THE SUPERIOR COURT DISCUSSES THE LAW ON THE ENFORCEABILITY OF CONTRACTS THAT VIOLATE THE RULES OF PROFESSIONAL CONDUCT AND THE "CONTINUOUS REPRESENTATION" DOCTRINE

DECEMBER 17, 2010

Superior Court Justice Richard McNamara, presiding justice for the Superior Court's Business and Commercial Dispute docket, has issued an order that expands the body of law on lawyering in New Hampshire.

Judge McNamara's order, issued on October 26, 2010 in *Frederick Murdock, Jr., Esq. v. Berge M. Nalbandian*, (No. 218-2008-CV-1062) and *Berge M. Nalbandian v. Frederick Murdock, Jr. Esq*. (No. 218-2009-EQ-0031), addresses (1) the enforceability of business contracts (primarily loans) between an attorney and his client that violate the rules of professional conduct and (2) the application of the "continuous representation" doctrine, a doctrine that can toll the statute of limitations applicable to attorney/client disputes during the term of the attorney-client relationship. Judge McNamara's order can be found on the Judicial Branch website and is also attached to this Advisory.

***Frederick Murdock Jr. Esq. v. Berge M. Nalbandian*, No. 218-2008-CV-1062; and *Berge M. Nalbandian v. Frederick Murdock Jr. Esq.*, No. 218-2009-EQ-0031 (hereinafter "Murdock/Nalbandian")(10/26/2010)**

The facts, as summarized by the Court, span almost 25 years. During that time, Attorney Frederick Murdock, while representing Mr. Berge Nalbandian and billing for the relevant transactional documents, arranged for several sizeable loans to his client from business entities simultaneously represented by Murdock and/or in which he held ownership interests or exercised managerial control. Frequently the loans were then assigned to Murdock individually. Reaffirmation agreements for the loans were also drafted by Murdock and billed to Nalbandian as client; and on occasion Murdock initiated lawsuits against Nalbandian alleging loan defaults. In at least one instance, he billed Nalbandian for the preparation of the lawsuit and a $2.5 million Petition to Attach brought against his client.

Two cases are now pending in Superior Court: Murdock's action at law to collect on a series of loans and Nalbandian's petition for declaratory judgment. Judge McNamara's order rules on Murdock's motion to strike

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three of Nalbandian's affirmative defenses. The defenses assert that the promissory notes and related loan documents violate the professional conduct rules and are therefore void or voidable as contrary to public policy; that the notes were the product of undue influence; and that the notes were fraudulently induced. While these generic defenses exist at common law and in a variety of circumstances independent of attorney-client relationships, each gains further strength in attorney/client disputes because of the conflicts and fiduciary duties implicated by business transactions between lawyers and their clients.

Because Nalbandian's counterclaim/petition for declaratory judgment seeks to invalidate the loans on the same essential theories, the Court treated Murdock's motion to strike as a motion to dismiss the counterclaim and subject to the same demanding burden applicable to any effort to dismiss based on the pleadings.

A. <u>Are Business Transactions that Violate the Professional Conduct Rules Void or Voidable as Contrary to Public Policy?</u>

The Court summarized the basic dispute between the parties as:

> whether or not the actions which form the basis of the notes render them void or voidable because Murdock represented Nalbandian at the time the loans were made and did not comply with the New Hampshire Rules of Professional Conduct.

The Court's opinion did not devote time to a review of Murdock's conduct against the disciplinary rules, but rather proceeded on the "(lack of dispute)" that the "contracts between the parties violated the New Hampshire Rules of Professional Conduct". At a minimum, the rules at issue could include conflict of interest rules prohibiting the representation of clients in matters directly adverse to one another (as when Murdock represented the business entity making a loan to Nalbandian or when Murdock brought suit against Nalbandian), *see* NHRPC 1.7(a); and the more stringent conflict of interest rule applicable to business transactions between a lawyer and a client. *See* NHRPC 1.8(a).

Citing *Kalled v. Albee*, 142 N.H. 747 (1998), Judge McNamara found that the mandatory standards set forth in the professional conduct rules are appropriate factors in determining whether a contract violates public policy, but also noted a general "disinclination" of courts from other jurisdictions to void a lawyer's contract based solely on the lawyer's violation of disciplinary rules.

The Court also found that "New Hampshire Professional Conduct Rule 1.8 and its predecessor DR Rule 5-104 do not absolutely prohibit (business arrangements) between lawyers and clients, but simply require that a lawyer make full disclosure, that the transaction be fair and reasonable, and that the client be given an opportunity to obtain independent legal advice".

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Because there is no absolute prohibition of business transactions with clients, Judge McNamara granted Murdock's motion to strike the affirmative defense that the contracts were void. However, citing the Rhode Island Supreme Court's decision in *DiLuglio v. Providence Auto Body*, 755 A.2d 757, 771-72 (R.I. 2000), he did find that even if the loans were economically "fair", they would still be "voidable at the election of the client" if the attorney had not "made full disclosure of all relevant information in his or her possession"; did not provide "adequate consideration"; or did not inform the client "about the need for, and then (give the client) the opportunity to seek, independent legal advice before completing the transaction".

The Court thus held that "to the extent the contracts violate the Rules of Professional Conduct, they may well be voidable, but they are not void, and to the extent the affirmative defense seeks a declaration that they are void, the counterclaim must be stricken."

B. <u>Should the Murdock/Nalbandian Transactions be Nullified Based on the Affirmative Defenses of Undue Influence and Fraud?</u>

Judge McNamara initiated the analysis of whether the Murdock/Nalbandian transactions should be nullified based on the affirmative defenses of undue influence and fraud by emphasizing the significance that courts place on an attorney's fiduciary duty to his or her client when conducting a retrospective review of attorney/client business transactions that occur during the course of representation:

> As a general rule, 'a transaction between an attorney and client which occurs during the relationship and which is advantageous to the attorney is <u>presumed</u> to violate the fiduciary duty and to have been entered into without sufficient consideration and under undue influence'. *BGJ Associates, LLC v. Wilson*, 7 Cal. Rptr. 3d 140, 148 (Cal. Ct. App. 2003); *see also Liggett v. Young*, 877 N.E.2d 178, 184 (Ind. 2007) (transactions entered into during a fiduciary relationship are presumptively invalid as the product of undue influence); *Johnson v. Gudmundson*, 35 F.3d 1104, 1115 (7th Cir. 1994). (Emphasis added.)

The New Hampshire Supreme Court has adopted the same demanding standard in reviewing changes to fee agreements that benefit the attorney and that are made during the course of an ongoing attorney-client relationship. *See Terzis v. Estate of Whalen*, 126 N.H. 88, 92 (1985) ("Accordingly, any attorney seeking to enforce a contract of this nature [mid-representation, favorable modification of fee agreement] has the burden of proving that it is fair and reasonable, and that the client had full knowledge 'of the facts and of his legal rights with relation thereto'") (citations omitted).

Judge McNamara also confirmed that the burden is always on the attorney, not the client, to prove the fairness of the business transaction; that the client entered the transaction voluntarily; that the client had a full, independent understanding of the transactions and his or her rights;

and that the client was fully advised. The Court held, although without reference to cases arising in the context of the attorney-client relationship, that "the law regarding fraud is similar".

Based on the foregoing, Judge McNamara concluded, as he had with Murdock's first affirmative defense, that "the Motion to Strike these affirmative defenses to the extent that they seek a ruling that the contract is void must be granted, but to the extent that they allege that the contracts are voidable", they were denied.

C. Does the "Continuous Representation" Rule Bar Nalbandian's Counterclaim?

Murdock sought to defeat Nalbandian's petition for declaratory judgment on statute of limitations grounds, arguing that a claim based on a 1999 note and underlying loan of $4,378,780 was personal in nature and subject to the three year statute of limitations of RSA 508:4. Nalbandian countered with several arguments that included the "continuous representation" rule. As explained by the Court, "(u)nder this rule, a client's cause of action against his attorney does not accrue until the attorney ceases representing the client".

The "continuous representation" doctrine postpones the accrual date for a claim by a client against an attorney - - a judicial policy judgment that clients should not be forced to initiate litigation while attorneys seek to cure errors that occur during an ongoing attorney-client relationship. The rule also is premised on the client's justifiable reliance on the skill and loyalty of their lawyer during active representation, and recognizes the speculative nature of malpractice claims brought while efforts are being made (for example through appeal) to remedy what appears to be damage to the client's interests.

Judge McNamara noted that this doctrine had been discussed in two Supreme Court decisions in New Hampshire.

The first, *Coyle v. Battles*, 147 N.H. 98 (2001), was a breach of contract action - - essentially a client's challenge to attorneys' fees - - brought within three years of the attorney/defendant's formal withdrawal from representation, but more than three years after the clients/plaintiffs had retained separate counsel and began to challenge the outstanding fees. In *Coyle*, the Supreme Court cited *Greene v. Greene*, 436 N.E.2d 496, 500 (N.Y. 1982) to explain one rationale of the continuous representation doctrine: "(The rule recognizes) that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered". Because the Coyles' decision to retain separate counsel to challenge Battles' fees eliminated any conceivable claim of "innocent reliance" on Battles' ongoing representation, the continuous representation doctrine did not apply.

The second Supreme Court decision mentioning the continuous representation doctrine is *Furbish. v. McKittrick*, 149 N.H. 426, 432 (2003).

Because the plaintiff failed to raise and preserve the issue below, the Court declined to address the doctrine's application to that case.

Judge McNamara found the rationale for the continuous representation rule "no different than that for the discovery rule", in that clients without an understanding of the law cannot be expected to discover the errors of their attorneys. The Court ruled that "whether the (*Murdock/Nalbandian*) case is even one for application of the rule depends upon a factual determination", and denied Murdock's motion to dismiss.

We would add to this analysis that while it is true that the "innocent reliance" rationale for the continuous representation rule bears similarities to the discovery rule, there are broader justifications for the continuous representation rule - - including the avoidance of unnecessary disruption of the attorney-client relationship that would occur if clients were compelled to bring litigation against their attorneys while the lawyers are trying to correct a problem. Whether New Hampshire courts will interpret the continuous representation rule to encompass such situations remains to be seen.

The Advisories on the Law of Lawyering in New Hampshire issued by the Attorney Conduct, Liability and Professionalism 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.

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Frederick Murdock, Jr., Esq.

v.

Berge M. Nalbandian

NO. 218-2008-CV-1062

And

Berge M. Nalbandian

v.

Frederick Murdock, Jr., Esq.

NO. 218-2009-EQ-0031

ORDER

These two actions involve a series of loans between Mr. Berge M. Nalbandian ("Nalbandian") and Mr. Fredrick Murdock, Jr., Esq. ("Murdock") his former attorney. Murdock moves to strike 3 affirmative defenses brought by Mr. Nalbandian in the law action. For the reasons stated in this order, the motion is GRANTED in part and DENIED in part. Murdock also moves to dismiss the declaratory judgment brought against him. For reasons stated herein, that motion is DENIED.

I

This case involves a series of loans that go back almost a quarter century. According to Nalbandian's pleadings, the loans are as follows:

1. On May 15, 1986, Attorney Murdock arranged a $440,000 loan to Nalbandian through a company known as Jana Corp. at an interest rate of 12.5%. Murdock billed

Nalbandian for the preparation of this loan. At the time the loan was entered into, Murdock was the treasurer of Jana Corp. On December 15, 1987, Jana Corp. assigned the loan to Murdock individually, and presently, Murdock is the holder of the $440,000 loan. In 1996 Nalbandian reaffirmed the $440,000 loan and a number of others, totaling $999,010.18 at a 12.5% interest rate. Murdock charged Nalbandian for the preparation of this reaffirmation agreement.

2. On May 17, 1989, Murdock arranged a loan of $300,000 to Nalbandian through 527 Limited Partnership. 527 was a client of Murdock when the transaction was made and Murdock was the sole general partner of 527 when the loan was made. Murdock billed Nalbandian for the preparation of this loan. The loan was secured by property owned by Nalbandian. On April 25, 1996, Nalbandian reaffirmed the loan, agreeing that the amount owing was $581,431.98 at 12.5%. Murdock charged Nalbandian for the preparation of the reaffirmation agreement. Murdock brought suit in Rockingham Superior Court, alleging default on this loan.

3. On October 15, 1991, Murdock arranged a loan of $50,000. Murdock charged Nalbandian for the preparation. This was reaffirmed in 1996, along with a number of other loans for $999,010.18 at 12.5%. Murdock charged Nalbandian for preparation of reaffirmation agreement. This loan is now held by Murdock, individually. Murdock brought suit in Rockingham Superior Court, alleging this loan is in default.

4. On April 29, 1993, Murdock arranged a loan to Nalbandian for $14,000 through 527 Limited Partnership. 527 was a client of Murdock when the transaction was made, and Murdock was the sole general partner of 527 when the loan was made. Murdock billed Nalbandian for the preparation of this loan. The loan was secured by

property owned by Nalbandian. This was reaffirmed in 1996, along with a number of other loans for $999,010.18 at 12.5%. Murdock charged Nalbandian for preparation of reaffirmation agreement. Murdock brought suit in Rockingham Superior Court, alleging this loan is in default.

5. On July 25, 1988, Murdock arranged for a loan to Nalbandian for $1,500,000 through Investment Specialties. At the time, Murdock was a trustee of Investment Specialties. Murdock drafted the loan and charged Nalbandian for preparation. The note was secured by a mortgage on Nalbandian's residence. The loan was modified in 1990 and again in 1991 at 12.5%. Murdock charged Nalbandian for both modifications. On December 24, 1993, Murdock wrote to Nalbandian, stating that the 1988 loan was in default and that he intended to initiate foreclosure proceedings against him. In March 2, 1994, Murdock filed a lawsuit against Nalbandian for default on the July 1988 loan. Murdock secured an ex parte attachment against Nalbandian in the amount of $2,500,000. Murdock billed Nalbandian for the preparation of the lawsuit and Petition to attach. Murdock, through counsel, and Nalbandian, pro se, stipulated to a judgment in the amount of $2,242,493.60 on June 4, 1994. The stipulation was approved by the Rockingham Superior Court (Gray, J.) on June 28, 2004.

In 1999, Murdock arranged a loan for Nalbandian through Investment Specialties in the amount of $4,378,780, which was dated December 25, 1999, but recorded on March 21, 2000. This loan refinanced the 1988 loan of $1,500,000, as well as the 1994 stipulated judgment, and set an interest rate at 12.5%. This loan was secured by property owned by Nalbandian. The documents were prepared by Murdock.

II

The action at law, Fredrick J. Murdock, Jr., Esq., Individually and as General Partner 527 Limited Partnership, arises out of the loans Murdock made to Nalbandian in 1986 and 1993. In his brief statement of affirmative defenses, Nalbandian asserts that these promissory notes and related loan documents are void because they violate public policy (affirmative defense 1), were the products of undue influence (affirmative defense 2), and were fraudulently induced (affirmative defense 8). Nalbandian's position is that the loans are therefore not enforceable. Murdock moves to strike the defenses. The procedural aspect of this case is somewhat unusual. Murdock's Motion to Strike Affirmative Defenses essentially operates as a Motion to Dismiss Nalbandian's counterclaim. The Court therefore applies the standard of judgment on the pleadings, considering all allegations made by Nalbandian in his averment of affirmative defenses, as undisputed facts.

There appears to be no dispute that the contracts between the parties violated the New Hampshire Rules of Professional Conduct. The Rules of Professional Conduct do not give rise to a cause of action against a lawyer, nor do they create any presumption that a legal duty has been breached; however, a violation may be evidence of a breach of the applicable standard of conduct. New Hampshire Rules of Professional Conduct, Statement of Purpose. In New Hampshire, the Rules of Professional Conduct may be used to determine whether a contract violates public policy. Kalled, 142 N.H. at 750. The Rules are employed as an instructive backdrop by which to analyze contracts involving attorneys. Id. Courts have generally been disinclined to say that even if a contract has not been performed in accordance with the requisites set forth in the disciplinary rules, the contract must be voided. See Son v. Margolius, Mallios, Davis, Rider & Tomar, 689 A.2d 645, 659 (Md. Ct. Spec. App. 1997), reversed on other grounds by Son v. Margolius, Mallios, Davis, Rider & Tomar, 709 A.2d 112 (Md. 1998).

The critical dispute between the parties is whether or not the actions which form the basis of the notes render them void or voidable because Murdock represented Nalbandian at the time the loans were made and did not comply with the New Hampshire Rules of Professional Conduct. Nalbandian argues that the New Hampshire Supreme Court has held that a contract made in violation of the Professional Conduct Rules is void and unenforceable, relying upon Kalled v. Albee, 142 N.H. 747, 751 (1998), in which the New Hampshire Supreme Court held that a fee agreement between a disbarred attorney and a licensed attorney in violation of Professional Conduct Rule 1.5 was void and unenforceable. But the facts in Kalled are distinguishable from the instant case, because there are no circumstances in which the fee splitting agreement in Kalled could be proper, see N.H. R. Prof. Conduct 5.4, whereas business arrangements between lawyers and clients have never been absolutely forbidden. See N.H. R. Prof. Conduct 1.8(a). New Hampshire Professional Conduct Rule 1.8, and its predecessor DR Rule 5-104, do not absolutely prohibit agreements between lawyers and clients but simply require that a lawyer make full disclosure, that the transaction be fair and reasonable, and that the client be given the opportunity to obtain independent legal advice.

The majority rule regarding the nature of such contracts seems to be stated by the Rhode Island Supreme Court in DiLuglio v. Providence Auto Body, 755 A.2d 757 (R.I. 2000). In that case, the court held that business transactions between an attorney and his client may be voidable at the election of the client depending upon whether the attorney has made full disclosure of all relevant information in his or her possession, whether consideration was adequate, and whether the client was informed about the need for, and then given the opportunity to seek, independent legal advice before completing the transaction. DiLuglio, at 771-72.

Here, assuming Murdock failed to comply with one of these responsibilities, the transaction may be voidable at the election of the client, even if the transaction is considered economically fair, if the client seeking to undo the transaction acted within a reasonable time after he learned of or should have learned of the facts. Id. at 772. Thus, to the extent that the contracts violate the Rules of Professional Conduct, they may well be voidable, but they are not void, and to the extent the affirmative defense seeks a declaration that they are void, the counterclaim must be stricken.

A similar result must be reached with respect to the affirmative defenses of undue influence and fraud. As a general rule, "a transaction between an attorney and client which occurs during the relationship and which is advantageous to the attorney is presumed to violate the fiduciary duty and to have been entered into without sufficient consideration and under undue influence." BGJ Associates, LLC v. Wilson, 7 Cal. Rptr. 3d 140, 148 (Cal. Ct. App. 2003); see also Liggett v. Young, 877 N.E.2d 178, 184 (Ind. 2007) (transactions entered into during a fiduciary relationship are presumptively invalid as the product of undue influence); Johnson v. Gudmundson, 35 F.3d 1104, 1115 (7th Cir. 1994). To overcome the presumption of undue influence, the attorney must prove three things:

1. The transaction's fairness;
2. The client's voluntary entry into the transaction; and
3. The client's full, independent understanding of the nature of the transactions and his or her rights.

Tyson v. Moore, 613 So.2d 817, 823-24 (Miss. 1992); see also BGJ, 7 Cal. Rptr. 3d at 148

("The burden of proof is always on the attorney to show that the dealing was fair and just, and that the client was fully advised."). The law regarding fraud is similar. Fraudulent inducement to a contract must be proved by clear and convincing evidence. Hair Excitement, Inc. v. L'Oreal, 158 N.H. 363, 369 (2009). If a contract has been induced by fraud, it is voidable. Restatement (Second) of Contracts § 7 (1981).

Ratification makes a voidable contract fully enforceable. Keshishian v. CMC Radiologists, 142 N.H. 168, 173 (1997) (citing Sawtelle v. Tatone, 105 N.H. 398, 403 (1964)). "[A]n informed and competent client acting voluntarily may ratify any such contract or release such rights." Tyson, 613 So.2d at 824. "Ratification may be expressed or implied from [the] course of conduct." Fowler v. Resolution Trust Corp., 855 S.W.2d 31, 35 (Tex. App. 1993). Ratification may be found under a variety of circumstances, including intentionally accepting benefits under the contract after discovery of facts that would warrant rescission, remaining silent or acquiescing in the contract for a period of time after having the opportunity to avoid it, recognizing the validity of the contract by acting upon it, or performing under it or to some degree acknowledging it. Keshishian, 142 N.H. at 173.

It follows then, that the Motion to Strike these affirmative defenses to the extent they seek a ruling that the contract is void must be granted, but to the extent that they allege that the contracts are voidable, the Motion cannot be granted. Resolution of all these issues will require evidence, and may be resolved on a motion for a summary judgment, but the issue cannot be decided on the pleadings.

III

The declaratory judgment brought by Nalbandian, Berge M. Nalbandian v. Fredrick W. Murdock, Jr., Esq., Individually and as General Partner of 527 Limited Partnership and Trustee of Investment Specialties Trust, essentially makes many of the same claims against Murdock as in the law action, except that it alleges that a 1.5 million dollar loan from a trust controlled by Murdock to Nalbandian is void. This loan is not part of the law action brought by Murdock against Nalbandian. The case was dismissed by the Superior Court, but the New Hampshire Supreme Court reversed on February 23, 2010, allowing the declaratory judgment to proceed with respect to the claim involving the 1.5 million dollar loan not referred to in the law action by Murdock against Nalbandian. The Supreme Court noted:

> The trial court dismissed the claim on grounds of *res judicata* apparently concluding because the original loan was subject to a judgment, any action to void the alleged subsequent modification loan was barred. Whether *res judicata* applies depends upon the interpretation of the 1999 note; whether it was a new loan as asserted by Nalbandian or a clarification of funds due and modification as asserted by Murdock. Construing Nalbandian's allegations in a light most favorable to him, he has raised a claim not previously addressed.

Nalbandian v. Murdock, No. 2009-0401, at 2 (N.H. Feb. 23, 2010) (3Jx Order).

Murdock moves to dismiss on two grounds. First, he alleges that the doctrine of *res judicata* bars the claim against him. In support of his motion to dismiss, Murdock has filed an affidavit asserting that the 1999 promissory note simply restates the 1994 judgment. Despite the affidavit filed by Murdock, Nalbandian argues that on a motion to dismiss, the Court must construe all of his allegations as true. Assuming the truth of Nalbandian's allegations, he asserts that new consideration was provided for the 1999 loan; therefore, the case cannot be dismissed on *res judicata* grounds.

Second, Murdock moves to dismiss on statute of limitations grounds. Because the action on the 1999 note is personal, the three-year statute of limitations of RSA 508:4 applies. Reading the Petition in the light most favorable to Nalbandian, as the Court must on a motion to dismiss, Perez v. Pike Industries, Inc. 153 N.H. 158, 159 (2005), he alleges that he is not responsible for the note in question for the same reasons he asserts as an affirmative defenses to the collection action: that the loan is voidable because it was obtained in violation of the Rules of Professional Conduct and is the product of undue influence and fraud.

Nalbandian also argues that even if the three-year statute of limitations applies to his claim, the action should not be dismissed because the "continuing representation rule" is applicable. Under this rule, a client's cause of action against his attorney does not accrue until the attorney ceases representing the client. "[T]he rule recognizes that a person seeking legal assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." Greene v. Greene, 436 N.E.2d 496, 500 (N.Y. 1982). In Coyle v. Battles, 147 N.H. 98, 101 (2001), the Court declined to adopt the rule in a case in which a plaintiff challenged the defendant's billing practices. The Court noted that the facts of the case did not raise the "innocent reliance which the continu[ing] representation doctrine seeks to protect" because the plaintiff's not only questioned the defendants' billing practices, but obtained separate counsel and threatened to sue. Id. (citation omitted). Similarly, in Furbush v. McKitterick, 149 N.H. 426, 432 (2003), the Court declined to apply the rule because it was not raised in the trial court.

It appears to this Court however, that the rationale for the rule is no different than that for the discovery rule. Illustrative on this point is McKee v. Riordan, 116 N.H. 729, 730-31 (1976), where the Court, while discussing the discovery rule, noted that it "finds its justification in the necessary reliance of the laymen on the professional in his field, and the mystery to the layman of the professional's work." Implicit in the New Hampshire Supreme Court's rejection of the rule in Coyle v. Battle, is a recognition that that the applicability of the doctrine cannot be resolved without evidence. Coyle v. Battle, 147 N.H. 101 ("The facts of this case do not raise [t]he innocent reliance which the continu[ing] representation rule is designed to protect"). Evidence is, of course, required before a court may rule on the applicability of the similar discovery rule. Black Bear Lodge v. Trillium Corp., 136 N.H. 635, 638 (1993). Apart from the issue of whether or not the rule is part of the law of New Hampshire, whether the case is even one for application of the rule depends upon a factual determination. Here, Nalbandian alleges that based on an ongoing representation by Murdock, it was reasonable for him to repose confidence in Murdock and not question Murdock's business dealings. Accordingly, dismissal without an evidentiary hearing is inappropriate.

IV

A number of discovery motions appear to be unresolved. The Court is not certain which motions are moot and which motions still need to be resolved. Accordingly, the Court directs the parties to meet and confer in light of this order to determine whether or not discovery disputes in this matter require a further hearing.

SO ORDERED.

10/26/10
DATE

Richard B McNamara
Richard B. McNamara,
Presiding Justice

RBM/mrs