

**SUPPLEMENTAL**

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC - 11800

Suffolk County

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Chris E. Maling & another,  
Plaintiffs/Appellants

v.

Finnegan, Henderson, Farabow, Garrett & Dunner, LLP.  
& others,  
Defendants/Appellees

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Appeal from a Judgment  
entered in the  
Suffolk Superior Court

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PLAINTIFF' S/APPELLANTS'

SUPPLEMENTAL BRIEF

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## STATEMENT OF THE ISSUES

This supplemental brief, the filing of which was allowed by the Court, will address the issue which the Court invited amicus curiae to address. This brief will therefore address "[w]hether, under Mass. R. Prof. C. 1.7, an actionable conflict of interest arose when, according to the allegations in the complaint, attorneys in different offices of the same law firm simultaneously represented the plaintiffs and a competitor in prosecuting patents on similar inventions, without informing the plaintiffs or obtaining their consent to the simultaneous representation."

## ARGUMENT

**The Breach of a Duty an Attorney Owes a Client Is Evidence of Negligence. The Breach of One or More Duties the Defendants Here Owed to Maling Pursuant to the Rules of Professional Conduct Is Evidence of Negligence Sufficient, at Least, to Survive a Motion to Dismiss the Complaint.**

The violation of a rule intended to protect against harm is evidence of negligence. *Guinan v. Famous Players-Lasky Corp.*, 267 Mass. 501, 516 (1929). The Rules of Professional Conduct, S.J.C. Rule 3.07

(the "Rules")<sup>1</sup> regulate the practice of law; they impose duties on attorneys in their relationships with clients. The defendants ("Finnegan" collectively) breached several of those duties and Maling was harmed by those breaches. Those breaches are evidence of negligence and Maling's Complaint therefore sufficiently alleged an actionable claim.

Assuming an attorney-client relationship, the existence of a duty is the first element of a legal malpractice claim, as it is with any negligence claim. *Alicea v. Commonwealth*, 466 Mass. 228, 234 n.9, (2013). That the Rules create duties that attorneys owe their clients is clear from the Rules and is well established. See, e.g. Comment to Rule 8.1 (Bar Admission and Disciplinary Matters) (applicable to bar applicants): "[1] The **duty** imposed by this Rule . . . ." and see "Preamble: A Lawyer's Responsibilities, Scope: [3] . . . there are some **duties**, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established." (Emphases added.) In fact, the violation of any of the Rules is

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References to the Rules refer to Rules designed to protect against harm.

misconduct and grounds for discipline. S.J.C. Rule 4.01(3)(1) (Bar Discipline).<sup>2</sup> One such duty is the duty to avoid representing clients with conflicting interests. Rule 1.7.

Notions of strict liability may not apply to legal malpractice claims, but the violation of the Rules is certainly evidence of negligence. *Fishman v. Brooks*, 396 Mass. 643, 649 (1986). Indeed, as properly promulgated regulations, the Rules have the same authority as statutes. *Global NAPs, Inc. v. Awiszus*, 457 Mass. 489, 496 (2010) ("a properly promulgated regulation has the force of law and must be given the same deference accorded to a statute."). If the violation of a rule (or a regulation or a statute) is evidence of negligence in any negligence claim (legal negligence claims as well), then the violation is actionable in the sense that no other act of negligence or violation of any other rule, regulation or statute is needed to support a claim. Restatement of the Law

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Section 3, Grounds for Discipline, provides:  
"(1) Each act or omission by a lawyer, individually or in concert with any other person or persons, which violates any of the Massachusetts Rules of Professional Conduct (see Rule 3:07), shall constitute misconduct and shall be grounds for appropriate discipline.

(Third) Law Governing Lawyers §52 (2000) is in accord.<sup>3</sup>

One Appeals Court case, cited in *Fishman v. Brooks*, 396 Mass. at 649, is *Robert L. Sullivan, D.D.S., P.C. v. Birmingham*, 11 Mass.App.Ct. 359, 368-369, (1981). *Sullivan* went a bit further. "While an attorney may be liable in damages to a person injured by his or her misconduct, that liability must be based on a recognized and independent cause of action and not on ethical violations." *Id.* at 368. No other Massachusetts case has followed *Sullivan* in requiring an independent cause of action in legal negligence

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Section 52 provides:

(1) For purposes of liability under §§ 48 and 49, a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.

(2) Proof of a violation of a rule or statute regulating the conduct of lawyers:

(a) does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty;

(b) does not preclude other proof concerning the duty of care in Subsection (1) or the fiduciary duty; and

(c) may be considered by a trier of fact as an aid in understanding and applying the standard of Subsection (1) or § 49 to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant's claim.

claims.<sup>4</sup>

Of course, the other elements of negligence must be shown. Absent damage proximately caused by the violation of a rule would not be actionable. In the context of this case, representing clients with conflicting interests might violate Rule 1.7 but there would be no claim if Maling had not been harmed by that dual representation. The Complaint however, alleges substantial harm. Complaint ¶¶ 27 to 31.

Section 6 of the Preamble to the Rules, Scope, quotes *Fishman v. Brooks* in explaining that the violation of a Rule is evidence of negligence.<sup>5</sup> But

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*Sullivan* made this point without explanation or Massachusetts authority. Two cases were referenced: *Slotnick v. Pike*, 374 Mass. 822 (1977) and *Rey v. Brown*, 4 Mass. App. Ct. 860 (1976). Both cases, however, held only that a client could not prosecute or be a party in a disciplinary proceeding.

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Section 6 provides: "'A violation of a canon of ethics or a disciplinary rule . . . is not itself an actionable breach of duty to a client.'" *Fishman v. Brooks*, 396 Mass. 643, 649 (1986). The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. The fact that a Rule is just a basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not necessarily mean that an antagonist in a collateral proceeding or transaction may rely on a violation of a Rule. 'As with statutes and regulations, however, if a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his



without more, the violation is not actionable. The more that is required must be that the Rule be meant for the protection of a person in the plaintiff's position.

Rule 1.7 protects against a client receiving impaired legal services because the attorney represents another client. See, e.g. Comment 4 to Rule 1.7.<sup>6</sup> Maling alleged as much in his Complaint. In paragraph 30, for example, the Complaint alleges "Had Defendants disclosed its conflict of interest and/or its work on competitor Masunaga patent, and ongoing long-term representation of Masunaga, Plaintiff would not have paid millions of dollars to develop products based on

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position, a violation of that rule may be some evidence of the attorney's negligence.'" *Id.* at 649."

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Comment 4 states: "Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved."

the Inventions and patent that Finnegan was prosecuting on their behalf."

In the end, there is little difference between the Rules and wrongdoing as is commonly understood. They are *malum per se*, as compared to a rule that is *malum prohibitum*, such as Rule 3:02(2) (prohibiting certain employees of the judicial system from practicing law).

The Preamble to the rules recognize that a lawyer's duties are essentially the same as every person's duties. See e.g. section 7: "A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious." See also section 1 of the Scope in the Preamble: "The Rules of Professional Conduct are rules of reason."

There can be little surprise, therefore, that many Rules have a very direct relationship with a rule of civil law that is actionable. The first Rule<sup>7</sup> is an obvious example. It requires lawyers to represent clients competently. The violation of this Rule is

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"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 1.1.

negligence, exactly as it is in non legal contexts.

Even if Rule 1.7 did not exist, a client would nevertheless have a negligence claim against his attorney for harm caused by a conflict of interest. "Negligence" is simply a question of what a reasonably prudent person would do in the circumstances. *Gilhooley v. Star Mkt. Co.*, 400 Mass. 205, 207 (1982); see also *Superior Court Jury Instruction 2.1.4*. The trend or custom that others follow in a profession is evidence of a duty. *Carthell v. Great Atlantic & Pacific Tea Company*, 291 Mass. 242, 243-244 (1935). It might be a leap of faith, but there can be some confidence in believing that most attorneys would not sacrifice the interests of one client to advance the interests of another, even if there were no Rule on point. Assuming as much, the conduct is below what a reasonably prudent person would do and therefore negligent. See *Morgan v. Lalumiere*, 22 Mass. App. Ct. 262, 267 (1986). A conflict of interests is therefore actionable, whether the claim is framed as one for simple negligence, or for the violation of Rule 1.7.

#### CONCLUSION

Negligence claims, including legal malpractice

claims, are based on the breach of a duty. The Rules obviously embody duties attorneys owe clients. The breach of those Rules is evidence of negligence, as is true for all negligence claims. The Complaint having alleged breach of duty and harm caused by the breach, it should not have been dismissed and the dismissal should be vacated and the case remanded for further proceedings.

Respectfully Submitted,  
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Dated: March 19, 2015

#### CERTIFICATE OF COMPLIANCE

The Plaintiff/Appellant, pursuant to Mass. R. A. P. 16(k), hereby certifies that the forgoing Brief complies with: Mass. R. A. P. 16(a)(6); Mass. R. A. P. 16(e); Mass. R. A. P. 16(f); Mass. R. A. P. 16(h); Mass. R. A. P. 18; and Mass. R. A. P. 20. The Plaintiff/Appellant's original Brief complied with Mass. R. A. P. 16(a)(6) and 18.



Hans. R. Hailey