

TO: Senior Partner Mr. Massey
FROM: Lowly Associate Syed Ibrahim Hasan '10
RE: Malpractice Suit on behalf of Anne Anderson
DATE: January 13, 1990

Introduction

Anne Anderson, one of the original Woburn plaintiffs, initiated contact with Massey & Myerson on January 5, 1990, seeking advice whether she may have a malpractice claim against Jan Schlichtmann and Schlichtmann, Conway & Crowley over their handling of the Woburn trial. Anne Anderson's son Jimmy died of leukemia and she, along with the other Woburn plaintiffs, retained the services of Jan Schlichtmann and Schlichtmann, Conway & Crowley and filed a lawsuit against W.R. Grace & Company and Beatrice Foods Company alleging that they had contaminated the Woburn town wells and thus caused the plaintiffs death and injury. This memo deals with the grounds for a malpractice suit on behalf of Anne Anderson against plaintiffs counsel Jan Schlichtmann and Schlichtmann, Conway & Crowley over their handling of the Woburn case.

Background

Anderson v. Cryovac, Inc. was filed in the Massachusetts Superior Court in May 1982 by Jan Schlichtmann and Anthony Roisman, the executive director of Trial Lawyers for Public Justice. It was later removed to the federal district court in June 1982 by motion of William Cheeseman, attorney for W.R. Grace & Company, where it was

delegated to Judge Walter Jay Skinner. Anderson was a personal injury toxic tort case brought by thirty-three plaintiffs against W.R. Grace & Company and Beatrice Foods Company. The Anderson complaint alleged that particular chemicals deposited or disposed of on each of the properties owned by W.R. Grace & Company and Beatrice Foods Company had contaminated the groundwater, which later traveled to the Woburn town wells causing a variety of injuries and deaths to the Plaintiffs who had been exposed to the well water. W.R. Grace & Company and Beatrice Foods Company were considered "deep pocket defendants" (Facher 2), a fact much appreciated by the plaintiffs counsel Jan Schlichtmann. Unlike the plaintiffs, however, the defendants, W.R. Grace & Company and Beatrice Foods Company, were represented by two formidable lawyers; namely, William Cheeseman, a senior partner at the Boston firm of Foley, Hoag & Eliot, and Jerome P. Facher, a senior partner and Chairman of the Litigation Department of the Boston law firm of Hale and Dorr LLP, respectively.

The trial began in March 1986 upon conclusion of the pretrial discovery. Under Judge Skinner's discretion, the case was to be tried in three separate phases. The first stage of the trial, also known as the "waterworks" phase (Harr 287), would deal with the question of whether W.R. Grace & Company and Beatrice Foods Company were responsible for contaminating the Woburn wells. If the jury determined that W.R. Grace & Company and/or Beatrice Foods Company were responsible for contaminating the wells, the trial would proceed on to the second stage. The second stage would address whether or not the chemicals concerned caused the Plaintiffs death and injury as alleged in the complaint. The third and final stage of the trial would then determine the

“compensatory, consequential and punitive damages” (P.80 Anderson complaint) due to the Plaintiffs as provided under the law.

Anderson v. Cryovac, Inc never made it past the first stage which took seventy-eight days and ended in July 1986. The jury deliberated for eight and a half days and returned its verdict exonerating Beatrice Foods Company of liability and finding W.R Grace & Company liable for contaminating the Woburn wells. With Beatrice Foods Company out of the case and with Schlichtmann, Conway & Crowley heavily under debt, the case against W.R Grace & Company became financially unsustainable and was then quickly settled out of court for eight million dollars.

Jan Schlichtmann tried to revive the case against Beatrice Foods Company and judgment for Beatrice Foods Company was appealed to the Court of Appeals for the First Circuit. The ground for appeal was the non-production of the Yankee Report, a report concerning the tannery property on file at the U.S. Environmental Protection Agency, which allegedly provided evidence against Beatrice Foods Company that was vital to the case against the defendant. Judge Skinner, however, denied the plaintiffs motion to vacate the judgment concluding that “under Rule 60(b) (2)” the “Yankee Report would not have affected the outcome of the case and, under Rule 60(b) (3), that its nonproduction did not prevent plaintiffs from fully and fairly presenting their case” (P.2 Facher). The Court of Appeals has yet to determine its verdict on Judge Skinner’s findings. Such is the current status of the case.

Recommendation

Massey & Myerson should file a malpractice suit on behalf of Anne Anderson against Jan Schlichtmann and Schlichtmann, Conway & Crowley over their handling of the Woburn trial. After examining the proceedings of the trial, it becomes evident that Anne Anderson has reasonably strong grounds for a malpractice suit against Jan Schlichtmann and Schlichtmann, Conway & Crowley. The plaintiffs counsel Jan Schlichtmann and the firm Schlichtmann, Conway & Crowley failed to provide effective advocacy for the plaintiffs. They are liable on three counts: namely, for failing to provide the plaintiffs with competent representation, for failing to communicate sufficiently with the plaintiffs, and finally, for failing to serve the plaintiffs with the loyalty due to them under the standard of zealous representation. I would also recommend, for strategic purposes, that the suit be filed in Judge Walter Jay Skinner’s federal district court at the earliest possible convenience of the firm.

Analysis

A. Competence

Jan Schlichtmann did not represent the Woburn plaintiffs with the competence that was due to the plaintiffs under the standard of zealous representation. He is liable on four counts: namely, his inexperience of environmental toxic tort cases, lack of funds necessary to sustain such an extensive case, lack of thoroughness in investigating John J. Riley Company, and finally inadequate preparation of his lead witness, George Pinder, whose testimony was crucial to proving the case against Beatrice Foods Company. In accepting the Woburn case, Jan Schlichtmann violated Rule 1.1 of the ABA Model Rules

of Professional Conduct which states that “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

i) Inexperience

Jan Schlichtmann did not have the legal knowledge pertaining to environmental toxic tort case reasonably necessary for the representation. He had been a lawyer in solo practice for about two years, following a brief spell as a government lawyer, when he accepted the Woburn case. Previously, he had handled “a few workers’ compensation claims, a drunk-driving case, a dispute between a customer and a local merchant, and a ‘slip’ n fall’, as it was called in the trade” (P.59 Harr). He had two more small personal injury cases to his name; namely, the Eaton case and the Piper Arrow case. He apparently “eked” out a living and had fallen “behind on payments for his law library” (P.60 Harr). He was clearly an inexperienced trial lawyer who had never dealt with an environmental toxic tort case, let alone one as large or complex as Woburn. A regular lawyer in his position would simply have declined to accept the case and then would have referred the plaintiffs to a law firm more capable of representing them competently.

Schlichtmann’s possible defense to this charge can be that a “lawyer can provide adequate representation in a wholly novel field through necessary study” and that “[c]ompetent representation can also be provided through the association of a lawyer of established competence in the field in question” (Comment 2 to Model Rule 1.1). He can claim that he certainly did put in a lot of work in the Woburn trial (whether or not that work resulted in competent representation of the plaintiffs is another matter) and that he did associate with Anthony Roisman, an experienced environmental tort trial lawyer.

However, even if our firm concedes that Schlichtmann did conduct ‘necessary study’, Schlichtmann was still negligent on the second count regarding ‘association’ with a lawyer of ‘established competence in the field in question’ because his association with Anthony Roisman was extremely limited and did not extend throughout the trial. In fact, it ended fairly quickly before the trial. When Schlichtmann provided Trial Lawyers for Public Justice a plan detailing potential expenses on Woburn, he was told by an angry board that there could be only “one captain of the ship” and that he, Schlichtmann, would run the show from now on (P.142 Harr). Emboldened by a new sense of authority, Schlichtmann felt he was ready to take on Woburn. He was bent on making a name for himself and sought to use Woburn as a means of ringing the “alarm” in the “corporate boardrooms across the United States” (P.251 Harr). His self-serving ambition ended up costing his clients their justice.

ii) Lack of funds

Jan Schlichtmann and Schlichtmann, Conway & Crowley did not have the funds necessary to sustain a case as expensive as Woburn and thus were not able to represent the plaintiffs in a competent fashion. They were heavily in debt before the commencement of the trial, as a result of which, Schlichtmann not only refused but also vehemently opposed a postponement of the trial proposed by Facher who had conceded that the case was an extremely complex one and would involve more time.

A postponement of the trial would have given Schlichtmann additional time to conduct discovery more effectively and thus might have afforded him the upper hand in the trial. Even Judge Skinner, who is supposedly part of a so-called ‘conspiracy’ against Schlichtmann, admitted that a postponement of the trial would have allowed “Mr.

Schlichtmann a chance to get better prepared” for trial (P.271 Harr). The real reason behind Schlichtmann’s opposition was that Schlichtmann, Conway & Crowley were heavily in debt before even the beginning of the trial and could not afford a postponement of the trial. The discovery process had proved to be costly for them and had exceeded their initial financial estimates. Their financial advisor, Gordon, could not “imagine any way of financing Schlichtmann through a long delay” because they were now “half a million dollars over the budget” and “[i]nterest alone on the debt to the Bank of Boston and other creditors amounted to several hundred dollars a day” (P.263 Harr).

One wonders why they took the case in the first place if they knew that they were not going to be able to sustain it. Is it the plaintiffs’ fault that Schlichtmann, Conway & Crowley ran out of money? These are very relevant questions that Anne Anderson is raising at this point and, frankly speaking, Jan Schlichtmann cannot return satisfactory answers to them. A standard law firm or a regular lawyer would have taken heed to calculate accurately the costs of a case the size of Woburn, where the burden of proof was immense and lay entirely on the shoulders of the plaintiffs. If a firm determined at any point that it would not be able to sustain the case with due justice, it would simply have referred the case to another firm more capable of providing competent representation to the plaintiffs. It is unethical behavior for a lawyer or a law firm to accept a case where, due to limited financial resources, there is reason to believe that competent representation may not be possible.

However, ethical considerations were clearly not on Mr. Schlichtmann’s mind during the Woburn trial. Woburn was his ticket to fame and riches. Despite being told by Conway, a more experienced trial lawyer, that Woburn was a “black hole” (P.73 Harr)

and despite being urged repeatedly to drop the case, Schlichtmann decided that he knew better and ploughed on hopelessly with the case. And to top it all off, Jan Schlichtmann was going against two corporate giants and some of the best law firms in the country. As it turned out, his clients paid dearly for his error in judgment and his breach of legal ethics.

iii) Lack of thoroughness

Jan Schlichtmann’s lack of thoroughness in investigating John J. Riley Company cost the plaintiffs the case against Beatrice Foods Company. Despite over a year of discovery, Schlichtmann had been unable to find “any tannery witnesses who could testify to using TCE” (P.193 Harr). To make matters worse, John Riley had “testified under oath that there were no records of the chemicals the tannery had used before 1979” (P.193 Harr). Because Schlichtmann had been unable to find any “hard evidence linking Riley and the tannery to the TCE on the fifteen acres” (P. 459 Harr), the case against Beatrice Foods Company was extremely weak. Schlichtmann admitted to himself that “[t]he case against Grace had occupied him throughout the spring and into the summer, and he done almost no work on Beatrice” (P.183 Harr). If Schlichtmann had been more thorough and in less of a rush to go to trial half-prepared as he was, he might have been able to break open the case against Beatrice Foods Company.

Firstly, during discovery he might have been able to locate witnesses like Mr. James Granger, a former tannery maintenance engineer, who could have proved that Riley had committed perjury on the witness stand. Secondly, he might have been able to procure the Yankee Report during discovery by conducting follow-ups and painstakingly taking care that he received every single document relevant to his case. At the very least,

by adopting such an approach, he would not have let Judge Skinner determine in his ruling that “Schlichtmann himself deserved part of the blame for not getting the report, for insisting on ‘rushing’ headlong to trial, despite Facher’s pleas for more time” (P.464 Harr).

Schlichtmann’s incompetence becomes even more evident in Judge Skinner’s final Rule 11 motion ruling against him. After viewing Schlichtmann’s investigative file on the Woburn case, the Judge concluded that there was no evidence regarding the case against the tannery in the first place and that Schlichtmann had knowingly pursued a case without sufficient evidence.

Although Judge Skinner’s alleged bias against Schlichtmann and suppression of evidence by Riley’s lawyer Mary Ryan and Beatrice’s defense lawyers is a topic of much discussion in the manuscript by Harr, there is no evidence to prove Schlichtmann’s allegations that the entire justice system somehow conspired against him to thwart his designs. Regarding the Judge’s bias, the manuscript conveniently does not dwell sufficiently on all the motions the Judge denied William Cheeseman, such as the original Rule 11 motion or the motion for Summary Judgment against the Woburn case, so that Schlichtmann’s case could make it to a jury. The manuscript also conveniently does not dwell much on Schlichtmann’s extremely unprofessional behavior during the taking of depositions such as “[s]wearing on the record, instructing witnesses not to answer, counseling witnesses on their answers...” that rightly roused the Judge’s anger against him in the first place (P.226 Harr). Regarding the non-production of the Yankee Report and suppression of evidence, Schlichtmann was a fool not to have realized that it was in Beatrice’s interests to keep incriminating evidence out of the courtroom and that the only

way to beat such a tactic was to be extra thorough during the discovery period by making use of all the time available. By refusing a postponement, Schlichtmann rushed on heedlessly to trial and allowed Facher and Mary Ryan to claim later that any document he didn’t receive was because of his own doing. Schlichtmann’s lack of thoroughness during the discovery process cost the plaintiffs the case against Beatrice.

iv) Inadequate preparation of lead witness

Schlichtmann’s inadequate preparation of his lead witness, George Pinder, whose testimony was crucial to proving the case against Beatrice Foods Company, also cost the plaintiffs dearly. George F. Pinder was a nationally recognized hydro- geologist from Princeton University, and his role in the trial was to explain how the contaminated ground water beneath the properties of Beatrice Foods Company and W.R Grace & Company flowed into the Woburn town wells. However, because Pinder had been poorly prepared by Schlichtmann, Facher completely and utterly tore his testimony apart and in the process not only undermined Pinder’s credibility in front of the jury, but also conclusively closed the case against Beatrice Foods Company.

As a result of poor preparation, Pinder committed two serious errors during his testimony in the trial. Firstly, feeling “overly confident” he redid some complex calculations in his head during his testimony, forgot to factor in the porosity of the soil, and thus made inaccuracies in the times taken by the harmful chemicals to migrate from the Beatrice and Grace properties to the Woburn wells (P.327 Harr). Facher, however, did not miss this slip and exposed Pinder in front of the jury. He treated him in a “most contemptible manner” and scornfully asked him, “Are you telling this jury that you came in here yesterday, as a Ph.D. and the chairman of a department and made a *little* mistake

in an opinion you've been preparing for the last year and a half?" (P.329 Harr) Pinder's little slip did not sit well with the jury either and had a negative bearing on his credibility as a witness.

As if that wasn't enough, Pinder made another mistake by not taking the trouble to read his own deposition before giving in his testimony. Under Facher's brutal cross-examination, he cracked completely in front of the jury. He started looking for a "trap in every question Facher asked" and to "avoid being trapped, he refused to answer even the simplest questions in a simple way" (P.330 Harr). Pinder's every statement "became 'in the context of what you're talking about,' or 'in the sense of what you're asking me'" (P.330 Harr). Even the judge, after a while, couldn't refrain from saying, "'I'm beginning to get the impression that this fellow has either got a very loose grasp of the language, or he will say anything that comes into his head'" (P.331 Harr).

Unlike Schlichtmann, Facher had prepared his lead witness Riley extremely well. Despite the fact that he was committing perjury on the stand, in a "benign, almost courteous manner" Riley steadfastly "denied ever dumping tannery waste or barrels on the fifteen acres" (P.306 Harr). In fact, Riley was so well prepared that despite being the weakest link in Beatrice's case, he was still able to get the better of Schlichtmann. Schlichtmann's bumbling cross-examination of Riley was so comical and ineffective that not only did Riley get away with committing perjury, but he also "didn't come off as slimy" as people thought he would (P.309 Harr). Schlichtmann simply did not have the time or the resources to prepare his witnesses properly, unlike his opponents. He should never have taken the Woburn case because here again, he lacked the capability to provide

competent representation to the plaintiffs. However, in defiance of legal and ethical considerations, he continued on with the Woburn trial to the detriment of the plaintiffs.

B. Communication

During the Woburn trial, Jan Schlichtmann and Schlichtmann, Conway & Crowley did not uphold the standard of communication due to the plaintiffs. They violated Rule 1.4 of the ABA Model Rules of Professional Conduct which deals with communication between a lawyer and his/her clients and states that a lawyer shall

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter

They are liable for withholding crucial information from the plaintiffs regarding Beatrice Foods Company's proposed settlement and for arbitrarily conducting unreasonable negotiations with Beatrice Foods Company, and W.R. Grace & Company without the plaintiffs' knowledge or consent.

i) Withholding information regarding settlement offers

Jan Schlichtmann did not communicate Beatrice's proposed eight million dollar settlement to the plaintiffs as he was required to do under the standard of ethical representation. A lawyer is "obligated" to keep his client "informed about the progress of the case and to explain the matter to the client so that the client can make an informed decision about those matters for which the client has responsibility," and it is the "client's

decision whether to settle a case” (P.9 Mohr). Beatrice’s settlement proposal was made in good faith by Jacobs who was fairly serious about his offer and had brought with him Beatrice’s assistant general counsel from Chicago so that a settlement could be authorized. A settlement would have been extremely beneficial for the plaintiffs and Schlichtmann, Conway & Crowley because, at the time, Schlichtmann’s case against Beatrice Foods Company was at best fragile. He was relying more on his suspicions than anything else and he had no evidence establishing that John J. Riley had dumped TCE on his fifteen acres. Schlichtmann could also have used the much-needed money from a settlement to finance the trial against W.R. Grace & Company and at the same time, put a “substantial sum into the hands of the families” (P.289 Harr). Furthermore, getting “rid of Beatrice” meant getting “rid of Facher” who had proven to be Schlichtmann’s “strongest adversary” (P.289 Harr). Even Schlichtmann conceded that “[w]ithout Facher to complicate matters, the trial against Grace would no doubt be simpler, and probably clearer and more compelling for a jury” (P.289 Harr).

However, despite all the attractions of Beatrice’s offer, Schlichtmann decided that he was ready for trial and that there was no need for him to negotiate a settlement. Although he wondered if he was “ethically obliged to inform the families of Jacob’s offer” (P.290 Harr), after consulting with Conway and Gordon, he decided against it. He believed that being forthright with his clients and upholding his ethical duty toward them would create “problems” for him. He argued, “What if some of the families wanted to take the money and others insisted on going to trial?” and decided not to inform the plaintiffs of Beatrice’s offer (P.290 Harr). In arriving at this decision arbitrarily, Schlichtmann violated his ethical duty to the plaintiffs.

Ironically enough, after the trial Schlichtmann settled with Grace for the “same \$8 million he presumably could have gotten from Beatrice before the trial even began” (P.4 Kennedy). After the deduction of Schlichtmann’s generous fee, each of the Woburn families received around three hundred thousand dollars, instead of the \$1 million they could have received had Schlichtmann communicated with his clients and accepted Beatrice’s offer.

- ii) Conducting unreasonable negotiations without the plaintiffs’ knowledge or consent

Schlichtmann’s comical negotiation at the Four Seasons is yet another example of how he failed the plaintiffs. Without so much as taking the trouble to consult with his clients about a settlement proposal, Schlichtmann went ahead with his own agenda and demanded around \$410 million over a thirty year period from Beatrice and Grace. His proposal was rightly received with contempt by his opponents. Facher, for one, did not take Schlichtmann’s proposal seriously because he thought that the figure was absolutely “preposterous” (P.278 Harr). It meant that Schlichtmann was either “crazy” or that he did not want to settle the case and “simply wanted to go to trial” (P.278 Harr). Even Conway thought that the figure was “ridiculous” and that Beatrice and Grace would “laugh” at such an unreasonable offer (P.274 Harr). As expected, Schlichtmann’s exorbitant demands buried any possibility of a pre-trial settlement and insured that Woburn would go to trial, and trial was something Schlichtmann was unprepared for. Before offering a settlement proposal, Schlichtmann had a duty to inform the plaintiffs and discuss his proposal with them. In failing to do so, he violated his ethical duty to his clients yet again.

C. Loyalty and Conflict of Interest

Jan Schlichtmann did not serve his clients with loyalty because of a conflict of interest between his goals and the objectives of the plaintiffs. In neglecting his duty, he violated Rule 1.2 of the ABA Model Rules of Professional Conduct which discusses the lawyer-client relationship and states that a lawyer “shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” Under the status quo, the adversary system requires that a lawyer must serve his client with “absolute loyalty” because as a client’s advocate, the lawyer “effectively steps into the client’s shoes” (P.5 Mohr). It presupposes a lawyer’s undivided loyalty to her client because a lawyer cannot be an effective advocate for his client unless his “resources at that moment in time are devoted to the client’s interests” absolutely (P.5 Mohr).

Jan Schlichtmann, however, violated this “most fundamental” of all ethics codes when he allowed his ambition and ego to play a lead role in the Woburn trial. The plaintiffs, especially Anne Anderson, had made it clear to Schlichtmann in public statements and private conferences that the trial was not about money but rather about the “suffering of the children” (P.4 Kennedy). Anne Anderson was even quoted by the *Boston Globe* as saying that “money wasn’t important to her” (P.280 Harr). Jan Schlichtmann, however, saw Woburn as his “destiny” (P.141 Harr) and his ticket to making his name in the world of personal injury law. He wanted to win a big settlement because aside from the boost in his reputation, his fee also depended on the size of the settlement. This ambition overshadowed all of his dealings with Beatrice and Grace. His immoderate demands at the Four Seasons conference effectively buried any possibility of

reaching a settlement with his opponents and demonstrated his conflict of interest with his clients.

Judge Skinner exposed Schlichtmann when he commented on Anne Anderson’s remarks in the *Boston Globe* saying that “if she doesn’t care about money, I think this case can be settled” (P.280 Harr). Schlichtmann’s response to this remark was illuminating. He “laughed politely, but it came out sounding as if he’d just heard a bad joke” (P.280 Harr). Judge Skinner caught the “thinness of Schlichtmann’s laugh” and observed, “Somebody cares about money” and that “somebody ought to tell Mrs. Anderson” because “she doesn’t think it’s about money” (P.280 Harr). In Anne Anderson’s words, Schlichtmann became so “enamored of himself that he forgot the cause” and “lost sight of what it was all about” (P.4 Kennedy).

Schlichtmann’s conflict of interest also led him to refuse Beatrice’s eight million dollar settlement and in violation of all ethical considerations, he did not inform his clients about it because he was afraid that they might accept it. Schlichtmann was clearly disloyal to his clients’ interests and failed to provide them adequate representation.

For all of these reasons, I urge you, Mr. Massey, to consider my recommendation regarding this case.