant who does simply want that second bite.

*Charlene S. Seibert is a shareholder in the lawyers' professional liability practice group in the Pittsburgh office of Marshall Dennehey Warner Coleman & Goggin. She defends attorneys in legal malpractice actions covering a wide range of practice areas. Seibert may be reached at csseibert@mdwcg.com.*