

Cohen & Covino Use Actual Innocence Doctrine To Obtain Immediate Dismissal Of Legal Malpractice Claim Relating To Four Year Double Jeopardy Incarceration And 93A Claims Related To Case Billing Format

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Attorneys Susan E. Cohen and William R. Covino recently won an early motion to dismiss a legal malpractice complaint alleging that a criminal defense attorney failed to promptly appeal a judge's order to trial after accepting a guilty plea (double jeopardy) with the result that the plaintiff-client was incarcerated for four years based on argument that plaintiff could not establish "actual innocence" of the crime charged on a guilty plea. The Court's decision is significant because it rejected the continued efforts of the plaintiffs' bar to expand the potential liability of criminal defense lawyers to include double jeopardy trials and time served after acceptance of a guilty plea. In granting the motion to dismiss, the Court rejected the argument that Massachusetts should adopt a limited sentencing exception to the Actual Innocence Doctrine.

The Actual Innocence Doctrine precludes a disappointed client from establishing a legal malpractice claim against his or her criminal defense attorney unless the client can establish that he or she was actually innocent of the crimes alleged. This rule reinforces the fundamental public policy that crime does not pay. An exception to the rule would give a person who committed a crime a civil action property interest in not being punished for their crime.

The Court also adopted Attorneys Cohen and Covino's argument that the wrongful incarceration claim was time barred. The statute of limitations had run prior to the filing of the case because the plaintiff had actual knowledge of appreciable harm when he was incarcerated. The plaintiff was incarcerated more than three years before filing his legal malpractice claim.

In addition, the Court agreed with Cohen and Covino's arguments that plaintiff's complaints that his attorney failed to provide itemized billing on a flat fee agreement were insufficient to support a 93A claim and so ruled leading to a clean sweep dismissal of the entire case.

A copy of the Court's eleven page decision can be found on *Westlaw* at 2017 WL 563920 and *Massachusetts Lawyer's Weekly*, No. 09-041-17 (Ricciuti, J.)