

THE STATUTE OF LIMITATIONS AND LEGAL MALPRACTICE: PROTECTING AGAINST THE REVIVAL OF STALE MALPRACTICE CLAIMS

By:

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A former client calls and asks to see you regarding a matter. With thoughts of a new engagement in mind, you agree to the meeting. He appears at the appointed time and asks you to discuss your recollection of a prior legal opinion or service you provided concerning a matter you handled nearly six or seven years ago. The question seems innocent enough, so off the top of your head you state your recollection of the matter. The client graciously thanks you and insists upon paying you “for your time.” You accept the offer of payment and forget about the whole affair. A month or so after this visit, you are served with a lawsuit by your former client accusing you of legal malpractice on the matter you closed nearly seven years earlier.

Your first reaction, after notifying your insurance carrier, is that the claim is certainly time barred under the two year statute of limitations applicable to legal malpractice actions. You stopped providing legal services to the client over seven years ago when you closed the file. Because a plaintiff must institute a lawsuit within two years of the date the attorney “discontinues serving” the client “as to the matters out of which the claims for malpractice

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arose” (aside from the six (6) month discovery rule), you are certain the client’s claims against you are dead.

You may be surprised to learn, however, that:(1) the trial court may disagree with you on what constitutes the “matter” you thought made up your prior representation; (2) that your discussion of the prior closed matter with the client (which he now undoubtedly will allege involved legal “advice” and not just your mere recollection of events), constituted "professional" work concerning the prior "matter"; and (3) your acceptance of a fee “for your time”, no matter how minor, constitutes an acknowledgment by you that your representation of the client was "*continuous*" through the date of your most recent meeting -- seven years after the matter was closed!

In a number of published and unpublished Michigan Court of Appeals cases, the Court continues to grapple with the scope and meaning of the two year *discontinuance rule* in the legal malpractice context. Recent cases have opened the door to the possible revival of stale malpractice claims for the unwary practitioner.

The Two Year Discontinuance Rule

The statute of limitations for actions charging malpractice against an attorney is embodied in MCLA 600.5805(4), which sets out the two year time limit for “an action charging malpractice.” Further, MCLA 600.5838(1) attempts to define when a malpractice action *accrues* for purposes of triggering the two year period:

- (1) . . . [A] claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues ***at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matter out of which the claim for malpractice arose***, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. (Emphasis added)

The statute, on its face, triggers the running of the two year limitations period when (1) an attorney “discontinues serving” (2) a client in a “professional . . . capacity” (3) as to “the matters out of which the claim for malpractice arose”

In analyzing the application of the “discontinuance” rule, some courts are placing too much emphasis on the last date the attorney “discontinued serving” the client, instead of attempting to analyze the nature of the “professional” service performed and the “matter” that makes up the malpractice claim at issue. As a result, a danger exists that courts may gloss over the limiting language of the statute which requires a court to also consider whether the claim of malpractice arises from the legal “matter” that makes up the last date of “professional” service by the attorney. The last contact with the client may simply not have any legal or “professional” connection to the “matter out of which the malpractice arose.”

Analyzing “The Matter” Out Of Which The “Malpractice Arose”

How the court defines the “*matter* out of which the claim for malpractice arose” is vital to the final analysis of whether a claim is viewed as stale and time barred by the two year period. There are a number of approaches -- some sound and unsound -- courts have used to define the “matter out of which the claim arose”. A court could:

1. Look at the parties retainer agreement to determine how they defined the “matter” or professional undertaking by the attorney (See Gabriz v Wechter, unpublished, rel’d 12/5/97, MLW#31361)
2. Look at the attorney’s course of conduct to determine if, through such conduct, the attorney has acknowledged the continuation of the representation of the client (See Maddox v Burlingame, 205 Mich App 466 (1994)).
3. Look to the plaintiff’s perception of the scope of the lawyer’s representation and whether the plaintiff believed the representation continued, even if the representation involved litigation and non-litigation matters (See Jakubiak v Abood, Abood & Rheume, unpublished, 1996 Mich App LEXIS 446 (1996);

4. Determine, as a matter of law, that a particular professional undertaking is intrinsically insular and separate, even if the attorney is representing the client on a number of different but related matters which may even overlap in time (See Miller v Kinney, Cook & Linderfield, unpublished, rel'd 4/11/97, MLW #28932), or
5. Some combination of the above.

Perhaps the least controversial situation occurs when there is a retainer agreement which specifically identifies the scope of the attorney's representation with the client, thereby defining the scope of the professional "matter" or representation. Being guided by the written retainer agreement comports with the *contract* based nature of the attorney-client relationship. See Fletcher v Bd of Ed of School Dist Fractional #5, 323 Mich 343, 348(1948); Scott v Green, 140 Mich App 384, 400(1985) (Kirwan, J. concurring). Indeed, the oft repeated "cardinal" rule of contract interpretation is to discern and then effectuate the actual intent of the parties. Further, looking to the manner in which the parties defined the representation accommodates the attorney's and client's right to enter into a contract of their own making. Under the Michigan Rules of Professional Conduct, an attorney is permitted to (and should) expressly define the scope of the representation and, further, can *limit* the nature of the representation to the anticipated legal work at hand. See Michigan Rules of Professional Conduct, §1.2(B) ("A lawyer may limit the objectives of the representation if the client accepts after consultation).

In a recent 1997 Michigan Court of Appeals decision, Gabriz v Wechter, unpublished, released 12/5/97, MLW #31361, the Court resolved the issue of determining the "matter out of which the malpractice arose" by looking to the executed retainer agreement. The case also is instructive on the danger of describing the representation in broad, undefined terms.

In Gabriz, the attorney represented the plaintiff in an original divorce proceeding and, later, with regard to the transfer of assets per the divorce settlement and a subsequent post-

judgment motion to enforce the alimony provisions of the divorce judgment. Plaintiff sued the attorney more than two years after entry of the divorce judgment, but within two years of the post-judgment petition regarding alimony. The malpractice allegations centered on alleged failures in discovery regarding the original divorce proceeding.

The defendant-attorney argued that the professional tasks making up the malpractice case arose out of the original divorce proceeding that had concluded over two years before the suit was filed and, therefore, plaintiff's claims should be time-barred. The Gabriz court rejected this argument based on the parties retainer agreement, which the Court ruled defined the "matter" in question for statute of limitations purposes. The agreement stated that defendant attorney agreed to provide "legal services in a domestic relations matter" and that defendant firm was retained "as attorneys for all matters *relating to the legal action.*" (Id. p. 2). Based on this broadly defined scope of engagement, the Gabriz Court properly determined that "defendant's services were not merely retained for various discrete tasks related to a 'domestic relations matter', but 'for *all matters*' " relating to the divorce action, including the "post judgment representation." Consequently, plaintiff's claim was deemed timely filed.

What if the parties failed to enter into any retainer agreement? How should the court determine the "matter" out of which the malpractice arose? When should a court construe an attorney's actions as "continuous representation" i.e., how should a court assess a situation where the parties have a long standing relationship with respect to multiple related and/or unrelated legal matters that overlap or where there are long time gaps in the representation of a particular client?

In order to implement the essential policies underlying the limitation statute -- preventing stale claims, preserving the accuracy of testimony and physical or documentary evidence, and

penalizing plaintiffs for sitting on their rights -- a court should focus on *all* elements of the *discontinuance* rule and not just the last date of service by the attorney. Two recent unpublished cases underscore the varying results that may occur if a court emphasizes the last date of service aspect of the statute without an appropriate analysis regarding the *nature* of the professional *matter* that the alleged malpractice arises from.

In Miller v Kinney, Cook & Linderfield, unpublished, released 4/11/97, MLW #28932, the Michigan Court of Appeals underscored the importance of determining the “underlying matter” for which the attorney was hired. In Miller, the trial court’s statute of limitations dismissal was affirmed. The Miller Court held that the legal malpractice suit regarding errors and omissions in *pre-judgment* divorce proceedings was filed too late when it was filed over two years later, but within two years from the last date of service on *post-judgment* matters relating to the same divorce case.

The plaintiff’s efforts to characterize defendant’s representation as “continuous service” for statute of limitations purposes was *rejected*, even though “*post-judgment* proceedings were numerous and often completion of one task overlapped the commencement of another.” (Id. p. 2). The Miller court, analyzing the nature of the specific legal services provided and relying on the “the matters out of which the claim for malpractice arose” language of MCLA §600.5838(1), viewed defendant’s representation as having been “undertaken on a task-by-task basis.” (Id.). Consequently, the court viewed all claims arising from the original task -- the original *pre-judgment* divorce proceeding -- as time barred: “[O]nce plaintiff’s divorce judgment was *entered*, *defendant’s representation* of plaintiff’s *pre-judgment* of divorce *ended*.” (Id.)(Emphasis added). The defendant attorney's representation on various subsequent matters related to the divorce "constituted specific legal services that ended when each assignment was completed." (Id. p.2).

The court noted the lack of any evidence to demonstrate that the "parties intended continuous representation." (Id.).

Compare Jakubiak v Abood, Abood & Rheume, unpublished, 1996 Mich App LEXIS 446 (1996), where the Court of Appeals refused to overturn the trial court's denial of Summary Disposition. This decision demonstrates a heavy emphasis on the last date of service. In Jakubiak, the plaintiff sued over the alleged mishandling of a pre-judgment divorce proceeding. Suit was filed more than two years after the final divorce judgment, but within two years of other legal services provided by defendant attorneys covering a period of three additional years after the divorce judgment was entered.

The other legal work included management of the minor children's trusts, a real estate transaction, drafting of a will, and distributing assets acquired in the divorce. The Jakubiak Court conceded that it had insufficient evidence to connect the distribution of assets or the trusteeship issues to any "continuing obligations" imposed as a result of the divorce judgment. The Court noted that plaintiff had testified in deposition that she considered all the legal work performed to be connected to her original divorce proceeding. In short, because of the variety of legal matters the attorneys worked on after the divorce judgment and the length of the professional relationship, the Jakubiak Court affirmed the trial court's conclusion that the representation had continued through the last date of service on plaintiff's various legal matters -- three years after the entry of amended divorce judgment that made up the malpractice claim.

Finally, attorneys need to avoid conduct that could be construed as acknowledging the continuation of a client relationship after a prolonged lull of activity and after the matter was closed. In Maddox v Burlingame, 205 Mich App 466 (1994), the Michigan Court of Appeals held that an attorney's last date of billed legal services was the date of accrual, notwithstanding the fact

that the sale of business transaction out of which the alleged malpractice arose had been completed years earlier. In Maddox, the attorney was hired to represent plaintiff in a sale of business transaction, which included perfecting security interests in collateral located in Florida. Years later, after the buyer had committed numerous defaults under the agreement, plaintiff notified the attorney of a problem concerning the security interest on the Florida collateral. The attorney then performed additional legal services by (i) conducting legal research into Florida's Uniform Commercial Code filing requirements, (ii) consulting with plaintiff's attorney in Florida; (iii) preparing a memo to the file regarding his findings and discussion. He then prepared and *sent to* plaintiff a legal invoice for one hour of time concerning his work.

The Maddox Court held that defendant attorney had *continued* to represent plaintiff with regard to the original sales transaction through the date of his last legal invoice:

In this factual setting, we are of the opinion that the work performed by defendant for plaintiffs, and duly billed to them, does constitute continuing representation following the 1986 sale of the business. We believe that an attorney's act of sending a bill constitutes an acknowledgment by the attorney that the attorney was performing legal services for the client.

205 Mich App at 451 (Emphasis added).

The court noted that not every delayed contact with an attorney will restart the limitations period:

We agree . . . that a call by a disgruntled former client to his former lawyer, accusing him of professional malpractice, does not in itself constitute a continuation of prior representation in connection with the client's business for purposes of the statute of limitations. However, . . . one would not expect the lawyer to bill the former client for the telephone call. 205 Mich App at 451.

Because the nature of the additional legal work fell within the scope of the original retention *and* because the attorney billed for his services, the Maddox court determined that the lawsuit was

timely filed.

Preventive Measures

Because some cases in Michigan place great emphasis on the last date of service and the length of the professional relationship, rather than on the nature of the specific legal services performed and their relationship to the alleged malpractice, a few simple but essential measures taken at the beginning of the attorney-client relationship will serve to strengthen a defendant attorney's position that a legal malpractice action may be time barred.

First, to provide greater protection against stale claims, practitioners should take the time to specifically define in the retainer agreement the scope of the services the practitioner is actually agreeing to undertake. Once the parties agree to the parameters of the substantive legal work, the practitioner should avoid using generalized catch all phrases in the retainer agreement, like the defendant attorneys in the Gabriz case. Avoid language that simply includes "all related" matters.

If additional legal work grows out of the original retention, regardless of the nature of the work or the degree to which it may or may not be "related" to the prior retention, practitioners should enter into new *separate* and *discreet* retainer agreements that define the new engagement. When a longstanding relationship develops regarding multiple interrelated matters, there is an increased likelihood that a trial court will focus on the last date the defendant attorney provided *any* services, notwithstanding the degree to which it may relate to the malpractice matter at issue, in finding a continuous representation that extends the *accrual* date for any claim. Absent countervailing evidence -- like separate retainer agreements -- the last date the attorney provided *any* legal work may be deemed to be the controlling triggering date for the start of the two year limitations period. The existence of separate retainer agreements should serve

as a bright line test for determining the last date of service on each limited service agreement and, in turn, the date when the statute of limitations begins to run for that matter. See Chapman v Sullivan, 161 Mich App 558, 411 NW2d 754 (1987). The outcome of the Jakubiak case, supra, would probably have been different if each subsequent legal representation had been the subject of independent retainer agreements.

Absent such agreements, all effort should be made to elicit from plaintiff at deposition that the defendant attorney was hired to assist in achieving certain objectives through a specific legal undertaking or task and, further, that the representation concerning that matter ended once the task was complete. The same effort should be made with regard to each subsequent "matter" making up any representation. Showing a court that each subject matter of representation had a beginning, middle and end, will go a long way in convincing a court to treat any ongoing professional relationship as not one *continuous* representation, but a series of separate agreements or understandings to perform particular legal tasks and objectives, similar to the findings in the Miller case, supra.

Finally, do not be lulled into the "Maddox trap". If approached by a former client on a completed matter that is over two years old, it would be prudent for the practitioner to identify any subsequent substantive legal work to be performed for that client, whether or not it relates to the previous engagement, in a separate retainer agreement as a *new* legal engagement. Further, the practitioner should be alert to any ruse to revive the limitations period. If the practitioner is asked by a former client to simply acknowledge a previously held belief or recollect events on a matter over two years old, this should serve as a "red flag" to the practitioner that the client may be "setting-up" them up for a legal malpractice claim.

More importantly, do not accept any fees or generate an invoice regarding such a meeting

or subsequent work unless the work has been clearly acknowledged as a *new* matter. The acceptance of monies, without such an acknowledgment, will create the opportunity for a Maddox - type argument that the representation *continued* because the attorney acknowledged that continuity by billing or accepting fees concerning the previously closed “matter.” While such after the fact meetings do not automatically *restart* the accrual of the limitations period, the practitioner should not engage in conduct that will result in a dispute over the nature and content of such a meeting and whether it constitutes a *new* last date of professional service. To avoid the appearance of “continuous representation” altogether, where no new legal work is done for the client or where the practitioner is being asked to essentially recite his memory of events or to repeat legal advice previously provided, it is strongly suggested that any offer of payment be declined and that the attorney *not bill* the client for any meeting time.

Practitioners must be vigilant in protecting themselves from stale claims. There are important policy considerations behind the existence of statutes of limitations: penalizing plaintiffs who essentially sit on their rights, protection against stale demands, relieving defendants’ fears of litigation, preventing the destruction of evidence, and preserving the accuracy of the testimony of the parties and witnesses. Until a bright line test is articulated by the Michigan Supreme Court, avoiding boiler plate retainer agreements, entering into separate and distinct service agreements and avoiding any *appearance* of continuous representation on any matter over two years old are effective mechanisms which may save the ‘informed’ practitioner from defending what otherwise would be a stale legal malpractice claim.