

## DiPietro v. Erickson: an Example of How You Can Unintentionally Waive the Attorney-Client Privilege




Gary Ronan  
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In a March 16, 2010 decision, Massachusetts Superior Court Justice Paul E. Troy ordered the lawyer for the plaintiff in a legal malpractice case against the plaintiff's former attorney to sit for deposition and to produce his client's documents that, but for a waiver found by the court, would have been protected from disclosure by the attorney-client privilege. The lawyer being sued in the malpractice case had represented the plaintiff in a divorce. As part of the resolution of the divorce case, a separation agreement was incorporated, but not merged, into a judgment of a divorce nisi (except for child-related issues, which were merged). This had the effect of precluding a later modification of the plaintiff's obligations to his wife due to changed circumstances – something the plaintiff claimed he discovered the hard way when he and his successor attorney sought to amend the divorce judgment and separation agreement by way of a complaint for modification and a motion for relief from judgment. The plaintiff's efforts in that regard were rejected, and the court ordered him to pay his ex-wife's attorneys' fees incurred in opposing them.

The plaintiff then sued his divorce attorney for malpractice, claiming that the divorce attorney failed to adequately explain to him the difference between merger and survival as they relate to the plaintiff's ability to modify his obligations to his wife created by the separation agreement and divorce judgment. During discovery in the malpractice case, the defendant lawyer served a subpoena duces tecum on the successor attorney who represented the plaintiff in connection with the complaint for modification, the motion for relief from judgment, and the malpractice case. The defendant lawyer sought to take the successor attorney's deposition and to have him produce documents concerning his representation of the common client. The plaintiff moved for a protective order, arguing that the deposition should not be allowed and that the documents should not be produced on the basis of the attorney-client privilege between himself and the successor attorney.

In his opinion, Justice Troy cited decisions from the Massachusetts Supreme Judicial Court, the First Circuit, and the District of Massachusetts standing for the proposition that a plaintiff who puts his communications with his attorney or the attorney's work product "at issue" in a case waives the attorney-client privilege applicable to his communications with that attorney. In particular, he relied on a decision by the Massachusetts Appeals Court, Zabin v. Picciotto, 73 Mass. App. Ct. 141, 896 N.E.2d 937 (2008), in which the Appeals Court held that when a client sues his former attorney for malpractice a waiver occurs "as to communications with all attorneys involved in the underlying litigation in which the malpractice allegedly occurred." Following Zabin, Justice Troy held that the plaintiff had waived his attorney-client privilege with his successor attorney because his complaint for modification and motion for relief from judgment were filed in the same divorce case in which the defendant lawyer had allegedly committed malpractice. Accordingly, Justice Troy ordered the successor attorney to sit for deposition and to produce the documents in his possession concerning the divorce case,



including those relating to the separation agreement, the divorce judgment, the complaint for modification, and the motion for relief from judgment. The case is DiPietro v. Erickson, Suffolk Superior Court Docket No. 09-00187, 2010 Mass. Super. LEXIS 50 (March 16, 2010).

The moral of the story: be aware that you and your company, by suing outside counsel for malpractice, might waive the attorney-client privilege not only as to communications with the lawyer whom you are suing, but also as to communications with your company's other attorneys who represent or represented it in connection with the matter in which the alleged malpractice occurred.

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