

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

FEBRUARY 18, 2009

This is the second in a two-part series that summarizes three decisions issued in late 2008 by the New Hampshire Supreme Court relating to the liability and ethical obligations of New Hampshire lawyers. If you do not have the prior Advisory, you can access it by [clicking here](#).

Jose Hilario v. Neil J. Reardon, 960 A.2d 337 (N.H. 2008)

The legal malpractice action in Jose Hilario v. Neil J. Reardon stemmed from a plea agreement entered into by the plaintiff, who had been indicted on various criminal charges. Under the terms of the plea agreement, if the plaintiff met certain conditions, including cooperation in other prosecutions, the State would petition for the suspension of a portion of his sentence. The same month that the plaintiff began serving his sentence, his attorney filed a motion to withdraw the plaintiff's plea, which was denied by the trial court. The plaintiff claimed that he did not authorize, and was not even aware of, this motion to withdraw.

Later, the plaintiff, acting *pro se*, sought to suspend a portion of the sentence imposed under the plea agreement. The State objected, arguing that by attempting to withdraw his plea, the plaintiff had breached the terms of the agreement. The trial court agreed with the State and denied the plaintiff's motion. The plaintiff did not appeal that ruling. Instead, he filed a legal malpractice complaint against his former lawyer. Relying upon the case of Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 143 N.H. 491 (1999), which held that a plaintiff bringing a malpractice action against a former criminal defense attorney must prove his or her actual innocence ("the actual innocence standard"), the defendant moved to dismiss. The trial court granted the motion, apparently because the plaintiff had failed to object. The plaintiff subsequently appealed, arguing that Mahoney should be overruled or, in the alternative, that it did not bar his specific claims.

As an initial matter, the Court held that the trial court's ruling constituted plain error because failure to object, in itself, is not an adequate basis for granting a motion to dismiss. Reaching the merits of plaintiff's appeal, the Court found that Mahoney need not be overruled.

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Focusing on plaintiff's alternative argument, the Court clarified the holding in Mahoney in order "to avoid unfairly barring certain criminal malpractice claims." The Court noted that it adopted the actual innocence standard based on three public policy principles: (1) the criminal justice system already affords individuals with protections against wrongful convictions, including protections against ineffective counsel; (2) guilty defendants should not be allowed to profit from criminal behavior through damage awards in legal malpractice cases; and (3) the pool of available attorneys for criminal defendants should be preserved. In Mahoney, the Court had not made a distinction between criminal defendants seeking damages related to their convictions and those seeking remedies for civil contempt fines because the challenged conduct in both instances "consisted of professional judgments intended to avert indictment and ultimate conviction." Hilario, 960 A.2d at 343 (quoting Mahoney, 143 N.H. at 498).

In contrast, the conduct at issue in this case was unrelated to the plaintiff's culpability for the underlying acts. Therefore, the Court held that Mahoney did not bar the plaintiff's malpractice claims. In so holding, the Court refused to use the actual innocence standard to create de facto immunity from malpractice for criminal defense attorneys whenever the criminal defendant bears some degree of guilt. As a result of this case, where the legal malpractice claim is unrelated to tactical or strategic decisions concerning the criminal defendant's conviction, and where the claimant does not argue that "but for" the attorney's negligence, a different result would have occurred in the criminal case, Mahoney does not bar the cause of action.

Goodrich v. Goodrich, 960 A.2d 1275 (N.H. 2008)

In Goodrich v. Goodrich, the New Hampshire Supreme Court reviewed an interlocutory appeal from a Superior Court order denying a motion to disqualify a law firm from representing defendants in pending litigation. Plaintiffs, the sons of one defendant, Morgan Goodrich, at the time of this appeal owned the corporate plaintiff. Originally, the sons had brought a civil suit against, *inter alia*, that same corporation when it was owned by their father. During the course of litigation, Morgan Goodrich transferred the corporation's stock to his sons. Thereafter, the sons dismissed the suit against the corporation and added it as a plaintiff. Subsequent to this change in ownership and pursuant to Rule 1.9 of the New Hampshire Rules of Professional Conduct, the plaintiffs moved to disqualify the law firm that had previously represented the corporation, alleging that the firm had a conflict of interest due to the corporation's status as a former client of the law firm. The trial court denied the motion and held that the corporation, now owned by the plaintiffs, was not a former client of the firm and therefore the attorney-client privilege did not transfer along with the stock transfer.

The appeal involved two specific questions: (1) whether the trial court applied an incorrect legal standard to determine whether defendants' legal counsel should be disqualified where defendants' counsel had previously represented the plaintiff corporation in the same matter?; and (2) whether

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the trial court correctly determined that no valid attorney-client relationship between defendants' counsel and the corporate plaintiff existed based upon its finding that the nature of the corporate plaintiff's business was not sufficiently similar to the nature of its business under prior ownership when defendants' counsel represented it in the same matter?

As to the first issue, the trial court had relied upon the legal standard articulated in Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343 (1985) and Tekni-Plex, Inc. v. Meyner and Landis, 674 N.E.2d 663 (N.Y. 1996), viz that "when ownership of a corporation changes hands, whether the [existing] attorney-client relationship transfers as well to the new owners turns on the practical consequences rather than the formalities of the particular transaction." Goodrich, 960 A.2d at 1281 (quoting Tekni-Plex, Inc., 674 N.E.2d at 668). This so-called "practical consequences" standard looks to whether "efforts are made to run the pre-existing business entity and manage its affairs." Id. Conversely, "the mere transfer of assets with no attempt to continue the pre-existing operation generally does not transfer the attorney-client relationship." Id. Ultimately, the Court held the trial court, in using the practical consequences standard, had applied the proper legal standard.

In reaching this conclusion, the Court looked at case law from other jurisdictions for guidance. The Court noted that "whether a particular corporate transaction allowed another entity to assume control of the corporation that had established the attorney-client privilege" was "pivotal" to an analysis of whether the attorney-client privilege passes in corporate transactions. When "control of the establishing corporation's business operations, rights, and liabilities" is transferred, it is generally presumed that authority over the attorney-client privilege transfers as well. Rather than using a purely formulaic approach, however, courts also assess "the 'practical consequences' and substance of a given transaction."

Regarding the second issue, the Court held that the trial court had not applied the correct legal analysis in this case. Principally, the trial court had focused upon the nature of the business before and after the corporation's stock transfer and concluded that the two businesses were not "sufficiently similar." More specifically, the trial court ruled that the plaintiffs failed to "meet their burden of proving that [the corporation] continues to exist as it did under [its former] management."

On review, the Court held that the nature of the business conducted by the two businesses "has some bearing on determining whether the attorney-client privilege transfers in a corporate transaction"; but this analysis "is not the linchpin of the 'practical consequences' standard." Instead, significant weight should be placed upon whether control of the business passed with the transfer of ownership -- in other words, whether the new business "possess[es] all the rights, privileges, liabilities and obligations" of the old business.

In the case at bar, control of the corporation transferred with the stock transfer and therefore the Court held that the attorney-client privilege transferred as well. "Once the plaintiffs established that [the new

business] maintained its corporate existence, a presumption arose that it likewise retained all of its pre-existing rights and liabilities.” Establishing this fact, the Court determined that the burden then shifted to the defendants to rebut the presumption or otherwise prove that the stock transfer did not transfer control.

Based on these findings, the Court held that the corporation had a valid attorney-client privilege with the law firm and remanded the case so that the trial court could consider the remaining factors pursuant to Rule 1.9(a)'s test for disqualification.

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