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Voice of the Bar

Time To Revisit the *Saffer v. Willoughby* Fee-Shifting Doctrine

Dear Editor:

I recently read with great interest the articles by Fruqan Mouzon, Bennett Wasserman and Jeffrey Donner concerning professional malpractice ["Two Views of the *Saffer* Fee-Shifting Rule," Jan. 19].

Over six years ago, on July 28, 2003, the *Law Journal* published my commentary titled "Look What *Saffer* Hath Wrought: Time Is Right To Reconsider Fee Shifting Ruling." I noted then that New Jersey was the only state that required fee shifting in legal malpractice cases as a result of *Saffer v. Willoughby*, 143 N.J. 256 (1996), and the same is still true today, unfortunately.

I pointed out in that article that these circumstances make malpractice insurance carriers more eager to settle to avoid the payment of attorneys' fees. Thus, the chilling effect of *Saffer* on carriers who defend lawyers is immeasurable, even though the carriers won't readily admit it.

In addition, then as now, no other professionals in New Jersey — doctors, accountants, architects, engineers, stock brokers, dentists, insurance brokers and agents, among others — are subject to such court-imposed fee-shifting sanctions. In my view, it is inherently unfair and a violation of our equal protection rights to treat lawyers differently than other professionals.

It is interesting to note that the Supreme Court in *Saffer* created the fee-shifting practice sua sponte, even though it was not requested by Willoughby in his briefs. In fact, all Willoughby ever sought was to prevent *Saffer* from collecting his fee through a confirmed fee arbitration judgment, pending the outcome of his claims for legal malpractice.

I still believe that lawyers are treated improperly and unfairly under the *Saffer* ruling and that it is ripe for reconsidera-

tion by the Supreme Court. Certainly, it is a telling commentary that none of the other 49 states have seen fit to adopt the *Saffer* standard. Enough time has passed since 1996 for the New Jersey Supreme Court to realize that it made a mistake and to correct it.

I also believe that *Saffer* ironically has a pejorative effect on attorneys' relationships with their own clients, as we often practice defensively in view of the *Saffer* fee-shifting provisions. This certainly does not represent a net benefit to clients.

Simply stated, lawyers should not be treated differently than other professionals in New Jersey. All licensed professionals should adhere to a high standard, and all should be judged and punished by the same standard. Nothing else is fair or appropriate in my view.

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