

## **LAWYER GETS OFF BECAUSE HE HAS CLIENT PLEAD GUILTY! WHAT IS WRONG WITH THIS PICTURE?**

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A legal malpractice suit against a New Jersey lawyer who advised a client to cooperate with an FBI investigation, despite having no criminal law experience, was deemed properly dismissed.

The Appellate Division on Jan. 20 affirmed dismissal of a suit against West Paterson, N.J., attorney Joseph A. Mecca, whose client ultimately pleaded guilty and was sentenced to prison based, at least partly, on the information he provided law enforcement at Mecca's recommendation. "The issue in this case is whether [the client] obtained some form of exoneration of his guilty plea so as to permit his legal malpractice claim to proceed," the court said in *Totoli v. Mecca*. "It is undisputed that no exoneration occurred and therefore, plaintiff's legal malpractice claim is barred as a matter of law."

The client, Andrew Totoli, had his auto body shop raided by federal agents and was arrested in connection with a narcotics investigation, according to the opinion. Totoli contacted Mecca—who previously advised him on business-related issues but had no experience with significant criminal matters—and they had a meeting while the former was in custody. Mecca advised Totoli to cooperate with authorities, despite Totoli's claims that he knew nothing about the alleged drug transactions, the opinion said.

No dates are provided in the opinion, but the arrest occurred in 1994, according to a report by The Record of Bergen County and federal court documents. A new attorney negotiated an agreement whereby Totoli provided testimony against co-defendants and pleaded guilty to a conspiracy charge. Totoli was sentenced to two years' imprisonment, followed by a five-year probation term, the opinion said.

Totoli first sued Mecca in 2000, but the matter was stayed in 2004 and dismissed by stipulation the following year, according to state court records.

It wasn't until 2013 that Totoli again sued Mecca for malpractice. He claimed the attorney's advice was negligent, and that he would have avoided prison had he not cooperated, according to the opinion.

Essex County Superior Court Judge James Rothschild Jr. dismissed the case, holding that Totoli was required to show, as a matter of law, that he was exonerated in order to make out a claim for legal malpractice in a criminal case.

Totoli appealed, but Appellate Division Judges Joseph Yannotti, Douglas Fasciale and Mary Gibbons Whipple affirmed, holding that Rothschild "properly dismissed plaintiff's complaint because plaintiff did not receive the requisite exoneration in the criminal matter."

The panel relied on the 2008 case *McKnight v. Office of the Public Defender*, where the New Jersey Supreme Court said a plaintiff in such a malpractice action "has to be exonerated to the point of being able to show some injury"—whether it's vacatur of a guilty plea, conviction of a lesser offense, or some other relief.

The appeals court in Totoli also pointed to the 2001 Appellate Division case *Alampi v. Russo*, where the court said allowing a malpractice suit by someone who pleaded guilty "would undermine the integrity of the federal guilty plea in pursuit of a highly speculative thesis."

Totoli's claim against Mecca, the court said, "falls squarely within the scope of *Alampi* and *McKnight* because plaintiff failed to show some form of exoneration." "Although plaintiff is correct that he need not show 'actual innocence' for his legal malpractice claim to accrue, he must still receive a 'disposition more beneficial to [him] than the original judgment,'" the court said, quoting the precedents. "This did not occur." The decision comes eight months after a different Appellate Division panel, in *Cortez v. Gindhart*, held that criminal defendants, even those who were convicted and never exonerated, can sue their counsel for malpractice.

But the *Cortez* panel, while recognizing the possibility of a cause of action even in the face of a guilty plea, nonetheless affirmed dismissal of the suit, and said no injury exists if the conviction can't be shown to be invalid. Therefore, the decision reached in Totoli's case "accords with" that in *Cortez*, the panel said. Mecca, who was pro se, didn't return a call seeking comment.

Totoli's counsel, Cynthia Walters of Budd Larner in Short Hills, N.J., also didn't return a call seeking comment.