

## **LEX LOCI: Recent New Hampshire Supreme Court Decisions**

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The issue of whether or not an attorney should be disqualified from representing a client because he is likely to be a witness at the trial was before the Supreme Court in *McElroy v. Gaffney*, decided June 3, 1987. This case was the first time since the 1986 adoption of the Rules of Professional Conduct that the Court has had the opportunity to rule on this issue. In a unanimous opinion by Justice Johnson, the Court took a restrictive view of the disqualification rule and upheld the trial court's ruling that the attorney be permitted to continue as counsel notwithstanding the fact that he probably would be called to testify at the trial. The rule governing this situation is Rule 3.7 of the Rules of Professional Conduct that establishes the general rule that a lawyer shall not act as an advocate at any trial in which the lawyer is likely to be a witness, but then establishes three exceptions:

- (1) where his testimony relates to an uncontested issue;
- (2) where the lawyer's testimony relates to the nature and value of legal services rendered in the case or;
- (3) disqualification of the lawyer would work an *unreasonable* hardship on the client.

It was this third exemption from the rule that the Court focused upon, the Court pointing out that New Hampshire Rule 3.7 as adopted by the Supreme Court differed from the ABA Model Rule because when the Rule was adopted in New Hampshire the word "substantial" was changed to "unreasonable" in "order to limit the scope of the required disqualification and ease the burden on the party charged with proving hardship." Based on this reasoning, the Supreme Court found that the attorney here involved had represented his client for many years and had an intimate knowledge of the matters involved which had had prior extensive litigation. The attorney's knowledge of his client's complex business was extensive, rendering him "particularly and uniquely qualified to represent the plaintiff, so that his departure would work an unreasonable hardship upon his client." The Court specifically noted that it did not want to create an exception that would "swallow the rule," but it expressed its concern that disqualification motions are a common trial tactic used purely for strategic purposes.

Are New Hampshire lawyers subject to regulations of the Consumer Protection Act, RSA 358-A? In an earlier decision, *Rousseau v. Eshleman*, 128 N.H. 564, the Court had ruled, 3 to 2, that lawyers were exempt, *per se*, from the Act. After the decision in that case, the Attorney General moved the Court to reconsider its opinion and the Supreme Court in this present decision denied that motion. *Rousseau v. Eshleman*, decided May 28, 1987. However, it is unclear as to what the Court's ultimate and future position on this issue will be. As the Court itself pointed out, there are only two justices still on the Court who were in the majority in the earlier decision, Chief Justice Brock and Justice Souter. In the earlier opinion, these Justices had held that attorneys were *per se* exempt from the Consumer Protection Act. Two judges of the earlier court, Justices Johnson

and Batchelder, dissented from the earlier opinion, reasoning that attorneys should not be *per se* exempt from the Act, but should be subject to the Act's proscriptions when engaging in commercial activities. In the present *per curiam* opinion, although Justices Johnson and Batchelder did not dissent, Justice Thayer did dissent and joined in the reasoning of the earlier dissent. Thus, counting strictly by number of justices, there appear to be three judges who would find attorneys subject to the Consumer Protection Act as to the commercial activities. However, in the context of the present case, the Supreme Court stood by its earlier decision. Unless the principle of *stare decisis* prevails, it would appear likely that in the future the Court will reverse itself.

In any event, whatever the *Eshleman Case* ultimately means, it is clear that even under the reasoning of the dissent, which would subject attorneys to regulation in their commercial activities, most activities of attorneys will not be affected by the Act. Justice Thayer's careful dissenting opinion addresses the issue in the context of a factual situation where it was claimed that the attorney gave the complainant investment advice and performed investment services in connection with the complainant's desire to make real estate investments. Under Justice Thayer's reasoning, these activities require the defendant attorney's professional judgment as an attorney, based upon his legal knowledge and skill and therefore would not come under the regulation of the Consumer Protection Act. In order to bring the attorney's conduct under the regulation of the Act, if it is held to apply to an attorney's "commercial" activities, there must be alleged

[a] violation of the consumer protection act involving unfair or deceptive practices relative to the "commercial" aspects of the practice of law, specifically. . . the way in which the price of legal services was determined or billed, or the way in which the defendant obtained the plaintiff as a client. . . . The plaintiff has not alleged that he reasonably relied on the defendant's fraudulent or, deceptive advertising, which caused him to engage the defendant's services. Moreover, he has failed to base his claim on the deceptive nature of the fee arrangement, and openly conceded during oral argument that the "fee issue is more motivation[a], and to show the intent of the perpetrator as opposed to a specific violation."

Is there a "Fireman's Rule" in New Hampshire and, if so, what is it? The answer to this question (which the author had never before encountered), is found in *England v. Tasker*, decided July 10, 1987. Although the question of the availability of the rule is of first impression in New Hampshire ("novel" is how Justice Johnson described it in his opinion for a unanimous Court), the rule has been almost universally recognized elsewhere. Furthermore, although designated the fireman's rule, most jurisdictions recognizing the rule have extended it to policemen. The rule precludes "a police officer or a fireman, both of whom are paid to confront crises and allay dangers created by an uncircumspect citizenry, from complaining of negligence in the creation of the very occasion for their engagement." The Court adopted the rule and applied it to both policemen and firemen in New Hampshire, holding specifically in this decision that a police chief who was injured when assisting an injured passenger at an automobile

accident scene was precluded from suing the defendant who negligently caused the accident in the first place.

There are several other interesting and important cases that should be noted. *Hess v. Turner* decided July 10, 1987 makes clear that the police need not warn a driver of all of the consequences of his failure to take a breathalyzer test. Specifically, the Court held that the police need not warn a driver in such a situation that revocation of the driver's license for failure to take the test is only one penalty, in addition to which other penalties may be imposed under the law. In *State v. Cote* decided June 3, 1987, the Supreme Court ruled for the first time that a trial judge, when sentencing a defendant, could not take into account when imposing sentence the fact that the defendant had been charged, but acquitted, of certain other offenses similar to the ones for which the defendant was being sentenced. In *State v. Day*, decided June 3, 1987, the Supreme Court held that an indictment charging the defendant with aggravated felonious sexual assault need not specify the name of the victim. The Court held that it was sufficient to charge with specificity the crime alleged, leaving the name of the victim unstated, the Court pointing out that the "protection of the victim from unnecessary disclosure of her identity, particularly in view of her age, is an appropriate policy concern of the State and omission of her name from the indictment was one, although perhaps not the best, way to protect her." In *Ross v. Eichman*, decided July 10, 1987, a trial court had before it that nefarious litigation producer: the purchase and sale agreement containing a financing contingency clause. In this case, the Court held that where the financing condition was for the protection of the buyer and where the buyer chose instead to pay cash, there was not a breach of the condition and the buyer could compel specific performance of the property from the seller who had refused to accept the tendered cash payment. In *State v. Thibeault*, decided July 10, 1987, the Court held that a town may enact an earth excavation ordinance without compliance with the zoning law, the Court holding that such ordinances were sufficiently grounded in the police powers of the town. In *Jaswell Drill Corporation v. General Motors Corp.*, decided May 28, 1987, the Supreme Court had before it one of the first issues arising out of the so-called "tort reform" legislative package enacted in 1986. The Court held that the application of the statute superseding the common law rule precluding contribution among tortfeasors applied only to underlying causes of action arising after the effective date of the act, and not, as the defendant claimed, to causes of action for the claim for contribution itself arising after the effective date of the statute.

In *Aubert v. Aubert*, decided June 5, 1987, a unanimous Supreme Court held that husbands and wives were liable to each other for their torts and that an action by one former spouse against the other for negligence is not affected by the fact that the parties were divorced after the action complained of but prior to the bringing of the subsequent action for personal injury.

Finally, very important issues involving the interpretation of multiple risk insurance policies were before the Court in *Ellis v. Royal Insurance Co.*, decided May 28, 1987. The Court in this case first had before it a conflict of law issue: whether the law of the state where the policy was issued and delivered controlled or the law of New

Hampshire, the place of the accident, where the policy in question covered a multitude of risks located in various states and was issued outside New Hampshire to a foreign corporation. The Court extended its prior reasoning in similar cases to hold unenforceable a limitation on the amount of uninsured motorist coverage which was contrary to the provision of the New Hampshire law which requires uninsurable motorist coverage equal to the base coverage, ruling that the law of New Hampshire controlled. The opinion next confronted some very tricky issues relating to which of two policies provided excess of primary coverage that are important if you ever have that kind of a case before you but which are generally incomprehensible otherwise. However, the Court went on to establish a rule for the allocation, between primary and excess insurance coverage, of the credit due the insurers for the amount received from the insured defendant. The Court held that a "sliding-scale approach" should be adopted in the case and in all future cases, by which through the use of a mathematical formula, the credit is apportioned between the insurers on the basis of how much money each of them contributes in fact to a settlement or court award.