

Does an Unimpeached Guilty Plea in a Criminal Proceeding Bar Recovery in a Legal Malpractice Action?

Clients engaged in criminal conduct may blame that conduct on bad legal advice from their lawyer. Under Pennsylvania law, however, there are defenses available to the lawyer that can preclude the successful assertion of a malpractice claim by a client who blames the lawyer for the client's criminal predicament. These defenses can include contributory negligence and *in pari delicti* (the client's own knowing wrongful conduct). Although not technically a defense, and also complicating matters for the client, case law holds that the client has the burden of showing that he or she was not guilty of a lesser included offense. But in a recent case a New Jersey appellate court recognized that a client who has pled guilty, which is tantamount to admitting criminal conduct, can assert a claim against his or her lawyer although that claim is inconsistent with the admitted facts supporting the guilty plea.

In *Winstock v. Galasso*, 64 A.3d 1012 (N.J. Sup. 2013), a husband and wife engaged a lawyer to procure the appropriate land-use approvals and otherwise to assist them in creating and opening a recreation club for adults. Although activities at the club included, among others, air hockey, billiards, bridge and chess, the activity that had potential criminal ramifications for the clients was poker for stakes. This club charged dues to its members and provided the poker tables, cards and chips but took no percentage of the winnings.

The client husband, who was a municipal police officer, understood that such an operation is legal so long as it complies with what the law enforcement community calls a "golden rule," i.e., "the house cannot make any money. They cannot take what's called a [d]ig and they cannot rake, [meaning] taking a cut of the gambling money for the house." The clients sought the lawyer's advice to verify the legality of such an operation under New Jersey law and, specifically, under N.J.S.A. 2C:37-1 *et seq.* At the

time there was no case law interpreting this statute with respect to this issue.

The lawyer opined that such a club would be legal. In his view, "[i]f members, at their option, wish to wager on the outcome, they are permitted to do so, provided there is no one, including the Club, acting as a bookmaker, which is in violation of the law." He analogized his clients' situation to pool halls and country clubs where gambling occurs but is considered legal.

When the client husband's chief of police learned of the gambling activities at the club, he allegedly requested that the client husband have the lawyer provide "a written memorandum confirming the legality of the club which could be presented to the prosecutor's office." The lawyer wrote such a memorandum in which he acknowledged the absence of any case law directly on point and that his opinion was "based solely up [sic] [his] review of applicable statutes and [his] anticipation as to the manner in which a New Jersey Court likely would decide the issue."

The client husband later allegedly spoke with another lawyer, not his own counsel, who represented another police officer who worked off-duty at the club. This lawyer was critical of the memorandum regarding "both the substance and scope of analysis." This second lawyer also stated in a letter to his own client that the memorandum "does not sufficiently address the legal issues involved in this business venture. Again, I also remain concerned with any involvement whatsoever of law enforcement officers in such an enterprise."

Undercover officers from the prosecutor's office began an investigation. They secretly recorded the client husband making "ostensibly incriminating statements about the dubious legal status of the club's operation." The investigation also revealed that the club's operation violated explicit restrictions imposed by the township's zoning hearing board.

The husband and wife clients "were indicted on multiple counts of perjury and illegal gambling, including maintaining a gambling resort." The prosecution did not agree with the proposition that the dues received by the clients did not constitute "financial gain" for purposes of "gambling" under the applicable statute. The client husband pled guilty, but the client wife was permitted to enter into a program somewhat similar to Pennsylvania's accelerated rehabilitative disposition (ARD). At his plea hearing client husband made several admissions on the record, including that he had operated the club specially for the purpose of having poker games and did so for "financial gain."

Thereafter the clients filed a malpractice claim against the lawyer, claiming he had given them "bad advice." The trial court granted the defendant lawyer's summary judgment motion on the basis that the clients were estopped from

Avoiding Liability



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taking a legal position in the malpractice action that was inconsistent with the legal position they took in the guilty plea. A unanimous three-judge panel of Superior Court, Appellate Division, reversed.

In a short discussion the appellate court reversed summary judgment against the client wife because the program she had entered did not require as a condition that she admit "her culpability to a particular corresponding criminal charge." She had therefore not made prior admission that estopped her from asserting a malpractice claim.

In granting summary judgment the trial court had relied upon *Alampi v. Russo*, 785 A.2d 65 (N.J. App.Div. 2001), wherein the doctrine of judicial estoppel or issue preclusion was invoked on public policy grounds to preclude a malpractice claim by a taxpayer against his accountant. The appellate court in *Winstock* distinguished *Alampi* on the basis that the client in *Alampi* had already engaged in criminal conduct when he engaged the accountant, whereas the lawyer in *Winstock* was engaged and gave advice before the clients had engaged in any criminal conduct. Although the admissions made in the guilty plea were admissible in the malpractice action, the appellate court in *Winstock* held that they did not preclude the client husband from presenting evidence to "rebut or otherwise explain the circumstances surrounding the admission."

The appellate court did not address any of the other defenses available under Pennsylvania law. However, what this case suggests is that a client's guilty plea arising out of activity that has been sanctioned by the client's lawyer may not necessarily shield the lawyer from liability.