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February 5, 2001

Civil Clerk's Office
United States District Court
for the District of Massachusetts
1 Courthouse Way, Room 2300
Boston, MA 02210

Re: *Michael Elbery v. Robert Sheketoff, et al.*
United States District Court for the District of Massachusetts
Civil Action No. 98-10163-MLW

Michael Elbery v. Daniel Sklut, et al.
United States District Court for the District of Massachusetts
Civil Action No. 97-11743-MLW

Dear Sir/Madam:

Enclosed herewith for filing in the above-entitled matter, please find Memorandum of the Sheketoff Defendants in Opposition to the Plaintiff's Motion for Summary Judgment and in Further Support of Their Motion for Summary Judgment.

Thank you for your attention to this matter.

Very truly yours,

John G. O'Neill

JGO/hbe

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL ELBERY, Plaintiff	)	
v.	)	CIVIL ACTION NO. 98-CV-10163-MLW
ROBERT SHEKETOFF, KIMBERLY HOMAN and SHEKETOFF & HOMAN, Defendants	)	

MEMORANDUM OF THE SHEKETOFF DEFENDANTS IN OPPOSITION TO THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

ARGUMENT

A. SUMMARY JUDGMENT CANNOT BE GRANTED IN FAVOR OF THE PLAINTIFF ON THE LIABILITY PORTION OF HIS LEGAL MALPRACTICE AND BREACH OF CONTRACT CLAIMS BECAUSE HE HAS NOT OFFERED EXPERT TESTIMONY AND HE CANNOT ESTABLISH LIABILITY AS A MATTER OF LAW.

In order to prevail on his legal malpractice and breach of contract claims, Elbery must produce competent, admissible evidence to establish the standard of care applicable to Attorney Sheketoff while he was representing Elbery and any breach of that standard by Attorney Sheketoff. Because the subject matter of these elements is beyond the common knowledge of an average juror, Elbery must produce expert testimony to do so for both of his claims.

Elbery's motion for summary judgment and his opposition to the Defendants' motion for summary judgment are unsupported by expert testimony. Accordingly, Elbery's motion for summary judgment must be denied. Moreover, the absence of expert testimony demonstrates that he has no reasonable expectation of proving the essential elements of his claims at trial.

Therefore, the Court should enter summary judgment in favor of the defendants on Elbery's legal malpractice and breach of contract claims.

1. A Layperson Could Not Properly Evaluate Attorney Sheketoff's Decision Not To File The Motion To Dismiss Based Upon Common Experience; Therefore, Elbery Must Produce Expert Testimony In Support Of His Legal Malpractice Claim.

Massachusetts law is well-settled that a legal malpractice plaintiff must ordinarily offer expert testimony to establish the standard of care under the circumstances and the defendant attorney's alleged breach thereof. Colucci v. Rosen, Goldberg, Slavet, Levinson & Wekstein P.C., 25 Mass. App. Ct. 107, 111 (1987); DiPiero v. Goodman, 14 Mass. App. Ct. 929, 929-30 (1982). The reason for this is simple: the average juror has no basis for judging the attorney's actions without the assistance of an expert to explain the attorney's obligation to his client under the circumstances and whether the defendant attorney met that obligation. Colucci, 25 Mass. App. Ct. at 112 (expert testimony necessary for legal malpractice claim because average juror could not determine, based upon common knowledge, whether attorney had been negligent in taking three days to prepare petition for restraining order and seeking order from single judge instead of three-judge panel).

The crucial requirement of expert testimony derives from the fact that the attorney's conduct, although perfectly reasonable and appropriate under the circumstances, may appear improper to a layperson who has little understanding of our legal system. See Colucci, 25 Mass. App. Ct. at 111 ("But it must not be understood that an attorney is liable for every mistake that may occur in practice, and held responsible for the damages that may result. If the attorney acts

with proper degree of attention, with reasonable care, and to the best of his skill and knowledge, he will not be held responsible. Some allowance must be always be made for the imperfection of human judgment.") (citations omitted). Accordingly, Massachusetts law requires that the plaintiff in a legal malpractice case present competent, admissible testimony from an attorney expert who has a sound basis for stating, based upon his or her experience and training, what the applicable standard of care was under the circumstances, and whether the defendant attorney conducted himself in accordance with that standard. Colucci, 25 Mass. App. Ct. at 112; Brown v. Gerstein, 17 Mass. App. Ct. 558 (1984).

Only in quite unusual circumstances, not present in this case, has a plaintiff been permitted to maintain a legal malpractice claim without expert testimony. The requirement is forgiven only where the conduct by the attorney constitutes such a gross deviation from acceptable practice that a layperson could, based upon ordinary experience, make an informed decision as to whether the attorney had been negligent. In the litigation context, these cases generally involve a complete failure to act by the defendant attorney, not a deliberately chosen strategy of the type taken by Attorney Sheketoff.

Thus, in Wagenmann v. Adams, 829 F.2d 196 (1st Cir. 1987), the court upheld a legal malpractice verdict obtained without expert testimony where the defendant attorney, who had been advised by a psychiatrist that his client was sane, not only failed to prevent the client's commitment to a mental hospital, but "seem[ed] to have done almost nothing to protect his client – either before or after the commitment." Id. at 219 (emphasis added). In particular, the attorney failed to familiarize himself with the facts of the case, failed to interview his own client, failed to

interview any of the prosecution witnesses, failed to file any pleadings on behalf of his client, and made no attempt to obtain a reduction in bail. In light of the attorney's failure to take any steps on behalf of his client, the court held that an ordinary juror could properly determine that the attorney had been negligent without expert testimony. Id.; see also Glidden v. Terranova, 12 Mass. App. Ct. 597 (1981) (since defendant attorney's failure to take any action whatsoever to protect the rights of his clients in civil suit was so grossly unacceptable, the court held that an ordinary person could adequately determine whether he had been negligent, dispensing with the need for expert testimony).

In this case, Attorney Sheketoff diligently defended Elbery's interests during the course of his representation of Elbery. For example, Attorney Sheketoff appeared at the hearing on the Commonwealth's motion to revoke the stay of execution on Elbery's sentence for the intent to maim conviction (Undisputed Facts ¶ 24-25); he argued that the motion to vacate the stay should be denied or that the Court should instead impose high bail, which would have allowed Elbery to maintain his freedom pending the appeal of that conviction (Undisputed Facts ¶ 26); in connection with the firearms charges, he filed and argued a motion to suppress on the grounds that the search of storage unit violated Elbery's Constitutional rights (Undisputed Facts ¶ 30-32); he requested and received discovery from the Commonwealth, and prepared to try the case (though Elbery discharged him prior to trial) (Undisputed Facts ¶ 29, 65). Given these efforts, it cannot be remotely suggested that Attorney Sheketoff so completely neglected Elbery's case that an ordinary person could make an informed judgement as to whether he was negligent in defending Elbery.

To the contrary, Elbery's negligence claim involves the difficult decision whether to file a motion to dismiss the firearms charges under G.L. c. 269, § 10(a) and 10 (h). The complex legal and practical concerns involved in that decision are far beyond the common experience of an average juror.

Attorney Sheketoff was confronted with a number of different strategic problems. One of the statutes at issue, G.L. c. 269, § 10(a), had recently been amended and there were very few cases interpreting the new statute. (Undisputed Facts ¶ 38-39). Under the plain language of the amended statute, the Commonwealth had only to prove that Elbery had a firearm in his possession away from his residence or business, or a firearm under his control in an automobile away from his residence of business. (Undisputed Facts ¶ 43). Possession in Massachusetts includes constructive possession. (Undisputed Facts ¶ 43). Attorney Sheketoff assessed the Commonwealth's apparent argument that Elbery was in possession or control of a handgun in an automobile at the storage facility, which was not his residence or business, and he reasonably concluded that the Commonwealth had a real argument that Elbery was in violation of the statute. (Undisputed Facts ¶ 44).

Attorney Sheketoff was concerned that, from a practical standpoint, a formal motion to dismiss the firearms charges would have highlighted the legal issues in the case for the Assistant District Attorney handling the case in the District Court, and that he might seek advice from a more experienced Assistant District Attorney in the Superior Court. (Undisputed Facts ¶ 49-50). The Commonwealth would then be better prepared for trial. Moreover, Attorney Sheketoff was concerned that the Assistant District Attorney might receive a suggestion to refer Elbery for

federal prosecution as a convicted felon in possession of firearms in violation of 18 U.S.C., § 922. (Undisputed Facts ¶ 46). In addition, Attorney Sheketoff knew that even if the motion to dismiss were successful, there was no guarantee that Judge Toomey would have reinstated the stay. (Undisputed Facts ¶ 45). Attorney Sheketoff reasonably concluded, based upon these considerations, that a formal motion to dismiss was not in Elbery's best interest and that he should instead try to obtain a dismissal at trial. (Undisputed Facts ¶ 51). Having made a careful evaluation of the legal situation, Attorney Sheketoff advised Elbery that he would not file the motion to dismiss. (Undisputed Facts ¶ 53).

Elbery misses the point when he asserts -- in conclusory fashion and with no expert support -- that the law was "settled," and that the motion would have succeeded. The application of the law to Elbery's case was not clear and, as discussed above, Attorney Sheketoff's decision not to file the motion to dismiss was based upon several strategic and practical considerations which were unrelated to the likelihood of success on the motion. Elbery cannot prevail by simply asserting that Attorney Sheketoff was wrong; he must prove by competent evidence that, under the unique circumstances of his case, Attorney Sheketoff's conduct was unreasonable and constituted a breach of his professional duties. Without the benefit of expert testimony, an average juror would have no means for making this determination. Elbery's failure to produce expert testimony to demonstrate that Attorney Sheketoff breached a standard of care is fatal to his legal malpractice claim, and the Court should enter summary judgment in favor of the defendants. Colucci, 25 Mass. App. Ct. at 112; Brown, 17 Mass. App. Ct. at 558.

Even if the Court determines, contrary to Massachusetts law and the facts of this case, that Elbery is entitled to maintain his claim without any expert testimony as to Attorney Sheketoff's alleged breach of duty, he is still not entitled to summary judgment in his favor on this element of his claim. This is because Attorney Sheketoff has produced evidence, in the form of expert opinion, that he did not breach an applicable standard of care under the circumstances. At a minimum, therefore, there is a factual dispute as to whether Attorney Sheketoff breached a standard of care which must be submitted to the jury and which precludes summary judgment in Elbery's favor. Glidden, 12 Mass. App. Ct. at 598.

2. Elbery's "Instructions" Relative To The Motion To Dismiss Do Not Establish A Duty Of Care Or Breach Thereof For Elbery's Legal Malpractice Claim Because Attorney Sheketoff Never Agreed To Them.

Elbery's request that Attorney Sheketoff prepare and file a motion to dismiss the charges under G.L. c. 269, §§ 10(h) and 10(a) does not establish the standard of care applicable to Attorney Sheketoff's actions. Only where a client specifies a task to be performed by the attorney and the attorney agrees to such undertaking, may the attorney be held liable for failing to perform the task:

> The client may instruct the attorney perform certain tasks or to act in a specified manner, the undertaking becomes contractual in nature, and the failure to perform can result in virtual strict liability for any resulting injury. The basic rule is that an attorney specifically instructed by the client should follow those instructions with reasonable care and promptness or be liable for damages proximately caused by the failure. Because the theory is in contract, the attorney's assent is required.

* * *

> If the wisdom of the instruction is questionable, the attorney should so counsel the client. An attorney, of course, may decline the instructions and, if necessary, end the representation.

1 Ronald E. Mallen and Jeffrey M. Smith, Legal Malpractice, § 8.9, p. 822-23 (5th ed. 2000) (emphasis added).

There are no recent Massachusetts cases that have considered the duty of an attorney to follow a client's instructions. Older Massachusetts decisions, consistent with the principles set forth above, have imposed liability only where an attorney agrees to a client's instructions, or leads his client to believe that he has agreed to the instructions, and subsequently fails to perform them. Thus, in Gilbert v. Williams, 8 Mass. 51 (1811) the court held that evidence of the attorney's breach of a standard of care was unnecessary because the attorney was liable for failing to adhere to the client's instruction to secure a debt by attaching the debtor's property. The client had included the instruction in a letter asking the attorney to represent him. The court found that by accepting the engagement to collect on the note, the attorney accepted the instructions to attach the debtor's property. Since he had failed to obtain the attachment, and failed to inform his client that he had accepted the debtor's promise to pay in lieu of the attachment, he was liable for all damages that resulted to his client. See also Whitney v. Abbott, 191 Mass. 59 (1906) (where client specifically instructed the attorney to do nothing to lose the seller's title to engine and the attorney accepted the engagement, attorney was liable for causing loss of seller's title to engine).

The cases cited by Elbery from other jurisdictions, like Whitney and Gilbert, hold that it is where an attorney agrees to a client's instructions that he may be held liable for his failure

to follow them. See McInnis v. Hyatt Legal Clinics, 461 N.E.2d 1295 (Ohio 1984) (attorney who promised in writing that client's divorce action would not appear in local newspaper was liable for causing notice of the suit to be published); Olfe v. Gordon, 286 N.W.2d 573 (Wis. 1980) (attorney who agreed to represent a seller after she advised him that she wanted a first mortgage on property was liable for failing to procure first mortgage); Gustavson v. O'Brien, 274 N.W.2d 627 (Wis. 1979) (attorney retained in connection with purchase of restaurant, who had been instructed as part of transaction to transfer title in the business to corporation, was liable for failure to effect transfer); McWhorter, Ltd. v. Irvin, 267 S.E.2d 630 (Ga. 1980) (attorney who had handled over 130 prior closings for client and was aware of client's "standing instruction" to avoid language indicating that purchaser was assuming outstanding loans was liable for preparing deed under which purchaser assumed outstanding loans).

Neither the Massachusetts cases nor the cases from other jurisdictions hold that an attorney must blindly accept every instruction given by the client. Indeed, such a rule would effectively preclude the attorney from exercising his independent judgment and render him liable for an honest disagreement with his client. Thus, the attorney may refuse a client's instructions where he determines they are inadvisable and, in such cases, the instructions do not dictate the appropriate standard of care. Mallen and Smith, Legal Malpractice, § 8.9 (because client's instructions make the undertaking contractual in nature, the attorney's assent required; attorney may decline client's instructions); cf. Com. v. Judd, 25 Mass. App. Ct. 921, 924 (1987) (criminal defendant was not denied effective assistance of counsel where attorney had substituted

his own motion to dismiss based upon violation of due process for client's pro se motion to dismiss for lack of speedy trial; attorney was not bound to follow every tactic urged by client).

In this case, it is undisputed that Attorney Sheketoff never agreed to Elbery's request that he file a motion to dismiss the firearms charges. (Undisputed Facts ¶ 20, 53). Instead, Attorney Sheketoff advised Elbery that he did not think the motion to dismiss would be in his best interest, and made it clear that he would not file such a motion.[1] (Undisputed Facts ¶ 53). Attorney Sheketoff also informed Elbery that if he disagreed, he could seek new counsel. (Undisputed Facts ¶ 53). Accordingly, Attorney Sheketoff never assented to Elbery's "instruction" to file the motion to dismiss, and he is not liable for allegedly failing to follow that instruction.

For these reasons, the Court should deny Elbery's motion for summary judgment to the extent that he alleges that Attorney Sheketoff is liable, as a matter of law, for failing to follow his "instructions." Because Elbery's "instructions" do not establish the standard of care, he must instead produce competent, admissible evidence to establish the standard of care under the circumstances and that Sheketoff's conduct breached that standard. Colucci, 25 Mass. App. Ct. at 111; DiPiero, 14 Mass. App. Ct. at 929. In order to do so, Elbery must produce expert testimony from an attorney qualified to render an opinion relative to Attorney Sheketoff's conduct. Focus Investment Assoc., Inc. v. American Title Ins. Co., 992 F.2d 1231, 1239 (1st Cir.

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[1] It should be remembered that Elbery merely retained Attorney Sheketoff to defend him in connection with the charges under G. L. c. 269, §§ 10(a) and 10(h). (Undisputed Facts ¶ 20). Attorney Sheketoff was not retained for the specific purpose of filing a motion to dismiss the firearms charges.

1993). Elbery has failed to produce the necessary expert testimony in support of his claims and, therefore, the Court should enter summary judgment in favor of the Defendants.

3. Because Attorney Sheketoff Did Not Warrant a Particular Result Elbery's Breach Of Contract Claim Is Governed By Tort Standards Whish Also Require Expert Testimony.

Under Massachusetts law, unless a professional warrants a particular result, he is generally only required to exercise the skill and care of a similarly situated professional:

> Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminable nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. . . . Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

Klein v. Catalano, 386 Mass. 701, 719-20 (1982) (citing Mounds View v. Walijarvi, 263 N.W.2d 420, 424 (Minn.1978)); Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc., 396 Mass. 818, 823 (1986) (differentiating between claims involving a professional's breach of promise to obtain a specific result, which are contractual in nature, and claims arising out of professional's breach of implied promise to exercise reasonable care, which are tortious in nature).

Accordingly, where an attorney has not warranted a particular result, a claim against the attorney for breach of contract is governed by tort standards. See Harris v. Magri, 39 Mass. App. Ct. 349, 352-353 (1995) (breach of contract claim against attorney did nothing more than implicate attorney's implied duty to exercise reasonable degree of care and skill in performance

of legal duties, and required evidence of attorney's failure to meet the standard of care under the circumstances); Brownell v. Garber, 503 N.W.2d 81, 83 (Mich. App. 1993) (in the absence of a "special contract" to achieve specific result, action against attorney for breach of contract was governed by ordinary tort standards); see also Resolution Trust Corp. v. Farmer, 823 F. Supp. 302, 308 (E.D. Pa. 1993).

In this case, Elbery retained Sheketoff to represent him in connection with the firearms charges. (Undisputed Facts ¶ 20). The terms of the agreement were simple: Elbery paid Sheketoff $5,000 and Sheketoff agreed to represent Elbery in connection with the charges. (Undisputed Facts ¶ 20). Attorney Sheketoff was not retained for the specific purpose of filing a motion to dismiss the firearms charges, nor did he agree to do so during the course of his representation of Elbery. (Undisputed Facts ¶ 20, 53). In short, since Attorney Sheketoff never warranted a specific result to Elbery in connection with the representation, his only "contractual" obligation is to be measured by the duty to exercise the reasonable care and skill of an ordinary attorney in representing Elbery. Harris, 39 Mass. App. Ct. at 352-53; Brownell, 503 N.W.2d at 83.

Therefore, Elbery's breach of contract claim, like his legal malpractice claim, requires proof of the applicable standard of care and an alleged breach thereof by Attorney Sheketoff. Harris, 39 Mass. App. Ct. at 352-53. As discussed above, because Elbery has failed to produce the necessary expert evidence in support of his breach of contract claim, the Court not only cannot enter summary judgment in his favor, but must also grant summary judgment in favor of the defendants on that claim.

B. THE COURT CANNOT ENTER SUMMARY JUDGMENT IN FAVOR OF ELBERY ON THE CAUSATION PORTION OF HIS LEGAL MALPRACTICE AND BREACH OF CONTRACT CLAIMS BECAUSE HE HAS NOT ESTABLISHED CAUSATION AS A MATTER OF LAW.

1. Elbery Needs Expert Testimony To Establish Causation.

Even if Elbery were to persuade the Court that Attorney Sheketoff's conduct was negligent as a matter of law, he still cannot prevail on his motion for summary judgment. A plaintiff in a legal malpractice case must produce competent evidence to prove that the attorney's allegedly negligent conduct proximately caused his loss. Jernigan v. Giard, 398 Mass. 721, 723 (1986); McCann v. Davis, Malm & D'Agostine, 423 Mass. 558, 559-560 (1996); Girardi v. Gabriel, 38 Mass. App. Ct. 553, 560 (mere possibility that the defendant's negligence caused the loss of assets under an estate plan insufficient to take the proximate cause issue to the jury). The plaintiff must show that he would have prevailed in the underlying litigation or obtained a better result, had the attorney not been negligent. Brown v. Gerstein, 17 Mass. App. Ct. 558, 566 (1984) (no liability against attorney for failure to bring action to enjoin foreclosure in absence of evidence tending to show that such action would have prevented foreclosure). The standard in the present case is a particularly high one. Because Elbery's claims arise out of Attorney Sheketoff's defense of criminal charges, Elbery must prove not only that he would have obtained a better result, but that he is actually innocent of the crime for which he was convicted. Glenn v.

Aiken, 409 Mass. 699, 707 (1991) (where client was guilty of the crime, he suffers no harm from the attorney's alleged malpractice and cannot recover damages).[2]

In order to establish causation in this case, Elbery must produce expert testimony to establish that he would have prevailed on the motion to dismiss the firearms charges and that the stay on his 10-year conviction would have been reinstated. Colucci, 25 Mass. App. Ct. at 111 (expert evidence necessary to establish that plaintiffs would probably have been able to prevail in underlying action by satisfying all five statutory criteria needed to obtain a temporary restraining order against picketing).

Without the assistance of competent expert testimony, the average juror would have no basis for deciding whether the motion to dismiss the firearms charges under G.L. c. 269, §§ 10(a) and 10(h) would have succeeded under the circumstances of Elbery's case. Such a determination

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[2] To the extent that Elbery asserts that Judge Zide's finding of "not guilty" on the firearms charges is preclusive and mandates a finding that he was innocent of those charges, he is incorrect. The principle of issue preclusion bars relitigation of any factual or legal issue that was actually decided in a previous litigation between the parties; however, the issue must have been actually litigated and essential to the judgment in the prior litigation. See Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 30 (1st Cir. 1984). Judge Zide's findings are not preclusive in this case because, as Elbery admits, the prosecution did not present a case against him and the firearms charges were not actually litigated. In addition, Attorney Sheketoff was not a party to the criminal proceedings and, therefore, any findings made by Judge Zide are not preclusive as to him. Even if the findings were preclusive against Attorney Sheketoff, Elbery would still have to prove his actual innocence in this action, not merely that Judge Zide found him not guilty. Glenn, 409 Mass. at 704 (former criminal defendant whose sentence was reversed on appeal must still prove, by a preponderance of the evidence, that he did not commit crime in order to prevail on malpractice claim against defense attorney).

is beyond the collective experience of the average juror and, therefore, expert testimony is required. Glidden, 12 Mass. App. Ct. at 598.

Expert testimony is also necessary to prove that the stay of execution would have been reinstated on Elbery's 10-year sentence. Pursuant to Mass. R. Crim. P. 31(a), the decision whether to reinstate the stay is entirely discretionary, and in this malpractice action, the determination as to whether it would have been granted must be decided on an objective basis. Glenn, 409 Mass. at 703. Thus, Elbery must produce competent, admissible evidence that a reasonable Superior Court Justice would have reinstated the stay of execution on his intent to maim conviction if the motion to dismiss the firearms charges had been granted.[3] An average juror would have no basis for deciding whether, under the circumstances of Elbery's case, a reasonable Superior Court Justice would have reinstated the stay and, accordingly, Elbery must produce expert testimony on the subject in order to maintain his claims. Colucci, 25 Mass. App. Ct. at 111; Glidden, 12 Mass. App. Ct. at 598.

Since Elbery has no expert evidence to establish that the motion to dismiss would have been successful or that a reasonable judge would have reinstated the stay, he has failed to establish that he is entitled to summary judgment on the causation element of his claims, and the Court should deny his motion for summary judgment. Likewise, the absence of expert testimony

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[3] Judge Toomey's remarks suggesting that he would hear argument from Elbery on the issue of reinstating the stay if the firearms charges were resolved are insufficient to prove that Elbery would have prevailed at such a hearing. See McCann v. Davis, Malm & D'Agostine, 423 Mass. 558, 560 (1996) (causation may not be left to speculation). Elbery must instead produce expert testimony as to what a reasonable Super Court Justice would have done under the circumstances. Glenn, 409 Mass. at 703.

means that he has no expectation of proving causation at trial, and the Sheketoff Defendants are therefore entitled to summary judgment in their favor. Celotex Corp., 477 U.S. at 322-23; Conway v. Boston Edison Co., 745 F. Supp. 773 (D. Mass. 1990).

2. Even Assuming This Court Can Rule On Causation As A Matter Of Law, The Motion To Dismiss The Firearms Charges Would Have Been Denied.

Elbery asserts that this Court may determine, as a matter of law, how the District Court would have ruled on a motion to dismiss the firearms charges under G.L. c. 269, §§ 10(a) and 10(h). Assuming that this Court may properly determine the issue as a matter of law, it is clear that a motion to dismiss the charge under G.L. c. 269, § 10(a) would have been denied.

In 1994, G.L. c. 269, § 10 stated:

> (a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:
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> (1) being present in or on his residence or place of business; or
>
> (2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
>
> (3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty;
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> * * *
>
> shall be punished by imprisonment in the state prison for not less than two and one-half nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction. . . .

G.L. c. 269, § 10(a) (West 1990 as amended).

The plain language of the statute generally prohibits a defendant from possessing a firearm or having a firearm under his control in a vehicle. One of the exemptions to the general prohibition is that a defendant may possess or have under his control a firearm while he is present at his residence or place of business. The decisions cited by Elbery (some of which interpreted prior versions of G.L. c. 269, 10(a)) hold that the term residence, as used in this context, includes certain areas located around a defendant's home over which he enjoys exclusive control (these areas are sometimes referred to as "curtilage"). They do not support Elbery's allegation that the term residence includes all areas, wherever located, over which the defendant exercises exclusive dominion and control.

For example, in Com. v. Seay, the Massachusetts Supreme Judicial Court held that the carrying statute was inapplicable where the alleged carrying occurred within the defendant's residence or business. See 376 Mass. 735, 743 (1978) ("We conclude that carrying a firearm in one's residence or place of business by one having a valid firearm identification card is not a criminal offense). However, the Seay Court found that the defendant had violated the statute because he was not carrying a firearm inside his residence (an apartment) but was instead found to be carrying it in a common area of the apartment building. Id. Subsequently, in Com. v. Dunphy, 377 Mass. 453 (1979) the Massachusetts Supreme Judicial Court remanded a case for a retrial to determine whether the residence exception was applicable to a defendant who had been found with a firearm in his back yard. In so holding, the Dunphy Court stated that the "crucial issues . . . [were] whether the defendant lived at [the property] and, if so, whether the back yard and stairs leading to the porch were within his exclusive control." Id. at 457 (emphasis added);

see also Com. v. Statham, 38 Mass. App. Ct. 582, 585 (1995) (upholding conviction for violation under G.L. c. 269, § 10(a) where judge's instructions adequately set forth analysis to determine whether defendant resided at location and whether he was in exclusive control of the part of the property on which he allegedly possessed firearm).

Stated simply, the cases cited by Elbery do not establish that his alleged control over the storage unit makes it the equivalent of his residence as a matter of law. Elbery concedes that he did not live in the storage unit and, in fact, the storage unit was located in a different town than his apartment. As a matter of law, because Elbery did not live in the storage unit, it could not could not qualify as Elbery's residence (or protected curtilage), and his possession of firearms in the storage unit was not exempted from the statute. Com. v. Dunphy, 377 Mass. at 457; Com. v. Statham, 38 Mass. App. Ct. at 585. Therefore, the Court should conclude that a motion to dismiss the firearms charge under G.L. c. 269, § 10(a) on the grounds that the storage unit was the equivalent of a residence under the statute would have been denied by the District Court.

At the very least, the Court should find that the District Court would have determined that there was a factual issue as to whether Elbery's storage unit was the equivalent of a residence under the statute. In each of the cases cited by Elbery, the issue of whether the defendant's possession of a firearm occurred within his residence was left for the jury to decide. Indeed, in Com. v. Belding, 42 Mass. App. Ct. 435 (1997), the Massachusetts Appeals Court reversed a conviction under G.L. c. 269, § 10(a), because the trial judge improperly determined that a defendant, who had allegedly extended his arm past the threshold of his apartment and into a common area while holding a gun, was away from his residence. The Appeals Court found that

the determination of whether the exemption applied was for the jury to decide. Id. at 439-40; see also Com. v. Statham, 38 Mass. App. Ct. at 584 (determinations as to whether defendant resided at a location and had exclusive control over back yard were factual issues for jury). The Court should therefore conclude that the District Court would have denied a motion to dismiss the firearms charges because there was a factual issue for the jury.

Even if this Court determines that the District Court would have allowed a motion to dismiss the firearms charges, it still cannot grant summary judgment in favor of Elbery with respect to causation. As discussed in the previous section, Elbery must still establish, that once the firearms charges were dismissed, a reasonable Superior Court Justice would have reinstated the stay on his 10-year sentence. Because Elbery has no expert testimony on this subject, his claims fail as a matter of law and the Court should enter summary judgment in favor of the defendants.

CONCLUSION

For the reasons discussed above, the Sheketoff Defendants respectfully request that the Court Deny Elbery's motion for summary judgment with respect to his legal malpractice and breach of contract claims, and instead enter summary judgment in their favor on all of Elbery's claims.

Respectfully submitted,
ROBERT SHEKETOFF, KIMBERLY HOMAN, and
SHEKETOFF & HOMAN
By their Attorneys,
SUGARMAN, ROGERS, BARSHAK & COHEN, P.C.

By: _____

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Dated: February 5, 2001

CERTIFICATE OF SERVICE

I, John G. O'Neill, attorney for the defendants, Robert Sheketoff, Kimberly Homan and Sheketoff & Homan, hereby certify that on this 5 day of February 2001, I served the foregoing Memorandum of the Sheketoff Defendants in Opposition to the Plaintiff's Motion for Summary Judgment and in Further Support of Their Motion for Summary Judgment upon the other parties to this litigation by causing copies thereof to be sent by first-class mail, postage pre-paid to:

Mr. Michael Elbery, C57634
c/o S.E.C.C.
12 Administration Road
Bridgewater, MA 02324

and to all counsel of record in the consolidated cases.

_____
John G. O'Neill

Enclosure

cc: w/ copy of enclosure

Mr. Michael Elbery, C57634
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