

SUPREME COURT RULINGS IN THE FINAL MONTHS OF 2008 (PART ONE)

JANUARY 26, 2009

As 2008 drew to a close, the New Hampshire Supreme Court issued three decisions relating to the liability and ethical obligations of New Hampshire lawyers.

In the first decision handed down in September, the Court reaffirmed that a plaintiff in a legal malpractice action must prove resultant harm caused by an attorney's breach of the standard of care, and that expert testimony would be required "in most instances," even where the attorney's conduct appears to violate court rules and state laws. See Estate of Marcus R. Sicotte v. Lubin & Meyer, P.C., 157 N.H. 670 (2008). In another legal malpractice case decided in November, this time arising in the criminal practice context, the Court distinguished a prior case, Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 143 N.H. 491 (1999), which had held that in order to prevail in a criminal malpractice action, a claimant must establish actual innocence of the conduct underlying the criminal charge. See Jose Hilario v. Neil J. Reardon, 2008 N.H. LEXIS 131 (2008).

Finally, in December, the Court addressed questions related to Rule 1.9(a) of the New Hampshire Rules of Professional Conduct in the context of an interlocutory appeal from the denial of a disqualification motion - - namely what standard should be applied in determining whether the attorney-client privilege transfers when a corporation changes hands as well as how that particular standard should be applied. See Goodrich v. Goodrich, No. LD-2007-867 (N.H. Dec. 4, 2008).

Because these professional responsibility cases are involved, we will discuss them in two separate Advisories. The first will address the Estate of Sicotte decision. The second will discuss the Hilario and Reardon rulings.

Estate of Marcus R. Sicotte v. Lubin & Meyer, P.C.

The plaintiff in Estate of Marcus Sicotte v. Lubin & Meyer, P.C. had been represented by the defendant law firm in a medical malpractice action arising from a minor's birth injuries. This underlying action had settled for over two million dollars and the law firm sought allowance of a contingent

Attorney Conduct & Liability Practice Group

Peter Beeson, Co-Chair
603.695.8517
pbeeson@devinemillimet.com

**Mitch Simon, Of Counsel
and Co-Chair**
603.228.1541
msimon@devinemillimet.com

Andy Dunn
603.695.8503
adunn@devinemillimet.com

Bob Dewhirst
603.695.8646
rdewhirst@devinemillimet.com

Shelagh C.N. Michaud
603.695.8703
smichaud@devinemillimet.com

Anne E. Trevethick
603.695.8725
atrevethick@devinemillimet.com

DEVINEMILLIMET.COM

fee of one-third, which the Superior Court (Nadeau, J.) approved. Almost two years later, the guardian of the minor's estate moved for the return of attorney's fees on the basis that: (1) the law firm had failed to inform the minor's parents that Superior Court Rule 111(E)(2) ordinarily would not allow an attorney's fee in excess of 25% of a minor settlement except "upon good cause shown"; and (2) the law firm did not give the minor's parents the option of paying an hourly rate rather than a contingent fee, in violation of RSA 508:4-e, II. The Superior Court dismissed the motion without prejudice - - noting that the Estate had not sought reconsideration of, or appealed from, Judge Nadeau's order approving a 33% fee. The Estate brought a legal malpractice action against the law firm.

The defendant law firm moved to dismiss the legal malpractice suit, arguing that the Estate had failed to disclose its expert or expert report by the court-ordered deadline. The trial court (Houran, J.) initially granted the motion, concluding that expert testimony was required on the issue of causation; however, upon reconsideration, the court permitted the Estate the opportunity to make a late disclosure. The Estate eventually made a timely disclosure of its expert and expert report, but the law firm once again moved to dismiss on the ground that the expert disclosure was inadequate. The trial court granted that motion to dismiss and the Estate appealed to the New Hampshire Supreme Court, arguing, among other things, that an expert was not required and that dismissal was barred by Terzis v. Estate of Whalen, 126 N.H. 88 (1985).

At the outset, the Court observed that expert testimony is necessary where the subject of the litigation is so distinctly related to an occupation "to be beyond the ken of the average layperson." Citing its earlier decision in Carbone v. Tierney, 151 N.H. 521 (2004), the Court first noted that in order to prevail in legal malpractice cases, a plaintiff must prove (1) that an attorney-client relationship existed conferring a duty upon the attorney; (2) a breach of that duty; and (3) resultant harm legally caused by that breach. "[A]bsent exceptional circumstances, expert testimony is necessary to inform the jury regarding the skill and care ordinarily exercised by lawyers and to prove a breach thereof." Additionally, "in most instances," expert testimony is also required to prove causation. The trier of fact needs to be able "to determine what result should have occurred if the lawyer had not been negligent. Unless the causal link is obvious or can be established by other evidence, expert testimony may be essential to prove what the lawyer should have done." Estate of Sicotte, 157 N.H. at 674 (quoting Carbone 151 N.H. at 528).

Rejecting the Estate's contention that the causation in the case was "obvious and implied", the Court held that the harm in question (i.e. the reduced amount of the settlement to the Estate due to the allegedly excessive attorney's fees) required expert testimony to prove that if the breach had not occurred either: (1) the minor's parents would have acted such that the trial court would not have approved a fee higher than 25%; or (2) the minor's parents would have retained alternate counsel who would have obtained similar results at a lower cost.

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001

The Court went on to hold that the Estate had failed to make the requisite expert disclosure by the court-ordered deadline (which was the second opportunity provided to trial counsel to make a timely, adequate disclosure).

The Court also rejected the Estate's argument based on Terzis - - a decision stemming from an attorney's effort to foreclose on property used to secure a fee arrangement. The Terzis decision contains a holding of importance to New Hampshire practitioners: that when a fee arrangement is modified in the midst of the attorney-client relationship, "when the position of trust is well established", Terzis 126 N.H. at 92 (quoting Spilker v. Hankin, 188 F.2d 35, 39 (D.C. Cir. 1951)), the attorney has the burden of demonstrating that the modified agreement is fair and reasonable, and that the client was aware of his or her legal rights relating to the agreement. Although the Estate of Sicotte ruling reaffirmed the importance of Terzis, it ultimately held that principles applied in an attorney's action to enforce a fee agreement did not relieve the plaintiff of its traditional burden in a legal malpractice action.

The Advisories on the Law of Lawyering in New Hampshire issued by the Attorney Conduct & Liability Practice Group are intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the Advisories are generic, they should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at AC&LPG@devinemillimet.com.