

Close the File on Malpractice Claims

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As most lawyers know, the basic statute of limitations for professional liability claims in California is one year. (See Cal. Code Civ. Proc. § 340.6.) But there are exceptions to that rule, and—as experienced malpractice litigators are well aware—that single year can turn into a considerably longer time period if the defendant-lawyer fails to take a few simple protective steps at the end of a case or client matter.

EVOLUTION OF THE LAW

Prior to the enactment of section 340.6 in 1977, attorney malpractice actions in California were governed by a strict two-year limit that began running at the occurrence of the negligent act or omission. However, courts eventually began to recognize that this strict rule was unfair, and they adopted a “discovery rule”—effectively providing that the limitations period for a legal malpractice action would begin only when the client discovered, or should have discovered, the facts essential to the malpractice claim. (*Neel v. Magna, Olney, Levy, Cathcart & Gelfand,*

6 Cal. 3d 176, 186, 194 (1971); *Budd v. Nixen*, 6 Cal. 3d 195, 200 (1971).)

In practice, the discovery rule carried with it inherent delay, which subjected attorneys to open-ended liability and greater difficulty in securing affordable errors-and-omissions insurance. The California Supreme Court therefore suggested in the *Neel* case that some outside parameters on the statute of limitations might be desirable. The Legislature took heed and, six years later, enacted section 340.6 with a one-year limitations period running from the time of actual or constructive discovery of the alleged malpractice; the statute also carries a firm four-year outside limit.

The statute balances the interests of “clients, who should not be prevented from obtaining relief when they could not have become aware of professional negligence, and attorneys, who in order to obtain malpractice coverage, needed some definite outside limitations period.” (*Beal Bank, SSB v. Arter & Hadden, LLP*, 42 Cal. 4th 503, 511 (2007).)

Section 340.6 applies to virtually any claim against an attorney that arises from the performance of legal services. (See *Vafi v. McCloskey*, 193

Cal. App. 4th 874 (2011) (malicious prosecution claim governed by one-year period).) The only exception is a fraud claim. (See § 340.6(a).)

And if an action involves a written instrument that will become effective only in the future, upon the happening of a specified event—such as the death of a will’s testator—the limitations period starts when that specified event occurs. (See § 340.6(b).)

TOLLING THE STATUTE

Section 340.6 contains several unique tolling provisions, which are designed to protect clients from the clock running out too quickly on a malpractice claim. In general, the statutory clock stops if:

- the plaintiff has not yet sustained actual injury;
- the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged malpractice occurred;
- the attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney (this provision tolls only the four-year period); or
- the plaintiff is under a legal or physical disability that restricts the plaintiff’s ability to commence legal action. (§ 340.6(a)(1)–(4).)

Appellate courts have restricted tolling to these four specific categories, and they have consistently refused to create judicial exceptions, such as equitable estoppel or waiver. (*Beal*, 42 Cal. 4th at 512.)

In many cases, it is difficult to determine when the statute begins

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to run and when it expires. Among the questions to ponder are whether (and when) the client has actual or constructive knowledge of the facts constituting the alleged malpractice; whether the client has sustained actual injury; and when the attorney ceases to represent the client regarding the “specific subject matter” in which the alleged act or omission occurred. The last of these inquiries can be particularly vexing, as there may be no clear dividing line between one client matter and another.

KNOWLEDGE OF FACTS

The key here is establishing when the client discovered the facts that constitute the wrongful act or omission, *not* when the client concluded that “legal malpractice” occurred. (*Truong v. Glasser*, 181 Cal. App. 4th 102, 110 (2009).)

Actual knowledge often can be established by third-party communications to the client, such as an adverse IRS audit determination in a tax matter. Reconstructing the context within which the client could have discovered the attorney’s error, and then demonstrating objectively that a “reasonably diligent client” should have obtained such knowledge, is considerably more challenging without such objective third-party evidence. However, courts have strictly construed the constructive-knowledge provision and often hold that the “means of knowledge are equivalent to knowledge” in finding that clients did not act prudently and diligently after being placed on “inquiry notice.” (*Nat’l Auto. & Cas. Ins. Co. v. Payne*, 261 Cal. App. 2d 403, 409 (1968).) Even so, the attorney bears the burden of proof regarding the client’s actual or constructive knowledge of the facts constituting the alleged malpractice. (*Samuels v. Mix*, 22 Cal. 4th 1 (1999).)

ACTUAL INJURY

The state Supreme Court has eliminated a great deal of uncertainty with respect to the actual injury requirement. In *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (18 Cal. 4th 739 (1998)),

the court held that the relevant inquiry is “whether the plaintiff has sustained any damages compensable in an action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of professional services.” The court confirmed that the fact of injury, not the amount, is the relevant consideration. The court followed the reasoning of an intermediate appellate decision that further clarified these concepts: “[W]hen malpractice results in the loss of a right, remedy, or interest, or in the imposition of a liability, there has been actual injury regardless of whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred.” (18 Cal. 4th at 750, quoting from *Foxborough v. Van Atta*, 26 Cal. App. 4th 217, 227 (1994).)

CONTINUOUS REPRESENTATION

The tolling of a malpractice claim during “continuous representation” is a situation lawyers encounter frequently.

Legal malpractice exposure can continue well beyond one year if the defendant-lawyer fails to take a few simple protective steps.

For example, assume a lawyer handles a real estate transaction, does the work to close the deal, and sets the file aside without doing anything more on the matter. Five years later, the lawyer provides other real estate services to the client involving the same property. Later still, the client files a suit for malpractice against the lawyer arising from the initial transaction: She alleges that the lawyer made an error in documenting the purchase, thus adversely impacting the client’s title—a circumstance the client only discovered six months ago.

At first blush, it may seem that the clock had run out on the client’s ability to sue over the original purchase and sale. However, in response to a statute of limitations defense, the client

could make a strong case that the lawyer continued to represent her during the entire period regarding the same subject matter, thus tolling the limitations period under section 340.6(a)(2). California courts have not recognized a bright-line rule governing the continuous representation tolling provision. Instead, judges typically look to the facts of the particular case.

The continuous representation rule was “adopted to avoid disrupting the attorney-client relationship with a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.” (*Laird v. Blacker*, 2 Cal. 4th 606, 618 (1992).) As a general proposition, as long as there are unsettled matters tangential to a case, and the attorney continues to assist the client with such matters, the courts will likely conclude that continuous representation exists and the statute

of limitations will be tolled on a malpractice claim. (*O’Neill v. Tichy*, 19 Cal. App. 4th 114, 121 (1993).)

SPECIFIC SUBJECT MATTER

Tolling during continuous representation does not occur with respect to every ongoing representation. It relates only to legal work that concerns the same specific subject matter in which the malpractice allegedly occurred. Courts have held that “once representation on that matter ends, a client must bring timely suit, notwithstanding that the attorney may continue to represent the client on a range of matters and a direct suit against the attorney may interfere with the attorney-client relationship in all other matters.” (*Beal*, 42 Cal. 4th at 514 & fn. 8.)

In litigation matters, the courts define *specific subject matter* more narrowly as the claim arising from the event that led to the filing of the malpractice suit. One court held that “an attorney ‘continues to represent’ the client in pending litigation until the representation is terminated ‘by operation of law, withdrawal or discharge.’” (*Hensley v. Caietti*, 13 Cal. App. 4th 1165, 1170 (1993).) The issue of representation should be viewed from the client’s perspective; thus, representation ended when the client retained new counsel, not on the date a substitution of attorney form was executed. (*Hensley*, 13 Cal. App. 4th at 1172–1173.) Another court thought the test should be objective. (See *Crouse v. Brobeck, Phleger & Harrison*, 67 Cal. App. 4th 1509, 1528–1529 (1998).) However, California courts have not had occasion to comment on the frequent situation where an initial transactional representation evolves into litigation. Does the litigation then constitute a new specific subject matter for purposes of continuous representation?

DISCONTINUING REPRESENTATION

A case handled by the authors illustrates the problems inherent in defeating the continuous representation tolling provision. The claim involved a real estate development project spanning many years. After the developer finally obtained preliminary approval, the local city council converted a small but valuable portion of the property to open space, thus precluding the developer from selling lots in the most desirable upper elevations of the property. His attorney sued to challenge the city council’s actions. The case was filed within the 90-day limitations period, but the attorney failed to serve the summons and complaint on the public entity within the same period. The case was dismissed as having been untimely served.

The attorney then pursued an unsuccessful appeal and even petitioned the California Supreme Court for review. The high court’s order denying review was promptly sent to the client, but the

client’s malpractice claim regarding the “lost” development rights to the open space portion of the property was not filed until more than two years later.

While the appeal was pending, the attorney gave the client advice concerning other aspects of the real estate development process and assisted the client’s other counsel in an unrelated environmental suit. After review was denied, the lawyer advised the client on additional steps he might take to force the city to compromise the open space designation, none of which were acted upon.

The real estate developer/malpractice plaintiff challenged the attorney’s statute of limitations defense, claiming that by offering advice about overcoming the city’s actions and aiding the client’s other counsel in the subsequent environmental case, the attorney had continued to represent him in connection with the proposed real estate development. The attorney contended that the specific subject matter in which the claimed negligence occurred was limited to the narrow issue of the validity of the city council’s open space designation and the untimely litigation seeking to challenge such actions, which ended when the state Supreme Court denied review.

Unfortunately, the attorney had not used a new engagement letter for the litigation against the city and did not create a separate billing file for the lawsuit or the appeal, leaving the continuous representation issue open to dispute. Had the attorney clearly segregated the various aspects of his representation of the client, it is far more likely that the client’s assertion of continuous representation would have failed.

CLOSE THE FILE!

If a legal matter is truly concluded, a lawyer can take unilateral steps to avoid a later claim of continuous representation. If a nonlitigation matter ends and no matters in controversy remain, the lawyer can confirm that fact in writing to the client and utilize some internal mechanism to administratively “close the file.” If the client later contacts the lawyer

with issues related to (but not directly concerning) the earlier matter, the lawyer should open a *new file* under a *different billing number* and prepare a *new engagement letter* specifically stating that the more recent representation involves a new and different subject matter.

This becomes even more important in a general retention, where the attorney acts as the client’s lawyer in a range of matters over a lengthy period. Lawyers should spend the extra few minutes at the outset of each new project to segregate the administrative aspects of the representation (new file, new billing number, perhaps even a new retainer deposit) and inform the client as this occurs.

At the other end of the relationship, the same protocol applies in reverse: Close out each matter when concluded, and so inform the client.

When litigation is involved, if a given dispute or case concludes, a lawyer should send the closing documents to the client (and, if applicable, the dismissal that was filed with the court); then the lawyer should promptly close the file. Beware of lingering negotiations over matters in controversy, such as a memorandum of costs. If the case involves ongoing proceedings *after* an interim settlement—as happens in marital dissolution proceedings—the lawyer should consider filing a formal notice of withdrawal or preparing a letter for the client’s signature acknowledging that representation as to the matter has ceased. Most courts have placed great weight on the client’s recognition and acknowledgment that a lawyer’s representation has concluded when evaluating tolling of the statute of limitations.

Taking the time to close a file (or open a new engagement) may seem tedious, but these simple steps can make all the difference when it comes to the statute of limitations on a claim for legal malpractice. 🗑️

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- 1 Before California Code of Civil Procedure section 340.6, malpractice actions had to be filed within two years of the client's decision to fire the attorney.
 True False
- 2 Section 340.6 generally requires a client to commence a malpractice suit within one year after discovering the attorney's error.
 True False
- 3 Malicious prosecution suits are not subject to section 340.6.
 True False
- 4 The Legislature left it up to the courts to decide whether other tolling doctrines should be added to those set forth in section 340.6.
 True False
- 5 The California Supreme Court permits tolling under principles of equitable estoppel.
 True False
- 6 If a malpractice plaintiff justifiably relies on a lawyer's erroneous statement regarding the statute of limitations, the court will permit the case to proceed.
 True False
- 7 Until a successor attorney advises a plaintiff that he or she has a potential malpractice claim against a former attorney, the limitations period does not commence running.
 True False
- 8 For the statute of limitations to commence, a client must discover facts constituting negligence *and* suffer compensable injury.
 True False
- 9 The defendant-attorney bears the burden of proving that the client could have discovered the facts underlying the malpractice claim through reasonable diligence.
 True False
- 10 If the client testifies that he trusted his lawyer and did not believe him to have done anything wrong, the court cannot find that the client should have discovered the facts constituting the alleged malpractice.
 True False
- 11 Before determining whether the client has sustained actual injury, courts will first determine whether the claimed damages exceed the jurisdictional minimum.
 True False
- 12 If the plaintiff has suffered impairment of a remedy but not monetary loss, the statute of limitations does not commence.
 True False
- 13 The continuous representation tolling provision was intended to let attorneys attempt to fix their mistakes without causing the client's time to file suit to run out.
 True False
- 14 When a fired attorney tries to negotiate a resolution of the underlying claim, representation does not continue for purposes of the malpractice statute of limitations.
 True False
- 15 An attorney who negligently prosecutes (and loses) a tort action and thereafter prepares the client's tax return engages in continuous representation for purposes of tolling the statute of limitations.
 True False
- 16 If the client fires his or her attorney, the representation will be deemed to have ended at that time.
 True False
- 17 Courts have always applied an objective standard in evaluating whether an attorney continues to represent a client for purposes of the statute of limitations.
 True False
- 18 The issue of continuous representation is determined from the client's perspective.
 True False
- 19 As a protective measure, attorneys should inform clients in writing when representation has ended.
 True False
- 20 It is a good idea (and a protective office practice) to open separate files for separate matters.
 True False

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