

An Update on DiPietro v. Erickson



Gary Ronan

June 2010

On April 26, 2010, a Single Justice of the Appeals Court vacated the Superior Court's order described in my April 9, 2010 posting. The Single Justice held that the Superior Court misapplied the "at issue" doctrine because it did not properly conduct a "fact-specific examination of [the extent to which] the current litigation put 'at issue' the client's communications with his successor counsel." Because the Single Justice found that proof of the malpractice alleged by the plaintiff depended on what transpired at the time his former lawyer represented him, and not on communications between the plaintiff and his current lawyer made years later, he held that the plaintiff had not put his communications with his current lawyer "at issue." As a result, the plaintiff had not waived his attorney-client privilege with respect to communications with his current lawyer, and the privilege shielded the lawyer from the discovery being sought. The Single Justice did, however, state that the defendant was not precluded from renewing his discovery requests if subsequent developments provide a compelling case that communications between the plaintiff and his current lawyer have been placed "at issue."

This G&S article should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.

Pursuant to IRS Circular 230, please be advised that, this communication is not intended to be, was not written to be and cannot be used by any taxpayer for the purpose of (i) avoiding penalties under U.S. federal tax law or (ii) promoting, marketing or recommending to another taxpayer any transaction or matter addressed herein.