Prepared by the Court:

BROOKS BANKER, Plaintiff, V. DAVID, DAWSON & CLARK LLP, ET AL., Defendant.	: SUPERIOR COURT OF NEW JERSEY : LAW DIVISION - CIVIL : COUNTY OF MORRIS : DOCKET NO.: MRS-L-497-18 **AMENDED ORDER**

THIS MATTER having been brought before the Court on the application of Jeffrey Spiegel, Esq., on behalf of the Defendants, seeking summary judgment against the Plaintiff; and Brooks Banker, Plaintiff pro se, having crossed-moved for summary judgment and having opposed the Defendants' application, and the Court having reviewed the papers submitted and having heard the arguments of counsel and the plaintiff on May 22, 2020, and thereafter the Court having asked for and reviewed supplemental submissions, and the Court having entered an Order dated January 6, 2021, indicating that an Amended Order would be issued along with a Statement of Reasons, and for the reasons set forth on the record and in the attached Statement of Reasons, and for good cause shown;

It is on this **8th** day of **June 2021**, **ORDERED** as follows:

1. Defendants' Motion for Summary Judgment as to Count Five of Plaintiff's Complaint is granted.

2. Plaintiff's Cross-Motion for Summary Judgment is denied.

HON. PETER A. BOGAARD, J.S.C.

Statement of Reasons

Banker v. Davidson
MRS-L-497-18

This matter comes before the Court by way of a Motion and Cross-Motion for Summary Judgment, filed respectively by Jeffrey Spiegel Esq., counsel for Defendants, Davidson, Dawson & Clark LLP and Philip G. Hess, Esq., and by Plaintiff, Brooks Banker, pro se. The Defendants have filed a Reply brief in response to the opposition/cross-motion papers.

Oral Argument was heard on May 22, 2020.

Background

For the reasons set forth below, Defendants' motion is granted and Plaintiff's cross-motion denied and summary judgment will be entered dismissing the fifth and sole remaining count of Plaintiff's complaint.

Defendant P. Gregory Hess, Esq. ("Hess") is a lawyer who was admitted to practice in the State of New York in 1972, and who appeared to focus his practice in the area of trusts and estates. In 1999, Caryle Billings Banker (the "Decedent") first engaged Hess to help with the creation of a will (the "1999 Will"). The 1999 Will indicates that Decedent was residing in the "County of Putnam and the State of New York" at the time Hess was retained.

Thereafter, Hess prepared a Last Will dated May 25, 2007, for decedent which provided: "I, CAROL B. BANKER, also known as SUSAN B. BANKER, of Morristown, New Jersey, declare this to be my will, and I hereby revoke all previous wills and codicils that I have made." The 2007 Will also provides that the decedent's third and then current husband, Lewis Goodfriend, be granted the right to live in the Decedent's home, with the obligation to pay reasonable rent until the home was sold.

Hess was again asked by the decedent (and apparently also Mr. Goodfriend) to render legal services in 2014. In connection with this engagement, on March 13, 2014, Hess sent the Decedent and Goodfriend a letter addressed to them at their residence at 16 Lidgerwood Place, Morristown, New Jersey. In this letter Mr. Hess wrote: "Dear Susan and Lewis: Enclosed for each of you for your review are drafts of the following documents: Will; Power of Attorney; Proxy Directive; Instruction Directive; and HIPAA Release." On October 29, 2014, Hess sent the Decedent an e-mail in which he wrote: "Please tell Lewis that his documents are ready to sign whenever he wants to come in. The same is true for yours."

In early 2015[1], the Decedent fell ill with lymphoma, and was confined to a New Jersey hospital. On February 17, 2015, Plaintiff (the Decedent's son) emergently emailed Hess, stating:

> "I am with my mother daily at Morristown Hospital. Her mind is stable but her body is failing. Please make arrangement to visit her this week. The sooner the better. She is soon to die."

On February 18, 2015, Plaintiff emailed Hess again, stating: "[the Decedent] understands [the] elective share." On or about this time, with the Decedent's health failing, Hess met with her at the hospital and wills dated February 19, 2015 were prepared for her and Goodfriend.

On February 25, 2015, Hess corresponded with Plaintiff, advising: "Enclosed is a new Will for your mother, identical to the original Will I brought with me to be signed (prior to the handwritten changes). Also enclosed are signing instructions. The validity of a Will depends on its being executed properly, so please follow the instructions carefully."

[1] The allegations as set forth by Plaintiff and more particularly the damage claims relate to the legal work that was performed in 2015.

On March 13, 2015, Hess drove from New York to Morristown Medical Center at the request of the Plaintiff and/or Decedent, where he was greeted by the Plaintiff and met with the decedent at her bedside. During that second Morristown hospital meeting, Hess supervised the Decedent's further execution of her Last Will and Testament.

On March 26, 2015, the Decedent passed away.

That same day, Hess hand-delivered to Plaintiff at Plaintiff's office (at the time the Plaintiff, a lawyer licensed to practice law in New York, maintained an office in Manhattan) the original of the Decedent's Will dated March 13, 2015. Also enclosed was "Morris County Surrogate's Court Probate Form A," wherein Hess noted: "[w]e have completed most of the form, but it requires some additional information on the last page of the form. Please review the form for accuracy and provide the missing information. We will add and then submit it to the Court."

There is no dispute that when Hess interacted with Decedent and Goodfriend in 2014-2015, both Decedent and Goodfriend resided in New Jersey.

There is no dispute that Goodfriend never executed an elective share waiver, whereby he would be voluntarily waiving his rights as a spouse to the statutory elective share of one-third of the augmented estate under N.J.S.A. § 3B:8-1.

There is further no dispute that Plaintiff advised Hess in February 2015 that the Decedent understood and/or was aware of what the elective share was.

Finally, no testimony was presented to suggest that Goodfriend would have ever agreed to sign a waiver of his elective share rights that he possessed as the husband of the Decedent.

A dispute arose between the Plaintiff and Goodfriend as to whether his inheritance monies would be held in trust (versus an outright distribution) and more particularly related to the appropriate way to calculate the value of the augmented Estate.

On September 4, 2015, Lewis Goodfriend (who as noted was the decedent's spouse at the time of her death) filed an Order to Show Cause in the Probate Part of this Court under the caption: In the Matter Of The Estate Of Caryle Billings Banker, Deceased, Civil Action, Complaint For Statutory Elective Share, Docket No.: MRS-P-0893-2015. ("Elective Share Action").

On September 16, 2015, Plaintiff herein retained Robert D. Borteck, P.C., to represent him in the Elective Share Action in Morris County Superior Court, Chancery Division, Probate Part. Pursuant to the retainer agreement Plaintiff paid the hourly rate of $495 for Mr. Borteck and $395 for his associate, Christine Czapek, Esq. Defendants did not represent the Estate in the Elective Share Action.

During the Elective Share Action, Plaintiff paid legal fees and expenses to the law firm of Robert D. Borteck, P.C. in the sum of $62,500.00 to defend the Decedent's estate.

On March 2, 2017, Plaintiff reached agreement with Lewis Goodfriend. In exchange for a lump sum payment in the amount of $55,000.00, and a payment of $115,000.00 designed to fund a marital trust, Mr. Goodfriend settled the Elective Share Action. The settlement also assigned to the Estate any rights Goodfriend had to litigate any claims he had against Hess and his firm.

The damages claimed by the Plaintiff in this lawsuit relate solely to the monies paid out in the above two (2) paragraphs, that being the $62,500.00 paid to Bortek and the $55,000.00 paid to Goodfriend in settlement of the Elective Share litigation. Plaintiff is not seeking to disgorge any

fees charged by Hess or his firm and has not asserted any claim for damages other than as set forth above.

Thereafter, Plaintiff commenced the instant litigation by filing his Complaint on March 13, 2018. Plaintiff's Complaint contained five causes of action: (1) Legal Malpractice (conflict of interest); (2) Legal Malpractice (Failure to Advise); (3) Legal Malpractice (refusal to cooperate); (4) legal malpractice (unauthorized practice of New Jersey law); and (5) Statutory Civil Claim Pursuant to N.J.S.A. § 2C:21-22a).

Defendants served written discovery requests demanding that Plaintiff identify all experts he expected to call as witnesses, including each expert's name, description of the subject matter upon which the expert is expected to testify, the substance of the facts including the expert's background, and any expert reports.

Plaintiff neither identified any expert witnesses in his discovery responses, nor produced any expert witness reports in discovery. Conversely, Defendants submitted through counsel a detailed and comprehensive expert report from Nathan J. Stein, Esq.

The discovery end date was September 27, 2019.

By Order dated May 26, 2020 (the "Order"), the Court partially granted the Defendants Motion for Summary Judgement and dismissed counts I through IV of the Complaint. The sole remaining count, Count V, involves a claim that Defendants' actions violated N.J.S.A. § 2C:21-22a, and involved the unauthorized practice of law.

Thereafter, on May 26, 2020, the Court directed the parties to submit supplemental briefing as to the sole remaining cause of action on the following three issues:

1. Should the Court determine as a matter of law that Hess engaged in the unauthorized practice of law in New Jersey or would that be a jury question;

2. Does the ethics opinion cited by Plaintiff (Op. 49) require more to be shown for someone to obtain the benefit of the carve out as set forth in the relevant RPC; and

3. Counsel and/or the parties are to provide the Court with as much information as possible relating to the decision made by Judge Wilson denying Summary Judgment in Villani v. Davidson Dawson & Clark, et al., Docket No. BER-L-004241-18. (Certification of David A. Tango, Esq. in Reply Brief ("Tango Cert."), pg.5).

Both the Defendants and the Plaintiffs submitted supplemental briefs.

Legal Standard

Under Rule 4:46-2(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to a judgment or order as a matter of law."[2] The "essence" of the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[3] Moreover, "on a motion for summary judgment the court must grant all the favorable inferences to the non-movant."[4]

Although non-movants obtain the benefit of all favorable inferences, bare conclusions without factual support in affidavits or the mere suggestion of some metaphysical doubt as to the material facts will not overcome motions for summary judgment.[5] A non-moving party "cannot

[2] Brill v. The Guardian Life Insurance Co., 142 N.J. 520 (1995).
[3] Id. at 533 (quoting Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 251-52 (1986)).
[4] Id. at 536.
[5] R. 4:46-5; *see also,* Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) (requiring submission of factual support in affidavits to oppose summary judgment motion); Fargas v. Gorham, 276 N.J. Super. 135 (Law Div. 1994) (self-serving assertions alone will not create a question of material fact sufficient to defeat summary judgment motion); Heljon Management Corp. v. Di Leo, 55 N.J. Super. 306, 312 (App. Div. 1959) ("It is not sufficient for the party opposing the motion merely to deny the fact in issue where means are at hand to make possible an affirmative demonstration as to the existence or non-existence of the fact.").

defeat a motion for summary judgment merely by pointing to any fact in dispute."[6] Therefore, if the opposing party only points to "disputed issues of fact that are 'of an insubstantial nature' the proper disposition is summary judgment."[7]

A court should not grant summary judgment when the matter is not ripe for summary judgment consideration.[8] For example, a matter may not be ripe when discovery is not completed.[9] The court should afford "every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case."[10] However, a plaintiff "has an obligation to demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action."[11]

Analysis

Summary Judgment is Granted as to Count Five.

Count Five alleges violations of N.J.S.A. § 2C:21-22a, related to the alleged unauthorized practice of law, violations which are claimed to have proximately caused a loss to the Plaintiff. The statute states, in relevant part:

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of any action or inaction by a person who knowingly engaged in the unauthorized practice of law in violation of section 1 of P.L.1994, c.47 (C.2C:21-22) may bring a civil action in any court of competent jurisdiction.

N.J.S.A. § 2C:21-22a.

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[6] Brill, 142 N.J. at 529.
[7] Id.
[8] Driscoll Const. Co., Inc. v. State, Dept. of Transportation, 371 N.J. Super. 304, 317 (App. Div. 2004).
[9] Id. In Driscoll, the appellate court held the trial court's granting of summary judgment was erroneous because at the time the motion was filed, discovery had not been exchanged and therefore, the evidence was not fully presented.
[10] Id.
[11] Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003).

Defendants argue that based on the statutory language, Plaintiff can prevail only if there are findings that: (1) Plaintiff suffered a loss of money or property; (2) that the loss was caused by or resulted from an act or omission of the Defendants; and (3) that the act or omission that caused the loss involved the Defendants knowingly having engaged in the unauthorized practice of law.

Defendants correctly note that the "ascertainable loss" requirement compels a showing that any loss was due to the acts or omissions of the person or lawyer in question. In other words, some act or omission must be a causative or substantial contributing factor to the alleged loss. Under the circumstances herein, it is cogently argued that expert testimony is required to demonstrate that necessary causal link.

In a May 26, 2020 submission, Plaintiff relies on the unpublished decision of Baron v. Karmin Paralegal Services, 2019 WL 6211234 (App. Div. November 21, 2019). In that case, neither the trial court nor the appellate court considered N.J.S.A. 2C:21-22a as a civil remedy against a person engaged in the unauthorized practice of law, the court looked only to common law fraud. Plaintiff's musings that if the Baron court had known about N.J.S.A. 2C:21-22a the outcome would have been different amounts to pure speculation.

Regardless, this Court finds Baron distinguishable since the Defendant in that case was not and never had been licensed to practice law, yet prepared legal documents for submission to a New Jersey court in connection with a child support dispute. Our Court has recognized that the "practice of law does not lend itself 'to [a] precise and all-inclusive definition.'" N.J. State Bar Ass'n v. N.J. Mortg. Assoc., 32 N.J. 430, 437 (1960) (quoting Auerbacher v. Wood, 142 N.J. Eq., 484, 485 (E. & A. 1948)). The practice of law is not "limited to the conduct of cases in court but is engaged whenever and wherever legal knowledge, training, skill and ability are required." Stack v. P.G. Garage, Inc., 7 N.J. 118, 121 (1951). Defining the practice of law generally requires a case-by-

case analysis because of the broad scope of the field of law. In re Op. No. 24 of Comm. on the Unauth. Practice of Law, 128 N.J. 114, 122 (1992).

In the within matter, the Court is not faced with an issue as to whether or not Hess engaged in the practice of law, since all admit that he did so in connection with the preparation of Decedent's and Goodfriend's wills. The various issues before the Court are far more nuanced, and implicate both a complex proximate cause analysis (i.e. What did Defendant do or fail to do that led to the Elective Share Action and the costs incurred regarding same? Did Defendant prepare documents relying on New York law, that were found by a New Jersey court to be a nullity? Were any of the legal instruments prepared by Hess found to be deficient by the Probate Court?) and a review of RPC 5.5(3)(v).

Plaintiff implores the Court to consider his pro se status in connection with the failure to serve any expert reports, though Plaintiff (himself a lawyer) saw fit to obtain and serve an Affidavit of Merit when filing this action.

He further argues that since the matter would proceed as a bench trial, an expert is unnecessary since the judge (a lawyer) has the necessary expertise to evaluate the complex estate planning, statutory, and legal issues involved. This argument is wholly without merit and overlooks a long and consistent body of jurisprudence that requires (absent certain narrow exceptions, none of which apply herein) expert testimony be produced when it is alleged that a licensed professional failed to follow the rules, regulations and/or standards applicable to their profession,

This Court as noted previously asked the parties to address certain questions, and those submissions are summarized below.

Question 1: Should the Court determine as a matter of law that Hess engaged in the unauthorized practice of law in New Jersey or would that be a question for the jury.

Plaintiff argues that the Court should find as a matter of law that Mr. Hess engaged in the practice of law in New Jersey. Plaintiff argues that by having made the decision not to respond by affidavit to Plaintiff's cross motion for summary judgment as to a violation of N.J.S.A. 2C:21-22a, Defendants cannot amend their Answer to Plaintiff's Complaint or factually supplement any of the pending motions. Plaintiff contends that this Court should find, as a matter of law, that Mr. Hess engaged in the unauthorized practice of law in New Jersey because he claims there are no genuine issue of material fact for a jury to decide.

Plaintiff's main argument in support of his Statutory Claim is that Hess violated the provisions of RPC 5.5 (Lawyers Not Admitted to the Bar of this State and the Lawful Practice of Law) by engaging in the unauthorized practice of law. Defendants counter that their legal relationships with Decedent first arose in New York and that any further work done was at best "occasional." In addition, as to the work done in 2015 when the Decedent was in a grave condition, they cite to the "safe harbor" language of the RPC, arguing (through a detailed expert report) that ignoring Plaintiff and Decedent's requests for their help and/or giving them the names of other counsel was both impractical and would have been extremely detrimental to the Decedent.

Defendants further contend that a necessary element of any legal malpractice claim involves a showing that the allegedly negligent act or omission was the proximate or efficient cause of the loss that is claimed. Put another way, Plaintiff must show but for the alleged unauthorized practice of law, Goodfriend never would have filed the Elective Share Action and that the result of that litigation would have been different.

The defense expert notes that RPC 5.5 includes a safe harbor and that the actions of the Defendants in 2015 fall within that safe harbor given the emergent and extremely time-sensitive nature of the legal work at issue. This presents a nuanced legal issue with little to no direct case law support where the Court finds that expert testimony is clearly necessary given the facts presented.

Further, this Court received and reviewed the available file materials from the matter that underlies this current litigation, that being the Elective Share Action. A short summary of what the matter actually involved is instructive.

Goodfriend brought the action to resolve a dispute over how to calculate the value of the "augmented Estate" – since it is off of that value that his 1/3rd share is calculated. He also wished to receive his share outright as opposed to through a trust. There was no issue or dispute in that matter as to the language or preparation of a share waiver agreement, since Goodfriend never signed one and nothing was presented to this Court or the Probate Court to suggest he ever would have signed one.

Plaintiff herein claimed in the Elective Share Action that the will as written made sufficient provision for Goodfriend, and that the items received under the Will were equal to or exceeded Goodfriend's entitlement to 1/3rd of the augmented Estate. Nothing was produced from the underlying litigation to show that anything Defendants did or did not do had any impact on that matter.

The Court finds the absence of any expert testimony from the Plaintiff to be fatal to his sole remaining cause of action, in particular on the issue of proximate cause. Even as to the purported statutory violation, the defense raises issues as to the "safe harbor" protection afforded

by the relevant RPC, questioning the position that the 2015 representation was "unauthorized" given the exigent circumstances involved.

Further issues are raised as to the failure of the Plaintiff to identify the specific act or omission involved, and to further show a causal link between such an act or omission and the specific loss the Plaintiff claims he suffered.

Question 2: Does the ethics opinion cited by Plaintiff (Op. 49) require more to be shown for someone to obtain the benefit of the carve out as set forth in the relevant RPC?

In support of Plaintiff's contention that Hess allegedly engaged in the unauthorized practice of law, Plaintiff points to an alleged violation of RPC 5.5. However, it is well settled that the alleged violation of a RPC does not in and of itself establish civil liability in a legal malpractice action as a matter of law.[12]

In arguing otherwise, Plaintiff seemingly attempts to assert a private cause of action under RPC 5.5. Defendants claim that this approach has been rejected by other courts in this jurisdiction.[13]

The absence of any cited case law allowing for such a cause of action is likely due to the fact that the RPC's serve purposes substantially different from those of a plaintiff seeking redress in a legal malpractice action. In Baxt, the Supreme Court described those purposes as follows:

> First, a lawyer may be disciplined [under the RPCs] even if the misconduct does not cause any damage. The rationale is the need for protection of the public and the integrity of the profession. Second, although the severity of the breach may affect the nature of the discipline, the prophylactic purpose of the ethical rules may result

[12] (See Estate of Spencer v. Gavin, 400 N.J. Super. 220, 242, n. 19 (App. Div. 2008) (citing Baxt v. Liloia, 155 N.J. 190, 193 (1998)).

[13] (See, e.g., Baxt, 155 N.J. at 198-99 (noting that the Supreme Court could not identify a single case from New Jersey nor "any other jurisdiction" permitting a legal malpractice cause of action based solely on a violation of the RPC)).

> in a sanction even if the conduct would not otherwise constitute a civil wrong. Third, even if the injured party initiates a disciplinary complaint, that individual is not a party to the proceeding.[14]

The legislature's enactment of N.J.S.A. § 2C:21-22a did not supplement or change the New Jersey Supreme Court's well-established jurisprudence on this issue. Indeed, the New Jersey Constitution provides the Supreme Court with the sole authority and responsibility for determining who can practice law in the State of New Jersey. See N.J. Const., Art. VI, Section II, Para. 3. Moreover, even assuming arguendo that Hess did not act in accordance with RPC 5.5, such a finding, alone, cannot subject Defendants to civil liability given that an alleged violation of the RPCs, in and of itself, does not establish the requisite elements of proximate causation and damages.[15]

Having failed to produce an expert opinion demonstrating Defendants' alleged conduct in violation of the RPC proximately caused him to suffer damages, Plaintiff cannot prevail on their Statutory Claim.

Opinion 49 of the Committee on the Unauthorized Practice of Law requires that every multijurisdictional and cross border practitioner not admitted to plenary practice in New Jersey take specific steps, the most important of which is registering for service of process with the Clerk of the New Jersey Supreme Court. Plaintiff argues that Defendants, who admittedly never registered with the Clerk of the New Jersey Supreme Court, are precluded from claiming safe harbor pursuant to Opinion 49 or otherwise.

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[14] Id. at 202 (quoting Hizey v. Carpenter, 830 P.2d 646, 652 (1992)).

[15] See Pinson v. Arzadi, No. A-5552-11T3, 2013 N.J. Super. Unpub. LEXIS 991, at *4 (App. Div. Apr. 30, 2013) (holding that "without expert testimony, the jury would not be permitted to determine whether defendants were professionally negligent merely as a result of an RPC violation or whether their alleged negligence was the proximate cause of any damage to plaintiffs.").

Further, Plaintiff argues that in deciding if a safe harbor shelters Defendants from Plaintiff's statutory claim pursuant to 2C:21-22a, this Court should not allow Defendant at this very late date to imply or inject into this proceeding a safe-harbor affirmative defense.

Plaintiff contends that because Defendants admitted in their Answer to Plaintiff's Complaint that neither Davidson Dawson & Clark nor Mr. Hess ever "registered" with the Clerk of the New Jersey Supreme Court or were otherwise admitted to practice law in New Jersey, Defendants are precluded from seeking the protection of the "safe harbor" pursuant to Opinion 49. Defendants allegedly failed to take any of the five steps concisely outlined in the Opinion. Having so failed, both Davidson Dawson & Clark LLP and Hess engaged in the unlawful practice of law in the State of New Jersey when they performed estate planning services in New Jersey.

Plaintiff claims that due to the foregoing facts, the analysis of the timing and content of Hess' legal representation of the Decedent from 2007 through 2015 is neither necessary nor relevant. He further claims that this Court need only focus on the failure by Davidson Dawson & Clark LLP (as a firm of lawyers) and by Hess (as an individual) to register with the Clerk of the New Jersey Supreme Court in order to conclude that, contrary to exculpating them, Opinion 49 inculpates Defendants.

Defendants counter that Plaintiff's reliance on Ethic Opinion 49 is flawed. Ethics Opinion 49, like RPC 5.5, merely sets forth the standard of professional conduct by which an attorney may be disciplined. The opinion and the RPC's do not establish a standard for civil liability under N.J.S.A. § 2C:21-22a. The RPCs are focused on attorney ethics, rather than the statutorily defined claim for damages advanced by Plaintiff under N.J.S.A. § 2C:21-22a.[16]

[16] (See Estate of Spencer, 400 N.J. Super. at 242, n. 19).

To prevail on the Statutory Claim, Plaintiff must prove that Mr. Hess knowingly engaged in the unauthorized practice of law and Plaintiff suffered an ascertainable loss that was proximately caused by such alleged conduct. Neither Ethics Opinion 49 nor RPC 5.5 refer to the requisite "knowing" scienter. Nor do either refer to the proximate causation requirement attendant to the civil claim for damages. Whether Hess' conduct ultimately complied with RPC 5.5 has no bearing whatsoever on whether Defendants knowingly engaged in the unauthorized practice of law, or whether Defendants proximately caused Plaintiff to suffer ascertainable damages as a result. Accordingly, the Court finds that Ethics Opinion 49 does not directly bear on the outcome of Defendants' motion for summary judgment on the Statutory Claim. That opinion nowhere absolves Plaintiff of the need to obtain expert support showing a causal connection between the actions of the Defendants and the loss alleged.

Question 3: Counsel and/or the parties are to provide the Court with as much information as possible relating to the decision made by Judge Wilson denying Summary Judgment in the matter referenced on the record. If there was a written opinion or a transcript of the oral opinion was obtained, same should be provided to the Court.

Defendants rely on Judge Wilson's decision in Villani v. Davidson Dawson & Clark, et al., Docket No. BER-L-004241-18, where the court denied the plaintiff's motion for partial summary judgment on his claim for legal malpractice based on the alleged unauthorized practice of law in violation of N.J.S.A. § 2C:21-22a, Defendants argue that Villani further supports granting the motion for summary judgment on the Statutory Claim. Because, in denying the plaintiff's motion, Judge Wilson determined that plaintiff could not prevail on his claim under N.J.S.A. § 2C:21-22a absent expert testimony.

Given the lack of precedential value that attaches to the Bergen County decision, the Court does not deem it necessary to engage in a detailed discussion and analysis of that case. Suffice to say, that case does not stand for the proposition that expert testimony is not necessary when a client sues their attorney and alleges a violation of the statute in question.

It is well established that "[a]n attorney is only responsible for a client's loss if that loss is proximately caused by the attorney's legal malpractice." It is also well settled that establishing the requisite proximate causation requires production of an expert opinion "explain[ing] a causal connection between the [malpractice] and the injury or damage allegedly resulting therefrom."

This Court recognizes that while Defendants rely on Villani for their position that the need for an expert is undeniably important, Judge Wilson's decision is not binding in the present matter. Further, it is important to note that in Villani there was a denial of summary judgment based on the lack of expert testimony, not a dismissal of the overall claim. The Court considers the Villani case unremarkable in that it is an unpublished, trial court opinion. Moreover, this Court does not place weight on the Villani decision in granting summary judgment in this matter.

Conclusion

Under the circumstances presented, where there was an existing relationship that began in New York, the Court agrees that a party needs an expert to sort through the RPC and the Statute and present a competent and factually supported opinion that demonstrates an ascertainable loss proximately caused by an act or omission of the Defendants. The failure to provide such evidence is fatal to Plaintiff's remaining claim, and as a result summary judgment is granted.

Given the findings and rulings of the Court, it is found that the issue of whether Defendants in fact engaged in the unauthorized practice of law need not be reached or determined by this Court.

s/Peter A. Bogaard
Hon. Peter A Bogaard, J.S.C.

Dated: June 8, 2021