

---

---

IN THE  
United States Court of Appeals  
FOR THE FIRST CIRCUIT

---

No. 95-1933

INGRID A.M. FRANCIS and ROBERT FRANCIS,

*Plaintiffs-Appellants,*

—v.—

DAVID GOODMAN AND KAREN DUNNETT,  
As Executors of the Will of Ira Rose,

*Defendants-Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

---

---

**BRIEF OF DEFENDANTS-APPELLEES**

---

---

HILARY B. MILLER  
*Attorney for Defendants-Appellees*  
112 Parsonage Road  
Greenwich, Connecticut 06830-3942  
(203) 861-6262

---

---

## TABLE OF CONTENTS

|  |     |
|--|-----|
| TABLE OF CONTENTS .....  | i   |
| TABLE OF AUTHORITIES .....   | iii |
| JURISDICTION .....   | 2   |
| PRELIMINARY STATEMENT .....  | 2   |
| STATEMENT OF THE CASE .....  | 3   |
| Background .....   | 3   |
| Rose’s Domicile .....  | 6   |
| The Lease of the Nantucket Store .....   | 10  |
| Rose’s Legal Services to Francis .....   | 14  |
| The Judgment Below .....   | 15  |
| SUMMARY OF ARGUMENT .....  | 16  |
| ARGUMENT .....   | 18  |
| <br>   |     |
| POINT I — THE COURT DID NOT ERR IN FINDING<br>DIVERSITY JURISDICTION TO BE PRESENT<br><u>BECAUSE ROSE WAS A NEW YORK DOMICILIARY</u> .....             | 18  |
| A. Rose Was A New York Domiciliary As A Matter of Law. ....  | 18  |
| B. The District Court Did Not Err In Failing To Hold<br>A Hearing On Francis’ Motion To Remand. ....   | 23  |
| C. If A Hearing Were Now To Be Ordered,<br>A Different Result Could Not Be Reached. ....   | 25  |
| <br>   |     |
| POINT II — BECAUSE FRANCIS FAILED<br>TO PROVE THAT HER LOSSES AROSE<br>FROM ERRONEOUS LEGAL ADVICE,<br><u>HER CLAIMS WERE PROPERLY DISMISSED</u> ..... | 27  |
| A. Introduction. ....  | 27  |
| B. Francis Must Show Not Merely That Rose<br>Was Her Attorney, But Also That Rose<br>Was Her Attorney With Respect To The Store. ....                  | 28  |

C. Rose Owed No Implied Duty To Francis  
Because He Owed An Express Duty To Nanben. ....31

D. Where The Existence Of An Attorney-Client  
Relationship Is In Question, Plaintiff Is Not Entitled  
To The Benefit Of the Doubt. ....33

**POINT III — THE DISTRICT COURT PROPERLY EXCLUDED  
THE TESTIMONY OF PLAINTIFF’S LAST-MINUTE EXPERT.....36**

**CONCLUSION.....39**

## TABLE OF AUTHORITIES

### CASES

|  |        |
|--|--------|
| <i>Abbott v. United Venture Capital, Inc.</i> , 718 F.Supp. 823 (D. Nev. 1988).....  | 20     |
| <i>Anderson v. Bessemer City</i> , 470 U.S. 564, 105 S.Ct. 1504,<br>84 L.Ed.2d 518 (1985) .....  | 22, 35 |
| <i>Baker v. Keck</i> , 13 F.Supp. 486 (E.D. Ill. 1936).....  | 19     |
| <i>Bank One Texas, N.A. v. Montle</i> , 964 F.2d 48 (1st Cir. 1992),<br><i>opinion after remand</i> , 974 F.2d 220 (1st Cir. 1992) .....   | passim |
| <i>Best v. Rome</i> , 858 F.Supp. 271 (D.Mass. 1994), <i>aff'd</i> , 47 F.3d 1156 (1st Cir. 1985) ..   | 28     |
| <i>Brandlin v. Belcher</i> , 67 Cal.App.3d 997, 134 Cal.Rptr. 1 (1977) .....   | 28     |
| <i>Butler v. Pollard</i> , 482 F.Supp. 847 (E.D. Okla. 1979) .....   | 19, 22 |
| <i>Chaplin v. Brennan</i> , 114 Ariz. 124, 126, 559 P.2d 680 (Az. App. 1976),<br><i>overruled on other grounds</i> , <i>Donnelly Constr. Co. v. Oberg</i> , 139 Ariz. 184,<br>677 P.2d 1292 (1984) ..... | 27     |
| <i>Commercial Bank and Trust Co. v. Kattar</i> , 307 F.Supp. 456 (D. Mass. 1969).....  | 22     |
| <i>Cumpiano v. Banco Santander P.R.</i> , 902 F.2d 148 (1st Cir. 1990) .....   | 35     |
| <i>Dedham Water Co. v. Cumberland Farms Dairy, Inc.</i> ,<br>972 F.2d 453 (1st Cir. 1992) .....  | 35     |
| <i>Delta Equip. &amp; Constr. Co. v. Royal Indem. Co.</i> , 186 So.2d 454 (La. 1966).....  | 28     |
| <i>DeVaux v. American Home Assur. Co.</i> , 387 Mass. 814, 444 N.E.2d 355 (1983)..   | 28, 33 |
| <i>Fall River Savings Bank v. Callahan</i> , 18 Mass. App. 76, 463 N.E.2d 555 (1984) ....  | 37     |
| <i>Galva Foundry Co. v. Heiden</i> , 924 F.2d 729 (7th Cir. 1991) .....  | 22     |
| <i>Glidden v. Terranova</i> , 12 Mass. App. 597, 427 N.E.2d 1169 (1981) .....  | 37     |
| <i>Gordon v. Steele</i> , 376 F.Supp. 575 (W.D.Pa. 1974) .....   | 20     |
| <i>Griffin v. Matthews</i> , 310 F.Supp. 341 (D.N.C. 1969),<br><i>aff'd</i> , 423 F.2d 272 (4th Cir. 1970) .....   | 20     |

|  |            |
|--|------------|
| <i>Hawes v. Club Ecuestre El Comandante</i> , 598 F.2d 698 (1st Cir. 1979) .....   | 19         |
| <i>Herzog v. Herzog</i> , 333 F.Supp. 477 (W.D. Pa. 1971) .....  | 20         |
| <i>Kurtenbach v. TeKippe</i> , 260 N.W.2d 53 (Io. 1977) .....  | 28         |
| <i>Lamare v. Basbanes</i> , 418 Mass. 274, 636 N.E.2d 218 (1994).....  | 32         |
| <i>Land v. Dollar</i> , 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947) .....  | 24         |
| <i>Loeb v. Textron, Inc.</i> , 600 F.2d 1003 (1st Cir. 1979).....  | 33         |
| <i>Lundquist v. Precision Valley Aviation, Inc.</i> , 946 F.2d 8 (1st Cir. 1991) .....   | 18, 19, 24 |
| <i>Lyons v. Salve Regina College</i> , 422 F.Supp. 1354 (D.R.I. 1976),<br><i>aff'd in relevant part</i> , 565 F.2d 200 (1st Cir. 1977),<br><i>cert. denied</i> , 435 U.S. 971, 98 S.Ct. 1611, 56 L.Ed.2d 62 (1978) ..... | 22         |
| <i>Media Duplication Svcs., Ltd. v. ADG Software, Inc.</i> ,<br>928 F.2d 1228 (1st Cir. 1991) .....  | 25         |
| <i>Messick v. Southern Penn. Bus Co.</i> , 59 F.Supp. 799 (D. Pa. 1945) .....  | 22         |
| <i>Mississippi Band of Choctaw Indians v. Holyfield</i> , 490 U.S. 30, 109 S.Ct. 1597,<br>104 L.Ed.2d 29 (1989) .....  | 19         |
| <i>Mitchell v. United States</i> , 88 U.S. (21 Wall.) 350, 22 L.Ed. 584 (1875).....  | 20         |
| <i>Moores v. Greenberg</i> , 834 F.2d 1105 (1st Cir. 1987) .....   | 28         |
| <i>Nat'l Metal Finishing Co. v. BarclaysAmerican/Comm'l, Inc.</i> ,<br>899 F.2d 119 (1st Cir. 1990).....   | 35         |
| <i>O'Brien v. Papa Gino's of America, Inc.</i> , 780 F.2d 1067 (1st Cir. 1986).....  | 35         |
| <i>O'Toole v. Arlington Trust Co.</i> , 681 F.2d 94 (1st Cir. 1982).....   | 23         |
| <i>Page v. Frazier</i> , 388 Mass. 55, 445 N.E.2d 148 (1983) .....   | 28, 33, 34 |
| <i>Prakash v. American Univ.</i> , 727 F.2d 1174 (D.C. Cir. 1984) .....  | 25         |
| <i>Reich v. Newspapers of New England, Inc.</i> , 44 F.3d 1060 (1st Cir. 1995) .....   | 35         |
| <i>Robertson v. Gaston Snow &amp; Ely Bartlett</i> , 404 Mass. 515, 536 N.E.2d 344 (1989),<br><i>cert. denied</i> , 493 U.S. 894, 110 S.Ct. 242, 107 L.Ed.2d 192 (1989) .....  | 28, 29     |
| <i>Rodriguez-Diaz v. Sierra-Martinez</i> , 853 F.2d 1027 (1st Cir. 1988) .....   | 18         |

|  |        |
|--|--------|
| <i>Satz v. ITT Fin. Corp.</i> , 619 F.2d 738 (8th Cir. 1980) .....   | 24     |
| <i>Seth v. British Overseas Airways Corp.</i> , 329 F.2d 302 (2nd Cir. 1963),<br><i>cert. denied</i> , 379 U.S. 858, 85 S. Ct. 114, 13 L. Ed. 2d 61 (1964) .....   | 24     |
| <i>Sheinkopf v. Stone</i> , 927 F.2d 1259 (1st Cir. 1991) .....  | 30, 33 |
| <i>Shropshire v. Freeman</i> , 510 S.W.2d 405 (Tex. App. 1974) .....   | 28     |
| <i>Stiver v. Parker</i> , 975 F.2d 261 (6th Cir. 1992) .....   | 37     |
| <i>United States v. Angiulo</i> , 847 F.2d 956 (1st Cir. 1988),<br><i>cert. denied</i> , 488 U.S. 852, 109 S.Ct. 138, 102 L.Ed.2d 110 (1988),<br><i>cert. denied</i> , 488 U.S. 928, 109 S.Ct. 314, 102 L.Ed.2d 332 (1988) ..... | 38     |
| <i>Valedon Martinez v. Hospital Presbiteriano de la Comunidad, Inc.</i> ,<br>806 F.2d 1128 (1st Cir. 1986) .....   | 24     |
| <i>Varnum v. Martin</i> , 15 Pick. 440 (1834) .....  | 37     |
| <i>Willis v. Westin Hotel Co.</i> , 651 F.Supp. 598 (S.D.N.Y. 1986) .....  | 19     |

**STATUTES**

|                                       |       |
|---------------------------------------|-------|
| 28 U.S.C. § 1291 .....                | 2     |
| 28 U.S.C. § 1332 .....                | 18    |
| 28 U.S.C. § 1332(a)(2) .....          | 2     |
| 28 U.S.C. § 1441(a) .....             | 3     |
| 28 U.S.C. § 1447(c) .....             | 4     |
| N.Y. Surr. Ct. Proc. Act § 205 .....  | 6     |
| Rule 16(b), <i>Fed.R.Civ.P.</i> ..... | 4     |
| Rule 402, <i>Fed.R.Evid.</i> .....    | 36    |
| Rule 52(a), <i>Fed.R.Civ.P.</i> ..... | 35    |
| Rule 52(c), <i>Fed.R.Civ.P.</i> ..... | 5     |
| Rule 702, <i>Fed.R.Evid.</i> .....    | 5, 36 |

**OTHER AUTHORITIES**

R. Leflar. L. McDougal III and R. Felix, *American Conflicts Law* (4th ed. 1986)..... 19

IN THE  
United States Court of Appeals  
FOR THE FIRST CIRCUIT

---

No. 95-1933

INGRID A.M. FRANCIS and ROBERT FRANCIS,

*Plaintiffs-Appellants,*

—v.—

DAVID GOODMAN AND KAREN DUNNETT,  
As Executors of the Will of Ira Rose,

*Defendants-Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

---

---

**BRIEF OF DEFENDANTS-APPELLEES**

---

---

Defendants-appellees David Goodman and Karen Dunnett, as Executors of the Will of Ira Rose (“Rose”), respectfully submit this brief in opposition to the appeal by plaintiffs-appellants Ingrid Francis (“Francis”) and Robert Francis from a Judgment in favor of defendants dated July 19, 1995 (A-106<sup>1</sup>) of the United States District Court for the District of Massachusetts (Reginald C. Lindsay, U.S.D.J.).

---

<sup>1</sup>References to the parties’ Joint Appendix are identified as “A-[page].”

## **JURISDICTION**

The District Court had subject matter jurisdiction of the underlying litigation pursuant to 28 U.S.C. §§ 1332(a)(2) (diversity). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (appeal from final decision).

## **PRELIMINARY STATEMENT**

This is an appeal of a legal malpractice action — one of four lawsuits by the embittered plaintiff, Ingrid Francis, the forsaken paramour of the defendant Ira Rose.<sup>2</sup> Although none of these actions has resulted in the recovery of any money for Francis, in this appeal she calls upon this Court in a final and desperate attempt to achieve monetary redress for her failed romance with Rose.

In this action, Francis adopted a novel approach to “piercing the corporate veil” of the bankrupt corporate tenant of her store: Francis alleged that Rose, an officer and director of the corporate tenant, and also an attorney, had committed legal malpractice by entreating Francis to refrain from taking action against his own slow-paying corporation.

Francis’ theory collapsed under its own weight at trial, because, the District Court ruled, she failed to demonstrate by a preponderance of the evidence that

---

<sup>2</sup>Rose died during the pendency of this action below, and the executors nominated under his last will and testament, as admitted to probate by the Surrogate’s Court of Westchester County, New York, wherein Rose was domiciled at the time of his death, were substituted as parties defendant. A-12, Docket Entries 91-94. For consistency of reference, the term “Rose,” as used in this brief, includes his executors.

Rose's entreaties constituted legal advice, rather the conventional pleas of a cash-strapped debtor; her claims were dismissed.

Francis appeals, asserting that: (a) the District Court lacked diversity jurisdiction because all parties were citizens of Massachusetts; (b) the District Court erred in finding that Rose had given Francis no legal advice with respect to the store; and (c) the District Court abused its discretion by excluding the testimony of plaintiff's eleventh-hour expert witness.

For the reasons hereinafter set forth, the judgment of the District Court should be affirmed.

## **STATEMENT OF THE CASE**

### **Background**

This is an action for legal malpractice, commenced August 12, 1992 in the Superior Court Department, Nantucket County (A-23) by plaintiff Ingrid Francis, individually and on behalf of her minor son, Robert,<sup>3</sup> against defendant Ira Rose.<sup>4</sup>

Pursuant to 28 U.S.C. § 1441(a), on September 10, 1992, Rose timely removed the action to the United States District Court for the District of Massachusetts, on the ground that there was complete diversity of citizenship between Fran-

---

<sup>3</sup>Robert Francis achieved majority and was substituted as a party plaintiff by order of Magistrate Judge Marianne B. Bowler on July 9, 1993. A-9.

cis, who now claims to be a domiciliary of Massachusetts,<sup>5</sup> and Rose, a domiciliary of New York. A-3, Docket Entry 1.

By motion filed October 5, 1992, Francis sought remand under 28 U.S.C. § 1447(c), alleging the absence of diversity. A-23. Rose opposed the motion. Following a review of comprehensive documentary submissions by both parties (in which the material facts were uncontroverted), and without any request by Francis for an evidentiary hearing, the District Court denied Francis' motion to remand.<sup>6</sup> Francis' motion for reconsideration was similarly denied. A-64.

On December 4, 1992, Magistrate Judge Bowler issued a scheduling order pursuant to Rule 16(b), *Fed.R.Civ.P.*, setting June 30, 1993 as the discovery cut-off date.<sup>7</sup> A-4, Docket Entry 18. On October 1, 1993, Judge Bowler declared discovery to be closed. A-10, Docket Entry 72.

---

(...continued)

<sup>4</sup>The action below was only one of four separate lawsuits commenced by Francis following the breakup of her romantic relationship with Rose. None of the other three actions has resulted in a financial recovery for Francis. A-101.

<sup>5</sup>Francis claimed to be a citizen of the Kingdom of Sweden for diversity purposes in 1989. A-34.

<sup>6</sup>*See*, endorsed memorandum of Edward F. Harrington, U.S.D.J, dated October 23, 1992. A-23.

<sup>7</sup>Judge Bowler's order required plaintiff to designate her experts not less than 75 days prior thereto (*i.e.*, by April 16, 1993) and to provide responses to defendant's expert interrogatories, including necessary supplementation, no less than 55 days prior to the cutoff date (*i.e.*, by May 6, 1993). Plaintiff designated no experts in her answers to interrogatories.

On June 21, 1995 — virtually the eve of trial then scheduled for July 8, and almost two years after the discovery cut-off date — Francis served Substitute Supplemental Answers to Interrogatories in which, for the first time, she set forth proposed testimony of Daniel O. Mahoney, Esq. as an expert witness regarding the standard of care owed by an attorney to a client. A-84-93. Rose opposed the eleventh-hour designation. A-110 *et seq.* At argument on June 28, counsel for Rose urged that the trial judge possessed at least as much expertise as the proposed expert witness and, importantly, stipulated that he would not argue that Francis had failed to prove the standard of care owed by an attorney. A-124. In reliance on this stipulation and the trial judge's own expertise in matters of attorney conduct, Judge Lindsay found that the proposed expert testimony would not be of "assistance the trier of fact" under Rule 702, *Fed.R.Evid.*, and excluded the proffered testimony. A-125.

The parties submitted a Joint Pre-Trial Memorandum consisting, *inter alia*, of an agreed statement of facts and exhibits, each of which was stipulated to be genuine and admissible. A-94-105.

The case was tried to the Court sitting without a jury on July 19, 1995. A-131 *et seq.* At the close of Francis' case, Rose moved to dismiss on the ground that plaintiff had failed to prove a *prima facie* case. Judge Lindsay granted the motion (treating it as having been made under Rule 52[c], *Fed.R.Civ.P.*), and found that Francis had failed to prove by a preponderance of the evidence that the statements alleged to have been made by Rose to Francis constituted legal advice. A-255-59.

Francis now appeals.

### **Rose's Domicile**

Rose was a life-long citizen of the State of New York. Born in 1943 in New York City, Rose grew up in New York and was domiciled there continuously until his death in 1995.<sup>8</sup> Affidavit of Ira Rose dated October 22, 1992 (A-49), ¶2. Upon graduating from law school in 1967, Rose worked for a year and a half year as an attorney with the Securities and Exchange Commission in Washington, D.C., then returned to New York to practice with the law firm of Phillips, Nizer, Benjamin, Krim & Ballon in New York City; Rose became a partner of Phillips, Nizer in 1972. *Id.*, ¶3. Rose was admitted to the District of Columbia bar in 1967, and to the New York State bar in 1969. *Id.*, ¶4.

In 1970, Rose and his wife purchased a large home in Larchmont, New York, and in 1977 purchased an even larger, 14-room home in Larchmont. *Id.*, ¶5. Mr. and Mrs. Rose raised their children at their homes in New York, and they sent their children to primary and secondary schools in New York. *Id.*

In 1987, Rose left Phillips Nizer and joined a smaller firm, also located in New York City. *Id.*, ¶6. In mid-1989, Rose established his own law practice in New York City. *Id.* During that time, he began to spend a greater portion of his law practice hours at his home in Larchmont, and eventually he converted part of his

---

<sup>8</sup>The proceedings below include the suggestion of Rose's death on the record, accompanied by Letters Testamentary issued by the Surrogate's Court of the State of New York, County of Westchester. A-12, Docket Entry 93. The authority of the Surrogate's Court extends only to New York domiciliaries. N.Y. Surr. Ct. Proc. Act § 205.

home into a law office. *Id.* By the end of 1990, Rose moved all of his office equipment, books, records and client files into his home office in Larchmont and terminated his office lease in New York City. *Id.*

In 1980 — several years after purchasing his principal residence in New York — Rose built a second, significantly smaller house in Nantucket as a vacation residence for himself and his family. *Id.*, ¶7. (Rose thereafter purchased another, smaller dwelling in Larchmont, New York; the value of the Nantucket house represented a mere fraction of the value of Rose’s real estate located in New York. *Id.*)

Rose suffered a heart attack in 1985, and divorce proceedings were initiated between Mr. and Mrs. Rose in 1987; Rose began spending more time in Nantucket. *Id.*, ¶8. Rose was admitted to the Massachusetts bar in 1989,<sup>9</sup> while still maintaining the majority of his practice in New York.<sup>10</sup>

Over the years Rose purchased real estate both inside and outside of New York and resided outside the state while a student and while working for the S.E.C. in Washington. *Id.*, ¶11. In each instance, however, Rose returned to New York as his permanent home once his out-of-state residency was completed. *Id.*

---

<sup>9</sup>The excerpt from the Martindale-Hubbell directory submitted by Francis in support of her motion to remand does not list Rose has even having been admitted in Massachusetts, but rather only in New York and the District of Columbia. A-30.

<sup>10</sup>While Francis claims that Rose “consolidated” his practice in Nantucket, in fact Rose always maintained a substantial percentage of his law practice in New York and represented a number of New York clients in various New York state and federal courts. *Id.*, ¶9. As such, and as evidenced by his in-state New York bar membership, Rose maintained year-round law practices in *both* New York and Massachusetts. *Id.*, ¶¶9-10; A-55-56.

Rose emphatically intended to remain a resident and domiciliary of New York indefinitely.<sup>11</sup> *Id.*, ¶12. Rose always considered his house in New York to be his principal residence, and his most valuable possessions were used to furnish the New York residence, not his Nantucket vacation house. *Id.*

Rose was registered to vote in New York continuously since 1968, and he voted in numerous local, state and federal elections from 1968 through his death, including elections in the years immediately preceding the commencement of the action below. Most recently (and, persuasively, prior to the filing of Francis' motion to remand), Rose applied for a New York absentee ballot for the November, 1992 election. *Id.*, ¶13; A-55. In contrast, Rose was never registered to vote in Massachusetts, nor did he ever actually vote in any Massachusetts election. *Id.*

Rose was the holder of a New York, not a Massachusetts, driver's license. *Id.*, ¶14; A-56. Rose's automobiles were registered in New York. *Id.* Rose's principal bank and brokerage accounts were in New York. *Id.*, ¶15.<sup>12</sup>

Rose was listed in both the Westchester County, New York telephone directory and in the New York *Lawyer's Diary*. *Id.*, ¶16; A-59-61.<sup>13</sup>

---

<sup>11</sup>As noted *infra*, this very critical fact was never controverted by Francis.

<sup>12</sup>At the time Rose built the Nantucket vacation home in 1980, he established two personal checking accounts in Nantucket. *Id.*, ¶15. Since 1989, Rose also opened an attorney account and an IOLTA account in Nantucket. *Id.* By contrast, he maintained his principal banking relationships with several major New York banks, with which he also maintained many of his personal, business and trust accounts containing the vast majority of his funds. *Id.*

Rose was a member of the New York bar at all times after 1969, and he was registered with the New York courts as maintaining both his home and his business in New York. *Id.*, ¶9; A-56.

The address of Rose's home in New York is the only address listed on Rose's income tax filings; Rose filed income tax returns only as a resident of New York, and he never filed a Massachusetts resident tax return. *Id.*, ¶17; A-62-63.

The vast bulk of Rose's business and personal books, records and client files were located in New York, as were most of his personal possessions, including family heirlooms and his most valuable personal property. *Id.*, ¶18. Although several members of Rose's family have since moved away from New York, a large number of Rose's friends and relatives still live in New York. *Id.*, ¶19.

Rose's personal physician and dentist were located in New York, and he even went to the local cobbler in Larchmont, New York to have his shoes repaired. *Id.*

Since 1989, Rose made an average of ten trips home to New York annually, and he spent an average of four to eight weeks in New York. *Id.*, ¶20.

In 1989, in an action in the United States District Court of the District of Massachusetts entitled *Pacific National Bank v. Ingrid Francis, et al.*, Civil Action Nos. 89-1085 and 89-1086 (WD), Francis herself sought to remove a foreclosure action filed by the bank in the Land Court Department of the Trial Court on the

---

(...continued)

<sup>13</sup>The fact that Rose's name had been omitted from the New York *Martindale-Hubbell* listings did not come to Rose's attention until the filing of Francis' motion to remand, and the omission was not made at his request. *Id.*, ¶16.

ground of diversity. In her Notice of Removal, Francis asserted that she herself was a citizen of the Kingdom of Sweden, and that “*defendant Rose is a citizen of the State of New York*” (emphasis added). A-34. Counsel for Francis<sup>14</sup> served the Notice of Removal on Rose at “750 Third Avenue, New York, New York 10017.” A-35.

Later, in her motion to extend the time in which to respond to the bank’s motion to remand, Francis admitted:

Plaintiff’s motion is devoid even of any suggestion that there is a scintilla of doubt that the requirements of both diversity and amount in controversy have been met by Defendant Francis in removing this case.

A-39.<sup>15</sup>

### **The Lease of the Nantucket Store**

Francis became involved in a romantic sexual relationship with Rose in 1985, and they cohabited at various times from August 1985 to July 1991. A-94; A-97, ¶1.

Francis owns a commercial property located at 46 Main Street, Nantucket, Massachusetts (the “Store”). A-95.

---

<sup>14</sup>Francis was represented by Andrew J. Leddy, Esq., independent counsel of her own selection, in that matter. A-34 *et seq.* In her affidavit in support of remand, Francis blatantly and falsely swore that Rose was her attorney in that matter (A-25, ¶14).

<sup>15</sup>Pacific Bank conceded the issue of diversity. A-44. However, the Pacific Bank action was later remanded on other grounds. A-48.

In 1986, Nanben Corporation (“Nanben”), a corporation controlled by Rose,<sup>16</sup> as tenant, entered into a lease of the Store from Francis, as landlord, to operate a Benetton clothing store in Nantucket. *Id.*

Very importantly, *each party had independent legal representation in the negotiation of the lease to Nanben*; Francis was represented by her trial counsel in this action below, Wayne F. Holmes, Esq., and Nanben was represented by Edward I. Tishelman, Esq. Holmes had previously represented Francis in the negotiation of her leases with prior tenants. A-95; A-100; A-189-190.

At the time of the negotiation of the lease, Rose had never performed any legal services for Francis, and Francis did not rely on any legal advice or other statements by Rose in entering into the lease. A-98, ¶13; A-196; A-203.

Francis was represented by independent counsel because *Rose had insisted* that she have her own counsel. A-222-23.

Francis had substantial prior experience as a landlord of rental properties, including prior leases of the Store, the letting of rooms in her house, and summer rentals of residential properties. A-192. Yet, prior to entering into the lease of the Store with Nanben, Francis observed none of the customary cautions of commercial landlords in assuring the performance of their would-be tenants. Specifically,

- Francis did not investigate any aspect of the business proposed to be conducted by Nanben (A-201);

---

<sup>16</sup>Rose was the sole shareholder, director and officer of Nanben, and Francis knew that Rose was the president and sole shareholder of Nanben. A-97, ¶¶1-2.

- Francis made no investigation of the prospects for a Benetton franchise in Nantucket (A-200);
- Francis deliberately ignored Rose's lack of any prior experience running a retail store or any other kind of business (A-199-200);
- Francis did not ask for or receive any financial statements of Nanben (A-200);
- Francis did not know Nanben's net worth (*Id.*);
- Francis did not review any projections of Nanben's cash flow (A-201);
- Francis did not obtain a credit report from Dun & Bradstreet or anyone else regarding either Nanben or Rose (*Id.*);
- Francis ignored the fact that Nanben was a "shell" corporation with no operating history (A-200); and
- Francis did not negotiate for or insist on a personal guaranty, letter of credit, surety bond or other assurance of Nanben's performance (A-198).

Francis testified that she had entered into the lease, not because of Nanben's creditworthiness, but because Rose was her friend and lover. A-202. She further testified that she did not understand that the corporation, rather than Rose personally, would be her exclusive source of rental payments under the lease. A-203. (Francis admits Rose was not responsible for her misunderstanding. A-234.)

Francis was also the first employee and manager of the business operated by Nanben and continued to work for and at Nanben until August 1992. A-97, ¶10. The eviction of Nanben from the Store would thus have resulted in the termination of Francis' employment by Nanben.

Nanben experienced financial difficulties and fell behind on its rent to Francis during and after 1989. In 1992, Nanben filed for federal bankruptcy protection. Francis lost rent of \$88,376 and, after Nanben's bankruptcy filing, obtained a state court judgment against Nanben, including attorneys' fees and costs, amounting in all to \$92,898, and for possession of the premises. A-95.

At various times when Nanben was in arrears of rent, Francis approached Rose regarding payment. *Other than telling Francis “not to worry” and assuring Francis that she would be paid, Rose made no other statements to Francis.* A-174; A-218. (At trial, Francis reaffirmed her prior deposition testimony that she had asked *Nanben*<sup>17</sup> for a promissory note evidencing Nanben’s arrears, and that Rose had told her that she did not need such a note.<sup>18</sup> A-217. On examination by the Court, Francis testified that she asked for “some note of some kind. I did not phrase it as a promissory note.” A-217.) Francis does not claim that she ever asked Rose for a personal guaranty of Nanben’s rent, or that she ever discussed whether such a guaranty would be necessary or appropriate. Although Francis was confused *ab initio* about who was liable under the lease, she denies that Rose was responsible for her confusion. A-234.

During the nearly three years of Nanben’s financial troubles, Francis was always aware of her right to evict Nanben, to obtain possession of the premises, and to re-rent the Store. A-193-194. Francis was also aware of her right to consult a lawyer other than Rose. A-230. Yet, because of Francis’ desire to “protect” Rose

---

<sup>17</sup> “Q.: From Nanben? A.: Yes.” A-226.

<sup>18</sup>Even if found to be “legal advice,” as urged by Francis, that statement was patently accurate. It is abundantly clear that a note from Nanben would have been every bit as worthless as Nanben’s contract obligation under the lease. Francis admits that this “advice” was not requested until spring of 1992. A-235; A-241. As substantially all of the damages alleged by Francis had already then accrued (the eviction action was commenced in early summer 1992), it is hard to imagine how this “advice,” even if erroneous, proximately caused any material portion of the harm alleged by Francis.

and “protect his image in Nantucket,” Francis deliberately refrained from evicting Nanben. Francis now admits that she was “stupid” to do so. A-203.

### **Rose’s Legal Services to Francis**

Francis had a multifaceted relationship with Rose. Rose was her friend, her lover, her domestic partner, her housemate, her business partner, her employer (through Nanben), her tenant (through Nanben), her tax-return preparer, a her lender and loan guarantor, and, occasionally, her lawyer. A-205-209.

Commencing in 1987<sup>19</sup> and continuing until 1992, Rose acted as an attorney for Francis in 16 matters, none of which was a landlord-tenant matter or involved either the Store or Nanben. A-96-97. In connection with those services, Francis made payments to Rose totaling \$14,295.90. A-99, ¶14. However, Francis never paid Rose for any purported legal advice relating to the Store or to Nanben, nor were any bills rendered by Rose to Francis for such advice. Indeed, the rendition of landlord-tenant advice was not, to Francis’ knowledge, even part of Rose’s law practice. A-107.

*Francis never requested that Rose act as her lawyer in connection with the Store lease or her dealings with Nanben. A-206.*

Francis never distinguished the role in which Rose was acting. Francis “believed everything that [Rose] has told me” because “he was the man of my life” and

---

<sup>19</sup>It is not disputed that Rose rendered no legal services until after the execution of the Nanben lease, in the negotiation of which, as noted *supra*, Francis had been represented by independent counsel.

they had a social, intimate relationship. A-228. Francis acknowledges that Rose frequently gave her advice of a non-legal nature. A-214-15.

Under examination by the Court, Francis testified as follows:

THE COURT: Did you communicate, Mrs. Francis, at any point to Mr. Rose that when you asked him that question, whether you should do something, you were asking him for legal advice?

THE WITNESS: I didn't specify that.

\* \* \* \* \*

THE COURT: At no point did you say to him, "I am asking you as a legal matter, do I need to see someone," or words to that effect? Did you say that ever to him?

THE WITNESS: I cannot recall that I said that.

A-229-30.

### **The Judgment Below**

Francis was the sole witness on her behalf. At the close of her testimony, Francis rested. Ruling from the bench, Judge Lindsay found that Francis had

. . . failed to establish by a preponderance of the evidence that her damages were caused, the damages of lost rent were caused by legal malpractice as distinguished from a failure of a tenant to pay rent.

The reliance on Mr. Rose and a reliance that seems to me in very large part based on the trust and the confidence of the affection that Ms. Francis had for him. And it is not clear, at least by a preponderance of the evidence, that that trust was a trust of a client to a lawyer.

And my finding, therefore, is plaintiff has failed to [meet] the burden of proof, and I conclude that as a matter of law, she cannot recover.

A-259.

From the judgment in favor of the defense, Francis appeals. For the reasons set forth below, the judgment should be affirmed.

### **SUMMARY OF ARGUMENT**

The record before the District Court unambiguously demonstrated that diversity jurisdiction was present, as evidenced by competent documentary evidence and the uncontroverted facts in the submissions of the parties. It was undisputed that Rose owned a large, fully furnished principal home in New York and also owned a second, smaller dwelling in New York, held a New York driver's license, registered his cars in New York, was registered to vote (and voted continuously) in New York, maintained his principal bank and brokerage accounts in New York, was registered with the New York State court system as maintaining both his home and law practice in New York, filed New York resident state tax returns, was listed in various New York directories (including the *New York Lawyer's Diary*), regularly traveled to New York, maintained the bulk of his personal and business books, records and client files, and the vast bulk of his personal property, in New York, and visited his physician, dentist and cobbler in New York. His sworn intention to return permanently to New York was consistent with the documentary evidence and not disputed by Francis. Francis never requested an evidentiary hearing on any matters in controversy, and the District Court properly resolved the matter on submissions without a hearing. Its determination was not "clearly erroneous." Now that Rose is dead, an evidentiary hearing at which Rose would testify solely by affidavit could not possibly produce a different result. *See, pp. 18-27, infra.*

The District Court also properly found that, while Rose had performed some legal services for Francis, he was not her lawyer with respect to the Store lease — a matter in which Francis had had independent counsel at Rose’s insistence. Francis testified that she had never requested Rose to act as her lawyer concerning the Store, that she had never been billed for (or paid for) any relevant legal services, that she never told Rose that she was asking for legal advice, and that she knew that Rose did not practice landlord-tenant law. The trial court had the opportunity to observe Francis’ demeanor as she testified dishonestly regarding both the substance of Rose’s purported legal advice and its timing. Francis was required to prove the existence of any attorney-client relationship by a fair preponderance of the evidence and was not entitled to the benefit of any doubt. Given the undisputed nature of the Store lease as a transaction based on the personal, rather than professional, relationship of the parties, the District Court’s determination that no legal advice had been rendered was manifestly correct and not clearly erroneous. *See, pp. 27-36, infra.*

The District Court properly excluded the proffered testimony of Francis’ eleventh-hour expert witness. Absent a finding of an attorney-client relationship, testimony regarding the standard of care owed by an attorney to his client was irrelevant and therefore properly excluded. But even if an attorney-client relationship had been found by the trial court, the testimony of Francis’ proffered expert witness concerned only disciplinary rules — matters solely of law — and provided no “assistance the trier of fact,” the Court sitting without a jury, beyond what the Court

could ascertain from its own experience and ordinary legal research. Rose's stipulation not to raise Francis' failure to adduce expert testimony regarding the standard of care as an objection to a finding of liability on the part of Rose rendered the exclusion, if indeed it was error, harmless. *See*, pp. 36-39, *infra*.

Accordingly, the District Court's judgment must be affirmed.

## **ARGUMENT**

### **POINT I**

#### **THE COURT DID NOT ERR IN FINDING DIVERSITY JURISDICTION TO BE PRESENT BECAUSE ROSE WAS A NEW YORK DOMICILIARY**

##### **A. Rose Was A New York Domiciliary As A Matter of Law.**

For purposes of diversity jurisdiction under 28 U.S.C. § 1332, an individual is considered a citizen of the state in which he is domiciled. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991).<sup>20</sup> While a person may have several residences, he can have only one domicile. *Id.* "A person's domicile is the place where he has his true, fixed home and principal establishment, and to which, whenever he is absent, he has the *intention* of returning. *Rodriguez-Diaz v. Sierra-*

---

<sup>20</sup>Importantly, the policy purposes underlying the availability of diversity jurisdiction for citizens of different states — *i.e.*, the perceived need to equalize any potential imbalance of treatment between "in-staters" and "out-of-staters" — also fully supports the maintenance of jurisdiction here. *See, e.g., Rodriguez-Diaz v. Sierra-Martinez*, 853 F.2d 1027, 1032-33, n.7 (1st Cir. 1988) (court may take into account federal goal "to protect a citizen from parochialism" in determining whether diversity jurisdiction exists). Such a policy is of particularly obvious application in the case at bar.

*Martinez*, 853 F.2d 1027, 1029 (1st Cir. 1988) (emphasis added). Importantly, a party need not actually reside in the state in which he is domiciled in order to have citizenship there: “[d]omicile’ is not necessary synonymous with ‘residence’ . . . and one can reside in one place and be domiciled in another.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). See also, *Willis v. Westin Hotel Co.*, 651 F.Supp. 598, 603 (S.D.N.Y. 1986) (“mere absence” from the domicile state “clearly” does not destroy presumption of citizenship there); *Butler v. Pollard*, 482 F.Supp. 847, 851 (E.D. Okla. 1979) (“citizenship is not necessarily lost by protracted absence from home, where the intention to return remains.”).

The courts impose a heavy presumption that (1) a party’s original domicile continues indefinitely, despite any temporary removal or absence from the domicile;<sup>21</sup> (2) the state in which a party is registered to vote is the state of domicile;<sup>22</sup> and (3) the establishment of a principal home in the domiciliary state continues even after the purchase and residence of another house in another state.<sup>23</sup>

---

<sup>21</sup>See, e.g., *Choctaw Indians*, *supra*, 490 U.S. at 48; *Bank One Texas, N.A. v. Montle*, 964 F.2d 48, 49 (1st Cir. 1992), *opinion after remand*, 974 F.2d 220 (1st Cir. 1992); *Hawes v. Club Ecuestre El Comandante*, 598 F.2d 698, 701 (1st Cir. 1979).

<sup>22</sup>See, e.g., *Griffin v. Matthews*, 310 F.Supp. 341, 343 (D.N.C. 1969), *aff’d*, 423 F.2d 272 (4th Cir. 1970); *Baker v. Keck*, 13 F.Supp. 486, 487 (E.D. Ill. 1936). See also, *Lundquist*, *supra*, 946 F.2d at 12 (placing “special weight” on place of voter registration); *Bank One*, *supra*, 964 F.2d at 50 (same).

<sup>23</sup>R. Leflar, L. McDougal III and R. Felix, *American Conflicts Law*, § 10 at 23 (4th ed. 1986) (“The home first established will continue as the domicile unless there is discovered a state of mind genuinely regarding the latter residence instead of the former residence as the principal home”).

Once a party has invoked a presumption of domicile in one state, the challenging party maintains the burden of producing proof by clear and convincing evidence that such domicile has been changed to another state. *See, e.g., Mitchell v. United States*, 88 U.S. (21 Wall.) 350, 353, 22 L.Ed. 584 (1875); *Bank One*, 964 F.2d at 50; *Herzog v. Herzog*, 333 F.Supp. 477, 478 (W.D. Pa. 1971); *Griffin v. Matthews*, 310 F.Supp. 341, 343 (D.N.C. 1969), *aff'd*, 423 F.2d 272 (4th Cir. 1970).

Francis explicitly conceded in prior filings with the Court below dated as late as June 1989 that Rose is indeed a citizen of New York. A-34. There is also no question — and Francis does not dispute — that Rose purchased his principal residences in New York well before purchasing the vacation home in Nantucket, and that he registered to vote (and, indeed, has voted regularly for 25 years preceding the commencement of this action) in New York. Moreover, Rose never manifested any intent to abandon his New York domicile, nor — fatally — does Francis allege such an intent.<sup>24</sup> To the contrary, at all relevant times Rose undisputedly:

- (1) owned a large, fully furnished principal home in New York and also owned a second, smaller dwelling in New York;
- (2) held a New York driver's license;
- (3) registered his cars in New York;
- (4) was registered to vote, and continued to vote, in New York;

---

<sup>24</sup>Francis correctly points out that self-serving statements of intent are relevant “entitled to little weight . . . if [they] conflict with objective facts.” *Bank One, supra*, 964 F.2d at 52. However, such statements are quite probative when, as in the case at bar, they are completely consistent with the objective, documentary evidence. *Abbott v. United Venture Capital, Inc.*, 718 F.Supp. 823 (D. Nev. 1988); *Gordon v. Steele*, 376 F.Supp. 575 (W.D.Pa. 1974). Francis has never asserted that Rose's statement of intent is inaccurate, and Rose's subjective intent is strongly supported by the eleven objective indicia listed above.

(5) maintained his principal bank and brokerage accounts in New York;

(6) was registered with the New York State court system as maintaining both his home and law practice in New York;

(7) maintained his tax status as a New York resident;

(8) was listed in various New York directories, including the New York *Lawyer's Diary*;

(9) regularly traveled to New York for periods of time;

(10) maintained the bulk of his personal and business books, records and client files, and the vast bulk of his personal property, in New York; and

(11) visited his physician, dentist and cobbler in New York.

Francis has utterly failed to meet her burden to show that Rose, virtually a life-long citizen of New York, recently changed his domicile to Massachusetts. Rather, Francis can merely assert the uncontroverted facts that Rose owned real property in Massachusetts, engaged in year-round law practices from his residences in both Nantucket and New York, spent extended periods of time on Nantucket between trips back home to New York, and maintained several bank accounts in Massachusetts.

At best, however, such allegations merely establish that Rose maintained a *residence* on Nantucket while maintaining a domicile in New York. *The fundamental allegations set forth in the preceding eleven numbered paragraphs have never been controverted by Francis.* Thus, even if the allegations as set forth in her affidavit in support of her motion to remand were all true, they would still be insufficient, as a matter of law, to overcome the presumption of Rose's domicile in New York.

Francis simply cannot satisfy her burden under these facts to rebut the presumption (created by Rose’s original and undisputed domicile in New York and by Francis’ 1989 admission regarding his New York citizenship) that Rose was a citizen of New York.<sup>25</sup>

In view of the massive documentary evidence and undisputed facts of Rose’s principal family and financial ties in New York, this Court cannot be “left with the definite and firm conviction that a mistake has been committed.” *Bank One*, 964 F.2d at 51, citing *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

Notions of judicial economy would be strongly disserved by an order for remand to the state court at this juncture. In contrast with the principal authorities cited by Francis, this case was not dismissed at preliminary stages of proceedings, leaving the parties free to pursue their remedies in state court without duplication

---

<sup>25</sup>See, e.g., *Galva Foundry Co. v. Heiden*, 924 F.2d 729, 730-31 (7th Cir. 1991) (change of domicile not shown by evidence that party bought vacation home, registered to vote, obtained a driver’s license, filed local tax returns, and stated he was a “permanent resident” of new state); *Lyons v. Salve Regina College*, 422 F.Supp. 1354, 1357-58 (D.R.I. 1976), *aff’d in relevant part*, 565 F.2d 200 (1st Cir. 1977), *cert. denied*, 435 U.S. 971, 98 S.Ct. 1611, 56 L.Ed.2d 62 (1978) (no change of domicile found, where party moved to new state, sought “temporary or permanent” employment there, told opposing party she wished to stay there, and temporarily changed her voter registration there); *Butler v. Pollard*, 482 F.Supp. 847, 850-51 (E.D. Okla. 1979) (party who maintained residence, registered to vote, belonged to union, registered his vehicle, and used doctor and dentist in California deemed citizen of California, despite establishment of second residence, mailing address, and physical presence “for considerable periods of time” in Oklahoma); *Commercial Bank and Trust Co. v. Kattar*, 307 F.Supp. 456, 458 (D. Mass. 1969) (presumption not overcome by evidence that party maintained home, conducted substantial business, registered cars and was registered to vote in other state — family-oriented contacts are the most important indicia of state citizenship); *Messick v. Southern Penn. Bus Co.*, 59 F.Supp. 799, 800-01 (D. Pa. 1945) (presumption not overcome by evidence that party worked full-time, spend approximately 75% of time, voted and maintained a driver’s license and auto registration in other state).

of effort. Rather, this case has been fully tried following three years of pre-trial proceedings at astronomical cost to the parties. Rose is now deceased, and his executors require a final determination of this matter in order to settle his estate. Unless this Court is overwhelmingly convinced “that a mistake has been committed,” justice requires that the determination below be affirmed.

**B. The District Court Did Not Err In Failing To Hold A Hearing On Francis’ Motion To Remand.**

Contrary to Francis’ assertion, there is no legal requirement that the District Court hold an evidentiary hearing on a motion to remand. As this Court has repeatedly held, district courts have wide discretion to determine which procedures to employ in resolving jurisdictional issues. *Bank One*, 964 F.2d at 51.

In *O’Toole v. Arlington Trust Co.*, 681 F.2d 94, 97 (1st Cir. 1982), this Court found:

Second, the court was under no obligation to require an evidentiary hearing. The trial court has the right to determine the procedures it will employ to decide a jurisdictional issue, *see Gibbs v. Buck*, 307 U.S. 66, 71-72 (1939), and its determination of procedure will be found lacking only if it is an abuse of discretion. We find no such abuse. Appellants had ample opportunity to present the court with facts supporting their allegation of citizenship in Florida when they responded to appellee’s motion to dismiss. *See Tanzymore v. Bethlehem Steel Corp.*, 457 F.2d 1320, 1323 (3d Cir. 1972). They chose to submit only their own affidavits, which contained only the facts recited above. Any failure on the part of appellants to fully avail themselves of the opportunity to present evidence to the court should not now be blamed upon the court’s choice not to require an evidentiary hearing.

Francis very disingenuously urges this Court that “both parties requested oral argument or a hearing on Mrs. Francis’ motion to remand.” Appellant’s Brief

at p. 19. The record clearly indicates that Francis requested solely oral argument but *did not request an evidentiary hearing*. A-23, A-65. (Rose requested neither oral argument nor a hearing. A-31-63.) Thus, Francis waived her right to an evidentiary hearing. *O'Toole*, 681 F.2d 94 at 97.

*Accord, Valedon Martinez v. Hospital Presbiteriano de la Comunidad, Inc.*, 806 F.2d 1128, 1132 (1st Cir. 1986) (“All that is required is that the court ‘afford the nonmoving party “an ample opportunity to secure and present evidence relevant to the existence of jurisdiction”” [citations omitted].); *Land v. Dollar*, 330 U.S. 731, 735, n.13, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); *Seth v. British Overseas Airways Corp.*, 329 F.2d 302, 305 (2nd Cir. 1963), *cert. denied*, 379 U.S. 858, 85 S. Ct. 114, 13 L. Ed. 2d 61 (1964); *Satz v. ITT Fin. Corp.*, 619 F.2d 738, 742 (8th Cir. 1980).<sup>26</sup>

It is significant that the documentary evidence alone in this case was dispositive of the issue of domicile. Even crediting Francis’ affidavit at face value, at best Francis established, *and Rose did not dispute*, that: (a) Rose had a “principal” law office in Massachusetts in his vacation home, and (b) that Rose had declared in corporate filings on behalf of a corporation that he was a Massachusetts resident.<sup>27</sup> Those facts were insufficient as a matter of law to overcome the probative value of the other undisputed eleven factors noted above. Because even finding those facts

---

<sup>26</sup>Discovery in this case was massive. Although Rose’s deposition was taken (A-10; A-126) and included extensive examination of jurisdictional facts, Francis never moved to renew or reargue her motion to remand.

<sup>27</sup>A person may have more than one residence but only one domicile. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d at 10.

as alleged by Francis would not have resulted in a determination of Massachusetts domicile, the District Court did not err in failing to hold a hearing. Moreover, because Rose's statements of intent were consistent with the documentary evidence, it was unnecessary for the court below to take oral testimony.<sup>28</sup>

**C. If A Hearing Were Now To Be Ordered, A Different Result Could Not Be Reached.**

As noted *supra*, Rose concedes the material factual allegations of Francis' affidavit in support of her motion to remand: that Rose had a vacation home and law office in Massachusetts, and that he had signed corporate filings as a Massachusetts resident. However, Francis has never controverted, and indeed cannot controvert, that Rose

- (1) owned a large, fully furnished principal home in New York and also owned a second, smaller dwelling in New York;
- (2) held a New York driver's license;
- (3) registered his cars in New York;
- (4) was registered to vote, and continued to vote, in New York;
- (5) maintained his principal bank and brokerage accounts in New York;
- (6) was registered with the New York State court system as maintaining both his home and law practice in New York;
- (7) maintained his tax status as a New York resident;

---

<sup>28</sup>Importantly, the cases cited by defendant for the proposition that a hearing should be required are distinguishable in this regard. See, *Bank One, supra*, 964 F.2d at 51 (hearing necessary because ambiguous documents in conflict with stated intent); *Media Duplication Svcs., Ltd. v. ADG Software, Inc.*, 928 F.2d 1228, 1236-37 (1st Cir. 1991) (hearing necessary because corporation's letterhead fails to show location of "nerve center"); *Prakash v. American Univ.*, 727 F.2d 1174, 1180 (D.C. Cir. 1984) (error to find Maryland domicile when conflicting documents indicate intention to remain in Pennsylvania).

(8) was listed in various New York directories, including the New York *Lawyer's Diary*;

(9) regularly traveled to New York for periods of time;

(10) maintained the bulk of his personal and business books, records and client files, and the vast bulk of his personal property, in New York; and

(11) visited his physician, dentist and cobbler in New York.

Nor, critically, did Francis dispute Rose's *family* contacts with New York (children's education, residence of relatives, etc.).

What is incomprehensible is how Francis imagines, in view of Rose's intervening death, a different result could be obtained by now weighing her testimonial credibility against the affidavit testimony of the absent Rose. It is simply beyond cavil that no determination of credibility can be made when an absent witness permissibly testifies by affidavit or deposition. There is no demeanor to observe and no witness to be subjected to cross-examination. Assuming on remand the District Court were to find Francis' live testimony to be credible, it would necessarily find Rose's recorded testimony on the matters, if any, in controversy to be no less credible.

Since an evidentiary hearing would be pointless, one need not be ordered. Moreover, because the undisputed eleven factors enumerated above are more than sufficient to establish Rose's domicile in New York as a matter of law, the determination of the District Court that it had diversity jurisdiction was not "clearly erroneous" (*see, fn. 33, infra*) and should be affirmed.

**POINT II**

**BECAUSE FRANCIS FAILED TO PROVE THAT  
HER LOSSES AROSE FROM ERRONEOUS LEGAL ADVICE,  
HER CLAIMS WERE PROPERLY DISMISSED**

---

**A. Introduction.**

It is commonly understood that personal-injury plaintiffs' lawyers play on the jury's sympathy for the injured plaintiff in order to overcome weaknesses in the plaintiff's proof of liability. So, too, in this case does the plaintiff's invocation of disciplinary rules and her "victim" status seek to bolster the one critical and missing element of Francis' case: she failed to demonstrate by a preponderance of evidence that she had an attorney-client relationship with Rose regarding the Store, or that her damages arose in any part from statements which could properly be characterized as legal advice. With due apologies to Judge Cardozo, proof of malpractice in the air, so to speak, will not do.

This is not an attorney disciplinary proceeding; it is a malpractice case.<sup>29</sup> Proof of violation of the standards of conduct to which attorneys are held to will not carry the day for Francis unless she can prove that Rose was *her* attorney *with respect to the Store*. Misconduct in the absence of duty is insufficient. Despite sympathies for Francis and distaste for Rose, that was an essential factual burden that

---

<sup>29</sup>As one court held, "We do not condone the actions of Attorney Brennan in this case, but believe that under Arizona law the proper remedy for his actions is the imposition of disciplinary proceedings through 17A ARS Sup.Ct. Rules, rule 29, *et seq.*, and not by the creation of a new cause of action founded on malpractice theory." *Chaplin v. Brennan*, 114 Ariz. 124, 126, 559 P.2d 680, 682 (Az. App. 1976), *overruled on other grounds*, *Donnelly Constr. Co. v. Oberg*, 139 Ariz. 184, 677 P.2d 1292 (1984).

Francis failed to carry at trial. Accordingly, the District Court's judgment should be affirmed.

**B. Francis Must Show Not Merely That Rose Was Her Attorney, But Also That Rose Was Her Attorney With Respect To The Store.**

Liability cannot be established in a legal malpractice case absent proof of the existence of an attorney-client relationship. *DeVaux v. American Home Assur. Co.*, 387 Mass. 814, 817, 444 N.E.2d 355 (1983).<sup>30</sup> Whether such a relationship exists is a question of fact, not of law, and its determination is properly the province of the trier of fact. *Page v. Frazier*, 388 Mass. 55, 61, 445 N.E.2d 148 (1983).

It is a well-settled principle of Massachusetts law that *the agreement or consent of an attorney to represent a client in a particular matter does not create an attorney-client relationship as to other affairs of the client.* *DeVaux v. American Home Assur. Co.*, *supra*, 387 Mass. at 817; *Robertson v. Gaston Snow & Ely Bartlett*, 404 Mass. 515, 522, 536 N.E.2d 344 (1989), *cert. denied*, 493 U.S. 894, 110 S.Ct. 242, 107 L.Ed.2d 192 (1989); *Page v. Frazier*, 388 Mass. at 61; *Best v. Rome*, 858 F.Supp. 271, 276 (D.Mass. 1994), *aff'd*, 47 F.3d 1156 (1st Cir. 1985).<sup>31</sup>

---

<sup>30</sup>The parties are in agreement that Massachusetts substantive law applies to this dispute. *Moore v. Greenberg*, 834 F.2d 1105, 1107, n.2 (1st Cir. 1987), requires that such agreements "ordinarily" should be honored.

<sup>31</sup>Other jurisdictions are unanimously in accord. *Delta Equip. & Constr. Co. v. Royal Indem. Co.*, 186 So.2d 454, 458 (La. 1966); *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 56 (Ia. 1977); *Brandlin v. Belcher*, 67 Cal.App.3d 997, 1001, 134 Cal.Rptr. 1, 3 (1977); *Shropshire v. Freeman*, 510 S.W.2d 405, 406 (Tex. App. 1974).

In this context, the facts of *Robertson* are highly instructive. During the mid-1970s, Gaston Snow, the defendant law firm, had performed personal services for Robertson in various matters, including the preparation of his will, which, at the time of the malpractice alleged, Gaston Snow still held in its files. In 1979, a corporate reorganization of Robertson's employer — in which Gaston Snow represented the employer — resulted in Robertson's becoming unemployed. Robertson sued for malpractice.

As with the case at bar, it was undisputed that Gaston Snow had no contract to render legal advice to Robertson in the reorganization, nor did Gaston Snow ever indicate to Robertson that it was representing his interests, nor did Gaston Snow ever invoice Robertson for any services in the matter. As with Mrs. Francis in this case, plaintiff simply believed that Gaston Snow would be representing his interests. "His claim is essentially, therefore, that he thought Gaston Snow represented him but that he failed to communicate this thought to anyone." 404 Mass. at 523. Robertson's claims were dismissed.

In the case at bar, Francis admits that she never requested that Rose act as her lawyer (A-206), she was never billed for (or paid for) any legal services (A-101, ¶127), nor did she ever tell Rose that she was asking for legal advice — as opposed to business or real estate advice, or even merely for an estimate of Nanben's payment abilities as a tenant (A-229); Francis' claims were therefore properly dismissed.

In *Robertson*, the only relationship between the parties was that of attorney and client. In the instant case, the multifarious relationship of Rose to Francis —

friend, lover, domestic partner, housemate, business partner, employer, tenant, tax-return preparer, lender, loan guarantor, lawyer — added further factual confusion to the existence *vel non* of an attorney-client relationship with respect to the Store. The trial court's evaluation of the testimony containing those ambiguous facts should be accorded great deference (see discussion *infra*, p. 33 *et seq.*).

Human beings routinely wear a multitude of hats. The fact that a person is a lawyer, or a physician, or a plumber, or a lion-tamer, does not mean that every relationship that he undertakes is, or can reasonably be perceived as being, in his professional capacity. Lawyers/physicians/plumbers/lion-tamers sometimes are husbands, or wives, or fathers, or daughters, or sports fans, or investors, or businessmen. The list is nearly infinite. To imply an attorney-client relationship, therefore, the law requires more than an individual's subjective, unspoken belief that the person with whom he is dealing, who happens to be a lawyer, has become *his* lawyer.

*Sheinkopf v. Stone*, 927 F.2d 1259, 1265 (1st Cir. 1991). In this case, Francis admits that she had a mere “subjective, unspoken belief” that Rose would act as her attorney. Francis offers no suggestion that she said anything to Rose from which he could reasonably have understood that Francis was looking to him for advice as a lawyer, rather than as a tenant, lover, friend or lion-tamer.

In reaching its decision, the District Court credited Francis' testimony and concluded that Rose could not believe that he was Francis' attorney with respect to the Store: it was Rose who had *insisted* that Francis seek independent counsel in the negotiation of the lease. “Now, the evidence that I have about whether he thought he was acting as her lawyer is what he did when the lease was signed, namely, suggesting that you [Wayne F. Holmes, Esq.] act as her lawyer. . . . the one time, which is clear there is legal — people had to sign documents and negotiate, he

suggested that she have a lawyer.” A-254. Clearly the fact that Rose had suggested to Francis the need for her to have independent representation regarding the lease demonstrated a lack of intent on the part of Rose to render legal advice regarding a matter in which he knew he had an adverse personal interest.

Having entered into a non-legal, business relationship with a non-client that had been “sanitized” by the retention of independent counsel to represent the other party’s interests, it defies logic that Rose would not be privileged to perform that relationship to its contractual conclusion and to make routine business statements to the other party without fear of liability for legal malpractice.

**C. Rose Owed No Implied Duty To Francis Because He Owed An Express Duty To Nanben.**

Alternatively, Francis argues, even if Rose was not her attorney with respect to the Store, Rose’s statements regarding Nanben’s payment of rent are actionable because Rose, an attorney, knew that Francis would rely on them. This argument fails because it is undisputed that *Nanben*, not Francis, was Rose’s master with respect to the Store (A-100, ¶17), and this very conflict of interest itself precludes a finding of breach of duty to Francis.

Absent an attorney-client relationship, the court will recognize a duty of reasonable care if an attorney knows or has reason to know a nonclient is relying on the services rendered. *See Spinner v. Nutt*, 417 Mass. 549, 552, 631 N.E.2d 542 (1994); *Robertson v. Gaston Snow & Ely Bartlett*, [citation omitted]. However, the court will not impose a duty of reasonable care on an attorney if such an independent duty would potentially conflict with the duty the attorney owes to his or her client. *See Spinner v. Nutt, supra* at 552; *Logotheti v. Gordon*, 414 Mass. 308, 312, 607 N.E.2d 1015 (1993). *See DaRoza v. Arter*, 416 Mass. 377, 383-384, 622 N.E.2d 604 (1993). To impose a duty of care where there is the potential for conflicting interests would be

inconsistent with S.J.C. Rule 3:07, Canon 4, DR 4-101, as appearing in 382 Mass. 778 (1981). The rule is founded on the realization that, if a duty was owed to the adversary of an attorney's client, an unacceptable conflict of interest would be created, and because it would be inimical to the adversary system for an adverse party to be allowed to rely on an opposing party's attorney. *Beecy v. Pucciarelli*, 387 Mass. 589, 597, 441 N.E.2d 1035 (1982). It is well-established that attorneys owe no duty to their client's adversary. *See Page v. Frazier*, [citation omitted]. Within the adversary system, "there is no room for existence of a duty running to the adversary." *Allied Fin. Servs., Inc. v. Easley*, 676 F.2d 422, 423 (10th Cir. 1982), citing *Tappen v. Ager*, 599 F.2d 376, 378 (10th Cir. 1979). The plaintiff Lamare admits that she was adverse to the defendant's client. Therefore, the defendant owed her no duty of care.

*Lamare v. Basbanes*, 418 Mass. 274, 276, 636 N.E.2d 218 (1994).

Because Francis *knew* that Rose was acting on behalf of an adverse party (A-16, ¶6; A-97, ¶5), Francis cannot recover on a claim that Rose also owed a duty to her. *Id.*

Francis' brief repeatedly, disingenuously, and in an improperly inflammatory style, suggests that Rose failed to "disclose that his financial interests were adverse to hers." Appellant's Brief at pp. 30-33. Nothing could be farther from the truth. *It was a stipulated fact in the litigation below that Francis was aware at all times of Rose's adverse interest.* A-97, ¶5. There was, as required by D.R. 5-101, "consent of the client after full disclosure." Moreover, Francis was at all times aware of her right to consult an independent lawyer, and she was completely conversant in the legal remedies available to a landlord whose tenant fails to pay rent. A-193.

**D. Where The Existence Of An Attorney-Client Relationship Is In Question, Plaintiff Is Not Entitled To The Benefit Of the Doubt.**

Francis suggests, apparently as a policy matter, that any doubt about whether an attorney-client relationship exists should be resolved in favor of the client.<sup>32</sup>

Francis thereby seeks to stand several hundred years of tort law on its head. Very few principles are better settled than that the plaintiff bears the burden of proof of each element of her claim by a fair preponderance of the evidence. *See, e.g., Loeb v. Textron, Inc.*, 600 F.2d 1003, 1008-10 (1st Cir. 1979).

Clearly the S.J.C. may impose a standard of *uberrima fides* on attorneys and discipline them for deeds that would, if committed by a non-lawyer, not be wrongful. But this is not a disciplinary proceeding. To suggest that any doubt regarding the existence of an attorney-client relationship should be resolved in favor of finding such a relationship absolves the plaintiff of a burden that she must carry as a fundamental factual element of the cause of action for malpractice. Absent *proof* that the defendant is acting *qua* attorney, a legal malpractice action is not maintainable. *DeVaux v. American Home Assur. Co.*, 387 Mass. at 817; *Page v. Frazier*, 388 Mass. at 61; *Sheinkopf v. Stone*, 927 F.2d at 1265.

Quixotically, Francis argues that the trial court “implicitly ruled” the existence *vel non* of an attorney-client relationship, or whether certain advice is prop-

---

<sup>32</sup>Francis apparently fails to see any epistemological difficulties with this circuitous reasoning.

erly characterized as legal advice, to be a “mixed question of law and fact.” Apparently the basis for this assertion is that Judge Lindsay refused to accord Francis the benefit of the doubt — doubt that Francis admitted that she both created and did nothing to dispel. Appellant’s Brief at pp. 28-29.

Massachusetts substantive law — which the parties agree applies — provides that the existence of such a relationship is solely a question of fact. *Page v. Frazier*, 388 Mass. at 61.

The District Court had the opportunity to listen to Francis’ testimony to the effect that Francis had never requested Rose to act as her lawyer (A-206), that she had never been billed for (or paid for) any relevant legal services (A-101, ¶27), that she never told Rose that she was asking for legal advice (A-229), and that she knew Rose did not practice landlord-tenant law (A-107). The District Court had the opportunity to listen to Francis’ incredible testimony that, although she had read the Nanben lease (A-189) and had been advised by independent counsel at Rose’s insistence (A-222-23), she never understood that she was leasing her store to a corporation rather than to Rose personally (A-189). And, perhaps most importantly, the District Court looked on incredulously as Francis dissembled regarding both the substance of Rose’s purported legal advice (A-216) and the timing of the purported advice (A-225).

At its essence, nothing about the Nanben lease of the Store suggests that it was ever intended by the parties to be an arm’s-length business transaction (see p. 11, *supra*). The entire transaction was based on the intimate personal relationship

between the parties. A-202. Not until after the parties' romantic relationship had broken up did Francis ever seek the purported "advice" from Rose that is at issue in this case, and then only literally on the eve of the eviction action, when substantially all of the lost rent had already accrued.

The evidence regarding the role in which Rose was acting was admittedly ambiguous. Where the evidence is susceptible of two plausible interpretations, the trier of fact's choice between them cannot be clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. at 574; *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1080 (1st Cir. 1995).<sup>33</sup>

On this record, it cannot be said that Judge Lindsay's findings were clearly erroneous.

---

<sup>33</sup>Rule 52(a), *Fed.R.Civ.P.*, provides that "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." As this Court has previously held, "To conclude that the trial court was clearly erroneous, it is not enough that we find evidence in the record to support [appellant's] position. Rather, we must find the second opinion to be unsupported by any permissible view of the evidence." *Nat'l Metal Finishing Co. v. Barclays-American/Comm'l, Inc.*, 899 F.2d 119, 125 (1st Cir. 1990). *Accord, O'Brien v. Papa Gino's of America, Inc.*, 780 F.2d 1067, 1076 (1st Cir. 1986); *Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 152 (1st Cir. 1990); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 457 (1st Cir. 1992).

**POINT III**

**THE DISTRICT COURT PROPERLY EXCLUDED  
THE TESTIMONY OF PLAINTIFF'S LAST-MINUTE EXPERT**

Rule 702, *Fed.R.Evid.*, permits the testimony of an expert witness to be admitted only if his “specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . .”

As a critical threshold issue, absent a finding of an attorney-client relationship,<sup>34</sup> testimony regarding the standard of care owed by an attorney to his client was irrelevant and therefore properly excluded. Rule 402, *Fed.R.Evid.*

But even if an attorney-client relationship had been found by the trial court to have existed, it is difficult to imagine how the testimony of Francis’ proffered expert witness, Daniel O. Mahoney, Esq., would “assist the trier of fact” — the court sitting without a jury — as required by Rule 702.

It is clear that Mr. Mahoney lacked any “specialized knowledge” not already within the expertise of the Court itself. As more particularly appears from Francis’ interrogatory answers (A-84-93), Mr. Mahoney has never written a single publication on the subject matter of his intended testimony, nor had he ever previously served as an expert witness with respect to such matters. He possesses no specialized education or training in those matters. He never served on any boards, organizations or committees related to, or having oversight of, the subject matter of his in-

---

<sup>34</sup>Notably, Mr. Mahoney did not propose to testify on the standard of care owed by an attorney to a non-client. A-87-87.

tended testimony. He has never held any elective office or appointment related to those matters. He has never been affiliated with or taught at any educational institution or continuing-education entity.

Moreover, as the interrogatory answers make clear, Mr. Mahoney's intended testimony related solely to his views regarding the applicability of disciplinary rules to Rose's conduct — matters solely of law.

In brief, Mr. Mahoney, who is unquestionably a very distinguished trial lawyer and credit to the justice system in every way, offered no expertise that the trial judge could not obtain from a trip to the library.

Ordinarily, expert testimony is required in order to establish the standard of care in a legal malpractice action. See, for example, *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992); *Glidden v. Terranova*, 12 Mass. App. 597, 427 N.E.2d 1169 (1981).

However, when the trier of fact's expertise alone permits such a determination, no expert testimony is required. *Varnum v. Martin*, 15 Pick. 440 (1834) (cited in *Glidden*); *Fall River Savings Bank v. Callahan*, 18 Mass. App. 76, 463 N.E.2d 555 (1984) ("Use of legal authorities, because of the special competence of judges to evaluate them, is distinguishable from professional texts in other disciplines . . . .").<sup>35</sup>

---

<sup>35</sup>Massachusetts substantive law, not federal common law of the Third or Seventh Circuits, as urged by Francis, governs the proof necessary in a legal malpractice action. Massachusetts law does not unflinchingly insist on expert testimony in all legal malpractice actions.

The determination of the qualification of an expert and admission of expert testimony are always committed to the sound discretion of the trial court. *United States v. Angiulo*, 847 F.2d 956 (1st Cir. 1988), *cert. denied*, 488 U.S. 852, 109 S.Ct. 138, 102 L.Ed.2d 110 (1988), *cert. denied*, 488 U.S. 928, 109 S.Ct. 314, 102 L.Ed.2d 332 (1988).

In this case, because of the combination of surprise, late disclosure, and lack of any meaningful “value added” of Mr. Mahoney’s testimony (in view of the trier of fact’s expertise), Mr. Mahoney’s testimony was properly excluded.

Perhaps most importantly in this context, Francis omits to mention in her argument Rose’s stipulation not to raise Francis’ failure to adduce expert testimony regarding the standard of care as an objection to a finding of liability on the part of Rose.<sup>36</sup> Thus, even if it had been error to exclude Mr. Mahoney’s testimony, such error was harmless.

---

<sup>36</sup>Rose does not dispute that, if Rose had been acting as Francis’ attorney with respect to the Store lease, he would have been held to the standards of his profession. Those standards are not and never have been in controversy. Rose does not concede that such a relationship existed, or that if it existed, any legal advice was ever rendered, nor does Rose concede the issues of causation, contributory fault, avoidable consequences or damages.

## **CONCLUSION**

For all of the aforementioned reasons, the undersigned respectfully requests that this Court affirm the District Court's judgment in favor of Rose.

Dated: Greenwich, Connecticut  
November 30, 1995

Respectfully submitted,

---

HILARY B. MILLER  
*Attorney for Defendants-Appellees*  
112 Parsonage Road  
Greenwich, Connecticut 06830-3942  
(203) 861-6262