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Paying the Price for Giving Free Advice

Mentor is called as witness when lawyer he helped on the phone is sued for malpractice

By Henry Gottlieb

Morris Pashman was on the bench for two decades and, like many venerated former jurists, is a mentor and sounding board for former clerks, even those old enough to be grandfathers themselves.

So on April 13, 1994, when the retired Supreme Court justice received a call from Hackensack solo practitioner Stephen Roth, his clerk in 1967-68, Pashman was willing to spare some minutes and some insights.

Now, Pashman the mentor has become Pashman the witness in a malpractice case against Roth.

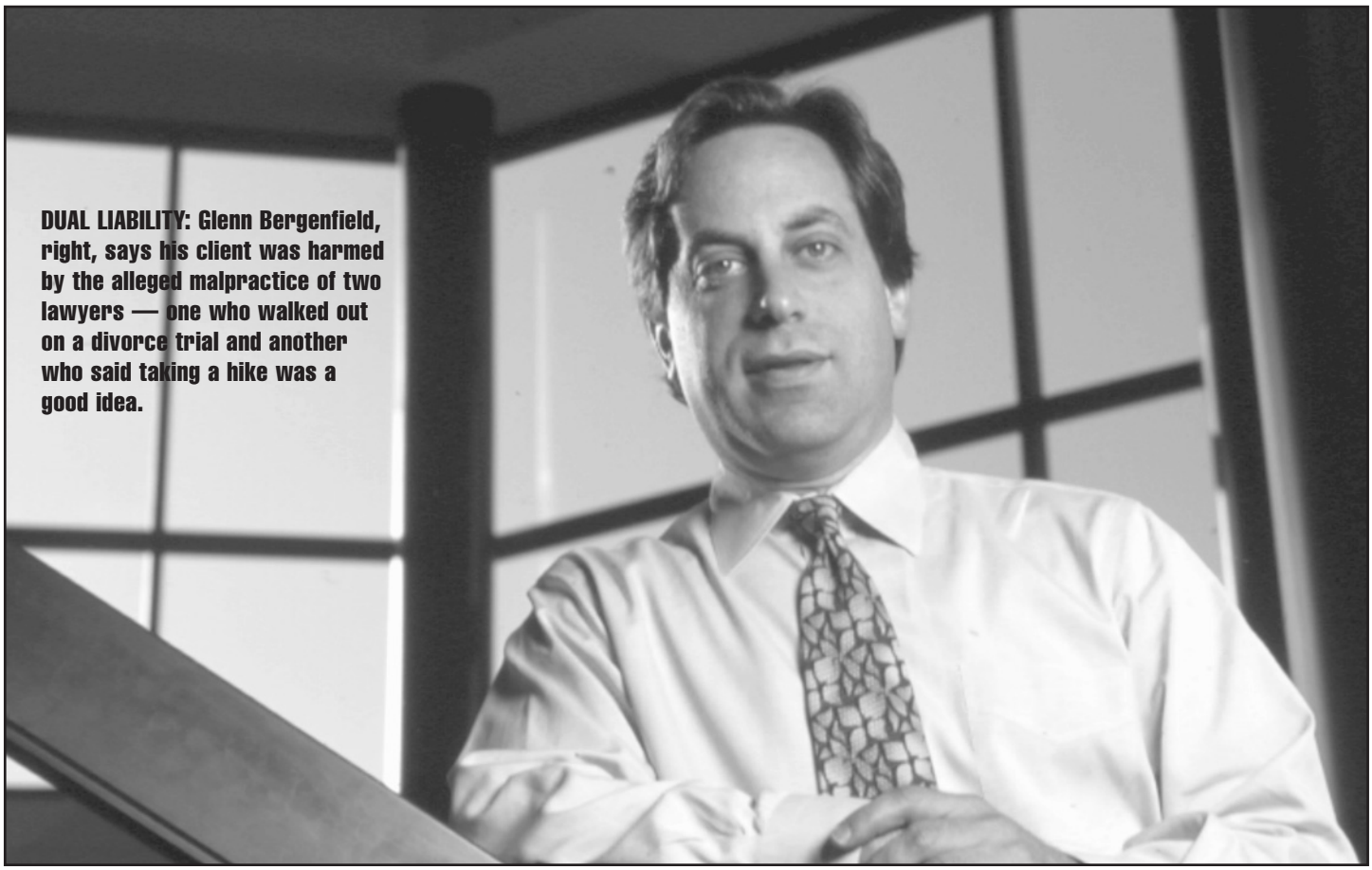
And he isn't alone. Three other lawyers who Roth says he may have chatted with about his case have been dragged into Roth's malpractice case as potential witnesses.

A fourth lawyer on Roth's list of friendly helpers, Fort Lee solo practitioner Charles Abut, has been named as a co-defendant in the malpractice case because there is evidence he didn't just share his views with Roth, he gave them to Roth's now-disgruntled client.

The inclusion of all these lawyers' names in Roth's litigation appears to be a warning that fleeting, unpaid advice to a colleague — the kind of conversation that Pashman calls "legal yack, yack when you're trying to help a friend" — can be dangerous, given the modern mania for malpractice suits.

It's an unwelcome development in a profession that prides itself on the free exchange of knowledge, according to Roth's lawyer, Thomas Flinn of Montclair's Garrity, Graham, Favetta & Flinn. If lawyers are to be punished or even annoyed by being made witnesses for "lending an ear," Flinn says, "the professional will suffer; clients will suffer."

So far, no New Jersey lawyer has been held liable for casual advice to a negligent



DUAL LIABILITY: Glenn Bergenfield, right, says his client was harmed by the alleged malpractice of two lawyers — one who walked out on a divorce trial and another who said taking a hike was a good idea.

attorney, says Christopher Carey, a malpractice defense lawyer. And another defense lawyer, William Voorhees of Voorhees & Ouda in Morristown, says he hasn't seen a trend away from lawyers' willingness to share their expertise with friends and colleagues.

But state Supreme Court decisions that have abolished the old-fashioned concept that there is no professional duty without privity make malpractice carriers jittery whenever an insured is dragged into a case, even as a witness, says Carey, a partner with Newark's Tompkins, McGuire & Wachenfeld.

"It's horribly unfair," says Pashman. "Two lawyers are talking about something, and the next thing is you're being subpoenaed."

Opting Out of Trial

According to the malpractice claim against Roth, he was negligent when he decided that he and his client, Barbara Crews, would not participate in a Bergen County matrimonial trial against her husband, Robert, the owner of a bookstore chain with millions of dollars in revenues.

Roth opted out, with Barbara Crews' permission, because Superior Court Judge Roger Kahn refused to grant an adjournment for more discovery that Roth believed to be crucial and warranted. Roth also said at the time that he had no choice, because Kahn refused to stay the proceedings until Robert Crews obeyed previous rulings to pay additional pendente lite fees in advance of the trial.

The trial went forward without Roth or Barbara Crews; Kahn set equitable distribution, alimony and child support, and an Appellate Division panel not only affirmed Kahn's handling of the trial and the bulk of his ruling, it questioned how Crews could appeal the rulings, given her decision to opt out of the trial.

Matrimonial lawyers following the trial lauded Roth for what they characterized as a principled stance, but they also said there was an enormous ethical risk in what he was doing.

Barbara Crews' new lawyer, Princeton solo practitioner Glenn Bergenfield, says that opting out was, in itself, professional negligence. The alleged damages are $2 million more in equitable distribution, plus additional child support and alimony that Barbara Crews could have won if Roth had stayed, Bergenfield claims.

"The case was lost because of Mr. Roth's poor judgment in quitting the game and taking his ball with him because he did not like the rules," Bergenfield wrote in a demand letter last year before filing suit.

To win, Bergenfield must convince a jury that Kahn and the appellate court would have ruled differently if Roth had done a better job. Roth counters in pleadings that he couldn't have done a better job because Robert Crews hid income, and he has filed a third-party claim against Robert Crews.

'It's horribly unfair,' says Pashman. 'Two lawyers are talking about something, and the next thing is you're being subpoenaed.'

Support From Friends

On the threshold issue of whether the walkout was professional negligence, Roth is sticking to the assertion made four years ago that he did the right thing, and he has testified in a deposition that other lawyers, back then, supported what he did.

"I was trying to reach every person that I thought might have some experience or perspective to share, which is what professionals do," Roth said in response to Bergenfield's questions at a Jan. 30 deposition.

Roth says that he had consulted with Pashman about a brief in an appeal of one of Kahn's earlier rulings and that he called the retired justice a few days after Kahn ruled on April 11, 1994 that the trial would go forward. Roth says that a few days later, when Barbara Crews began having doubts about the opt-out decision, he called Pashman again.

Pashman had been Bergen County assignment judge in 1967-68 when Roth clerked for him and he seemed like someone who might show sympathy for a cause like Barbara Crews'. A 1981 report by a panel Pashman had chaired, the Supreme Court Committee on Matrimonial Litigation, had railed against the family courts' practice of postponing pendente lite fees until the end of a case — just what Roth was accusing Judge Kahn of doing.

In his account of the telephone conversation with Pashman, Roth quoted the former justice as saying, "Kahn is going to kill you whatever you do. At least this way you have a chance on appeal to get a reversal because of what he did to you on the 11th."

Roth didn't say Pashman expressed confidence that opting out would be the best way to win the appeal. But Roth said in the deposition that, "I did believe that he felt that given the two choices that we had made the correct one and should stay with it."

Bergenfield says that at the request of Pashman's attorneys at Wayne's DeYoe, Heissenbuttel & Mattia, he has agreed to postpone Pashman's deposition.

In a telephone interview last Thursday, the former justice denied that he counseled Roth about trial strategy; the conversation was about possible appeals. He says he advised Roth to make an interlocutory appeal for a stay of the trial, but cautioned Roth that appeals courts rarely interfere with trial court calendars.

While Pashman's alleged comments have made him a witness in the case, no one, including Bergenfield, has suggested that the comments, if Pashman made them, create liability for him.

The Client's Reliance

But Bergenfield is claiming that Abut is liable, based on Barbara Crews' recollection that Abut supported Roth's decision to opt out, that Abut spoke to her

directly and that she relied on his advice.

Roth said in his deposition that Abut "understood the difficulty of the choices, reviewed with us the difficulties of those choices, told her that in his opinion the decision that we not participate was the more likely of the two to prevail on appeal, and told her, as I recall, that I was doing a valiant job for her and that she was taking a brave and valiant stand for herself and for women."

Abut's lawyer, Lewis Cohn, of counsel to Short Hills' Hurley & Vasios, declines to comment.

Other lawyers mentioned by Roth in his deposition were Frank Luciano, who heads a firm in Rochelle Park; Michael Boardman, a solo practitioner in Ridgewood, and Gene Schiffman, of Hackensack's Schiffman, Berger, Abraham, Kaufman & Ritter.

Roth says they are friends whom he telephoned, though he can't be sure if he reached them. He does say that everyone he reached advised him that he was on solid ground for opting out.

Schiffman says he remembers that he had a phone discussion with Roth about the case but he doesn't remember what he or Roth said.

Luciano and Boardman declined to comment.

In the deposition, when Bergenfield sought to explore what Abut told Crews., Roth responded: "I mean that's just trying to snare poor Charles in this, and I don't like you doing this, and I don't know what the sequence was.

"Charles is a volunteer and was my friend, and he was offering independent guidance to me because he knew how difficult this case was. That's what it was."

Yet lawyers outside the case say Bergenfield would be remiss for not including Abut in the complaint, given the evidence that Abut spoke directly to Barbara Crews.

Whether Abut was retained by Crews is irrelevant under a line of cases, including *Zendell v. Newport Oil Corp*., 226 N.J. Super. 431 (1988). The issue, says Carey, Voorhees and another defense lawyer, George Canellis of Dwyer & Canellis in Westfield, is whether the lawyers' advice was relied upon by the plaintiff.

Carey says, though, that he would like to see a Supreme Court decision that states unequivocally that no liability attaches to lawyers who give the kind of informal advice allegedly given by Pashman — to a colleague, and not to a colleague's client.

That leaves open the question, however, of whether a lawyer who gives advice is liable if the recipient tells the client about the advice and the client relies on it.

Hilton Stein, who heads a Montville firm that represents plaintiffs in malpractice cases, says that when he gives advice to friends he takes great pains to make sure the advice doesn't come back to haunt him.

He says he sends the friend a written disclaimer that the advice was nothing more than an off-the-cuff comment about a case, that he hadn't read the pleadings, that others should be consulted and that no client should rely on what he had said.

"You have to be very careful about everything, even in an informal setting," Stein says. ■