

OPINION

Successor litigation counsel beware

By Debra Squires-Lee



Imagine this scenario: A potential client approaches you. His company has lost a jury verdict in a complicated fraud case. Since judgment has not entered, time has not yet

expired to file post-judgment motions or to appeal. Decisions need to be made, the trial analyzed and issues researched. Quickly.

Now imagine that the client has lost faith in his trial counsel. He thinks the lawyer made serious errors of judgment, and he may have a legal-malpractice claim. You and he hit it off, and the client engages you to handle post-trial motions as well as the appeal. He also confirms his intent to file a malpractice action against trial counsel.

Sounds fabulous, right? Maybe. As you proceed, you must keep one crucial consideration in mind: Your communications with and advice to your client about post-trial issues and the appeal, even settlement discussions, may be discoverable and admissible in that malpractice action to the extent they are “at issue.”

In other words, successor trial counsel in Massachusetts must beware. But in order to

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‘Zabin’

In *Zabin v. Picciotto*, 73 Mass. App. Ct. 141, 157-58 (2008), the plaintiff (discharged counsel in the underlying matter) sought attorneys’ fees once his former client settled the underlying matter. The defendant (the plaintiff in the underlying matter) claimed that only successor counsel contributed to the settlement.

In considering the propriety of the trial court’s finding of waiver of the privilege as to successor counsel, the court stated that in cases “in which a client sues a former attorney for malpractice, the attorney-client privilege is waived as to all communications with all attorneys involved in the underlying litigation in

which the malpractice allegedly occurred.”

Many have read *Zabin* as creating a new rule regarding the waiver of the attorney-client privilege. However, *Zabin* did not involve a malpractice action. Rather, because the defendant argued that the advantageous settlement was the result of the efforts of successor counsel, the Appeals Court found that (i) the work successor counsel performed was “at issue,” (ii) the only source to testify regarding that work was the lawyer; and (iii) successor counsel could be deposed.

Zabin can thus be read as a straightforward application of the “at issue” waiver rule announced in *Darius v. City of Boston*, 433 Mass. 274 (2001).

In two cases decided this spring, the Appeals Court clarified that the scope and breadth of the *Zabin* ruling depends not on an analysis of the parameters of the underlying litigation, but on the issues and claims the plaintiff injects, or puts “at issue,” in the legal-malpractice action.

In *Dipietro v. Erickson*, 2010 WL 2035590 (Mass. App. Ct., April 26, 2010) the plaintiff alleged that his divorce lawyer negligently advised him to enter an unfavorable separation agreement. Five years later, successor counsel unsuccessfully petitioned to amend the separation agreement. Successor counsel thereafter filed a legal-malpractice claim against the divorce lawyer.

Relying on *Zabin*, the divorce lawyer

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sought to depose successor counsel and obtain privileged communications concerning attempts to modify the separation agreement. The divorce lawyer argued that by suing him for malpractice, the plaintiff “put [successor counsel’s] legal representation directly at issue.”

The Superior Court, applying *Zabin*, agreed. A single justice of the Appeals Court, applying *Darius*, disagreed.

Confirming that the heart of the “at issue” waiver doctrine begins not with *Zabin* but with *Darius*, the single justice asked not whether successor counsel’s attempts to modify the separation agreement were or were not part of the “underlying litigation,” but whether “successor counsel’s communications with the husband” were “at issue” in the malpractice case.

The judge stated, “What is called for is a fact-specific examination of the questions that underlie *Zabin*: to what extent has the current litigation put “at issue” the client’s communications with his successor counsel?”

Relying on the fact that successor counsel sought post-judgment relief “many years” after the underlying divorce, the judge

found no waiver, while making clear that “it may be possible for former counsel to develop a stronger case for waiver as the litigation develops.”

‘Global Investors’

Nearly a month to the day after the *Dipietro* decision, a full panel of the Appeals Court decided *Global Investors Agent Corp. v. Fire Insurance Co. of Hartford*, 76 Mass. App. Ct. 812 (2010), and affirmed a finding of waiver of the attorney-client privilege.

Global Investors confirmed that the “at issue” waiver doctrine applies when “the advice of counsel, at the time a party took certain action, is directly or indirectly implicated in the party’s claim or defense.”

The *Global Investors* plaintiff claimed the insurer breached its duty to defend, and the plaintiff was “forced to settle the underlying litigation on disadvantageous terms, even though the claims in the underlying litigation were without merit.”

The defendant insurer was granted the right to depose the plaintiff’s lawyer in the underlying litigation and inquire as to his “perceptions, recollection and analysis of the plaintiff’s defenses and strategies before,

during, and after the mediation of the [underlying] litigation.”

The Appeals Court affirmed. Relying on *Darius*, the court held that the plaintiff’s claims depend “on the relative merits and value of [its] case in the [underlying] litigation and the only source of that information was [its] attorney.”

Dipietro and *Global Investors* establish that a court faced with a claim of “at issue” waiver of the attorney-client privilege must consider the claims and defenses in the pending litigation to determine what communications with successor counsel are “at issue.”

Global Investors arguably makes clear, however, that the lawyer in the hypothetical described above — successor counsel who enters a litigation before final judgment — proceeds at his peril. Any malpractice claim against trial counsel will require an analysis of the strengths and merits of the underlying litigation and put “at issue” successor counsel’s choices and advice — for example, to file post-judgment motions or not, to appeal or not, to settle or not.

So my advice: successor litigation counsel beware. MLW