The Legal Malpractice Trifecta by the Supreme Court of Ohio

Monica A. Sansalone
Partner/Gallagher Sharp

Over the last three years, the Supreme Court of Ohio has issued three significant decisions in the area of legal malpractice: *Paterek v. Peterson & Ibold*, 2008-Ohio-2790, *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 2008-Ohio-3833, and *National Union Fire Insurance Company of Pittsburgh, PA v. Wuerth*, 199 Ohio St. 3d 1442, 2008-Ohio-4487. The Court, through these decisions, successfully restored rationality to Ohio legal malpractice jurisprudence and brought it back in step with the rest of the nation.

The detour initially occurred in 1997, with the decision by the Supreme Court in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259. In the wake of *Vahila*, lower courts in Ohio, both trial and appellate, issued confusing and often contradictory decisions with respect to the standard of proof required in legal malpractice cases. These divergent lower court decisions over the succeeding decade lead the national treatise on legal malpractice to state unequivocally: "In Ohio, causation needs clarification by the state's supreme court." 4 Mallen & Smith, Legal Malpractice 688 (2007 ed.), Section 30:52.

The decision in *Vahila* made some sense based upon its particular facts but proved to be difficult in illuminating other corners of the legal malpractice terrain. The door was wide open for plaintiffs' lawyers and courts to distill *Vahila* into a single broad proposition: The "case-within-a-case" rule in Ohio no longer exists. The result was a chaotic "free-for-all" where cases which should have been dismissed by trial courts were instead put into the hands of jurors with nearly free rein to follow their impulses unconstrained by coherent jury instructions.

Taking a look at *Vahila*, the alleged malpractice there stemmed from the failure of the lawyer defendants to properly disclose potential consequences flowing from plea bargains entered into by their clients. Given the allegations, the Vahilas arguably sustained damage or loss regardless of whether they would have been successful in the underlying matter. As a result, the Supreme Court of Ohio rejected the blanket proposition that a legal malpractice plaintiff must, *in every instance*, prove that he would have prevailed in the underlying case in order to prove causation. In some cases, it may be enough for a legal malpractice plaintiff to prove merely that he lost the opportunity to realize a better outcome.

Specifically, the problems spawned by *Vahila* came from dicta that a plaintiff "may be required, depending on the situation, to provide *some evidence* of the merits of the underlying claim," without proving that he probably would have actually prevailed. Id. 77 Ohio St.3d at 428 (emphasis added).

Lawyers prosecuting malpractice claims seized on the "some evidence" language advocating that the "case-within-the-case doctrine" was no longer law in Ohio in any circumstance. They argued that a legal malpractice plaintiff need only to demonstrate "some evidence" of the merits of the underlying claim in order to prevail, regardless of the nature of the claimed malpractice. As the Supreme Court would later clarify, this was never the intention of the *Vahila* decision. Specifically, the Supreme Court has disavowed absurd results flowing from *Vahila* in two recent cases.

The *Paterek* Case

This erroneous reading of *Vahila* was illustrated most profoundly by the Eleventh District Court of Appeals in *Paterek v. Peterson & Ibold*, 11th Dist. No. 2005-G-2624, 2006-Ohio-4179. In that case, the Court of Appeals, relying on *Vahila*, held that a legal malpractice plaintiff could recover an amount greater than the maximum amount that the parties stipulated would have been collectible from the underlying tortfeasor had the attorney malpractice not

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occurred. The Eleventh District concluded that collectibility of the underlying judgment is irrelevant in a subsequent legal malpractice case because a plaintiff is no longer required to prove the "case-within-the-case" pursuant to its interpretation of *Vahila*.

The Eleventh District holding would have resulted in a windfall to the plaintiff, who would have benefitted from his attorney's malpractice in that he would have recovered more money from his attorney than could have been collected from the underlying tortfeasor. After exercising discretionary jurisdiction, the Supreme Court of Ohio unanimously reversed, holding "that in an attorney-malpractice case, proof of the collectibility of the judgment due to the malpractice is an element of the plaintiff's claim against the negligent attorney." *Paterek v. Peterson & Ibold*, 2008-Ohio-2790, ¶ 1. In writing for the Court, Justice Pfeifer relied on *Vahila* for the decision.

With *Paterek*, it became clear that the Supreme Court of Ohio was on the road to clarifying legal malpractice law in Ohio without abandoning *Vahila*.

The *Environmental Network* Case

On the heels of *Paterek* came *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 2008-Ohio-3833, which specifically clarified the standard of proof required in legal malpractice actions in Ohio, affirming that the "case-within-the-case doctrine" is still a central part of Ohio legal malpractice jurisprudence.

The Environmental Network plaintiffs claimed that their attorneys coerced them into accepting a settlement on the second day of trial in the underlying case. They argued that, but for their attorneys' breach of duty in coercing the settlement, they would have tried their case to conclusion and obtained a better result. At the legal malpractice trial, the Environmental Network plaintiffs did not attempt to prove that they would have achieved a better result had the underlying case been tried to a verdict. The trial court instructed the jury that they could find for the plaintiffs if the plaintiffs presented merely "some evidence" of the merit of the underlying case, an instruction based on *Vahila*. The jury returned a verdict for plaintiffs. On appeal, the Eighth District Court of Appeals affirmed the verdict, agreeing with the trial court that the Environmental Network plaintiffs were required only to present "some evidence" of the merits of their claim in the underlying case.

In arguments made to the Supreme Court of Ohio, the example of the A/B settlement demonstrated the problems with the "some evidence" standard:

> Following an arms' length reasonable settlement of litigation between A and B, both A and B could each sue their respective attorneys for malpractice in connection with the settlement, and both A and B could recover from the attorneys the value of all relief sought in the litigation, even though it is literally impossible that both A and B could have prevailed had the case been tried to a conclusion.

In reversing the Eighth District, Justice O'Connor, writing for the majority, stated that the "case-within-the-case doctrine" is the appropriate tool to analyze the claim where the plaintiff's sole theory for recovery is that if the underlying matter had been tried to conclusion, he would have received a more favorable outcome than he obtained in settlement. The Supreme Court did not overrule *Vahila,* but clarified it by stating:

> ***in holding that not *every* malpractice case will require that the plaintiff establish that he would have succeeded in the underlying matter, the *Vahila* court necessarily implied that there are s*ome* cases in which the plaintiff must so establish. This is one such case." Id. at ¶ 17. (Emphasis in original.)
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> The Syllabus of the Court states:
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> When a plaintiff premises a legal-malpractice claim on the theory that he would have received a better outcome if his attorney had tried the underlying matter to conclusion rather than settled it, the plaintiff must establish that he would have prevailed in the underlying matter and that

> the outcome would have been better than the outcome provided by the settlement. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 674 N.E.2d 1164, clarified.

The *Wuerth* Decision

In 2009, the Supreme Court of Ohio handed down its decision in *National Union Fire Insurance Company of Pittsburgh, PA v. Wuerth*, 199 Ohio St. 3d 1442, 2008-Ohio-4487. This completed the high court's trifecta of legal malpractice cases which clarified this area of law. *Wuerth* addressed the issue of whether a law firm, as an entity, practices law and a law firm's vicarious liability for the malpractice of its attorneys. The Supreme Court of Ohio was asked the following certified question from the United States Sixth Circuit Court of Appeals:

> Under Ohio law, can a legal malpractice claim be maintained directly against a law firm when all of the relevant principals and employees have either been dismissed from the lawsuit or were never sued in the first instance?

The Supreme Court of Ohio answered: (1) a law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice; and (2) a law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice.

Wuerth involved a legal malpractice complaint arising out of representation provided by attorneys who had been retained to defend an insured of National Union. The underlying litigation resulted in an adverse judgment of several million dollars against National Union's insured. The suit filed by National Union alleged that both the firm and the individual attorney had committed legal malpractice and sought to hold the law firm vicariously liable for the attorney's malpractice. Because the complaint had not been timely filed against the individual attorney, the district court dismissed the attorney from the action. The federal district court then proceeded to dismiss the vicarious liability claim against the law firm because no cognizable claim remained against the individual attorney. This dismissal of the law firm was grounded in the determination that a law firm, as an entity, does not engage in the practice of law.

National Union appealed to the Sixth Circuit. The Sixth Circuit found there to be a split in opinion and certified the question to the Supreme Court of Ohio. The Supreme Court reviewed two specific issues: "one, whether a law firm may be directly liable for legal malpractice – i.e., whether a law firm, as an entity, can commit legal malpractice – and two, whether a law firm may be held vicariously liable for malpractice when none of its principals or employees are liable for malpractice or have been named as defendants."

National Union argued that a law firm could be held directly liable for legal malpractice since an attorney-client relationship exists between the law firm and the client giving rise to a duty of care. The Supreme Court disagreed, holding that a law firm does not practice law. The Supreme Court looked both to the Rules for the Government of the Bar and established common law regarding medical malpractice for guidance. Ohio common law has long established the principal that only an individual physician may practice medicine. The language utilized in the Rules for the Government of the Bar and the Rules of Professional Conduct also support the assertion that only an individual practices law. The Bar Rules, for example, state that persons – not law firms – are admitted to the practice law in Ohio. When an attorney joins a law firm, the attorney is said to practice law "through" the law firm. The Supreme Court likened a law firm to a business entity through which "one or more individual attorneys practice their profession." Noting that it is the individual lawyer who gives legal advice and forms the attorney-client relationship, not the law firm.

National Union also claimed that a firm can be held vicariously liable for its attorneys' malpractice even when the individual attorney cannot be held liable or has not been named as a defendant. In disagreeing with that contention, the Supreme Court applied the basic principals of vicarious liability. A principal may only be liable for the conduct of its agent if the agent is liable - there is no difference "between a law firm and any other principal to whom Ohio law would apply."

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Conclusion

The Supreme Court of Ohio made important strides in clarifying legal malpractice law in Ohio. With *Paterek* and *Environmental Network*, the standard of proof required in legal malpractice cases has been raised to a level consistent with better-reasoned decisions in a majority of states in the union. Plaintiffs' advocates will have to contend with the "case-within-the case" doctrine again, and they will be required to prove collectibility as part of their case-in-chief on proximate cause and damages.

With *Wuerth*, lawyers who were traditionally not individually named in malpractice cases, or dismissed, for personal exposure concerns will have to remain defendants. Plaintiffs' attorneys too will have to ensure that individual lawyers be made parties to agreements tolling limitations period.

With *Wuerth*, the Supreme Court may have also made a splash beyond the legal malpractice arena. Could *Wuerth* be used to extract other types of entities and/or businesses in vicarious liability situations when the actual tortfeasor is not a defendant? No doubt, defense lawyers will so advocate.

Ms. **Monica Sansalone** joined Gallagher Sharp as an Associate in 1997 and was named Partner in 2004. She represents lawyers and/or their liability insurance carriers in grievance procedures and matters alleging malpractice, and has successfully defended such claims in motion practice, at trial, and on appeal. She also assists in risk management and prevention, pre-suit evaluation and claim repair, and can handle any facet of post-trial activity and appellate procedure.