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The timeliness of attorney malpractice claims

Earn MCLE credit reviewing the applicability of the “continuous representation” rule.



SCOTT P. DIXLER

Attorney, Horvitz & Levy LLP

Scott has significant experience working as appellate and trial counsel to defend public entities, employers, premises owners, financial services entities and others in matters involving catastrophic injuries, class actions, business torts, intellectual property, contracts, securities, antitrust and discrimination claims.

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Statutes of limitations serve important public purposes. As the California Supreme Court has explained, statutes of limitations “promote the diligent assertion of claims, ensure defendants the opportunity to collect evidence while still fresh, and provide repose and protection from dilatory suits once excess time has passed.” *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal. 4th 1185, 1191 (2013). In California, claims for attorney malpractice are subject to a one-year statute of limitations. Code Civ. Proc. Section 340.6(a)(2).

But California’s one-year statute of limitations for attorney malpractice claims is itself subject to a significant limitation: Under the “continuous representation” rule, the statute of limitations begins to run only once the attorney no longer “continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.” *Id.* This rule advances important policy objectives in its own right. As the California Supreme Court explained in *Beal Bank, SSB v. Arter & Hadden, LLP*, 42 Cal. 4th 503, 511 (2007), the rule is meant to “avoid the disruption of the an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize 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.” In view of the importance of the continuous representation rule, it is critical for all parties to a malpractice suit (or impending malpractice litigation) to determine when an attorney’s representation of a client ends.

While the continuous representation rule is easily stated, it has proved difficult to apply in some circumstances. The boundaries of the attorney-client relationship can at times be nebulous, and parties to malpractice litigation often dispute when an attorney’s representation of a client actually ceased. The Legislature has provided little specific guidance in this area — “Code of Civil Procedure 340.6 does not expressly state a standard to

guidance in this area — “Code of Civil Procedure 340.6 does not expressly state a standard to determine when an attorney’s representation of a client regarding a specific subject matter continues or when the representation ends, and the legislative history does not explicitly address this question.” *Gonzalez v. Kalu*, 140 Cal. App. 4th 21, 28 (2006). This uncertainty has been exacerbated by an absence of recent case law applying the continuous representation rule.

This past year, different panels of the California Court of Appeal decided two significant continuous representation cases. In both of these cases, the appellate courts emphasized that determining when legal representation ends requires an objective analysis focusing on what a reasonable client would believe regarding his or her continued representation by a lawyer, as opposed to what a particular plaintiff may subjectively hope or believe in that regard. Because this objective inquiry presents a question of law, as opposed to a question of fact, these recent decisions illustrate that statute of limitations issues in attorney malpractice cases can often be resolved before trial (i.e., through a summary judgment motion). These decisions thus add certainty to attorney malpractice litigation and provide malpractice defendants with the opportunity to defeat such claims before incurring the cost and uncertainty of a trial.

The first of the recent pair of continuous representation decisions was *GoTek Energy, Inc. v. SoCal IP Law Group, LLP*, 3 Cal. App. 5th 1240 (2016), decided by Division 6 of the 2nd District Court of Appeal. There, the attorneys withdrew their representation after their client informed them that it planned to assert a malpractice claim against the attorneys. The former lawyers asked the client where they should send the case file. The client responded, and then sued the former lawyers for malpractice. The former lawyers contended that their representation of the client terminated when they told the client they were withdrawing and asked where to send the case file, or on the day after that, when the client responded. The client countered that the representation ended later, when the former lawyers actually sent the case file to the new attorneys.

In siding with the former lawyers in the subsequent malpractice action, the Court of Appeal emphasized the objective nature of the continuous representation inquiry. The Court of Appeal explained that whatever the client may have subjectively believed, any reasonable client would believe its relationship with its attorneys had ended when those attorneys told the client that they must withdraw due to a planned malpractice action. The result of this objective analysis was the dismissal of an untimely malpractice suit.

Shortly after *GoTek*, the 3rd District Court of Appeal handed legal malpractice defendants another win in *Flake v. Neumiller & Beardslee*, 9 Cal. App. 5th 223 (2017). In that case, former counsel filed a formal motion to withdraw from representing a client. The client then sued his former counsel for malpractice more than one year after the former counsel filed a motion to withdraw, but less than one year after the motion to withdraw was granted by the court in the underlying action. The question, then, was when former counsel's representation of the client ended under the continuous representation doctrine.

The Court of Appeal sided with the former counsel, concluding that the attorney's continuous representation of the client ended when the attorney's motion to withdraw as counsel was *filed*, and not when the motion was ultimately *granted*. Because the filing of a motion to withdraw would objectively put a reasonable client on notice that the attorney's legal representation had ended, the client's subjective understanding of the relationship was immaterial.

Given the important public policies served by the continuous representation rule, and the relative paucity of case law addressing the topic, the recent decisions in *Flake* and *GoTek* provide the bench and bar welcome guidance. These decisions emphasize that determining the end of an attorney-client relationship depends on objective, rather than subjective factors. Thus, even if a client believes that a lawyer still represents him, the statute of limitations on a legal malpractice claim will begin running even if the client's subjective belief is unreasonable. Further, in emphasizing that determining the end of legal representation presents a legal question, these decisions provide defendants with a powerful tool for combating malpractice litigation before trial.