Cleveland State Law Review

Volume 21
Issue 2 *Legal Profession Problems Symposium*

Article 8

1972

Commencement of Statute of Limitations for Malpractice of an Attorney

James Gordon Joseph

Commencement of Statute of Limitations For Malpractice of an Attorney

*James Gordon Joseph**

IN 1953 A MOTHER AND HER SON employed an attorney to prepare a last will and testament for the mother. The will included a devise of specific real property to the son. The attorney negligently requested the son to be one of the two attesting witnesses and the son did so. The mother died in 1959, almost seven years after the execution of the will. Only after the will was filed for probate did the son discover that the devise to him was invalid.[1]

On March 28, 1962, an attorney advised his clients that they could lawfully realize a profit upon the resale of property to a corporation promoted by them. He also advised the clients that they need not disclose to the other stockholders that they planned to make the profit. Acting on the attorney's advice, the clients resold the land to the corporation. In January of 1964 certain shareholders brought a derivative action to recover the clients' secret profits. On August 24, 1964, the clients cross-complained against the attorney, alleging his malpractice and seeking indemnity for $104,800, the amount of their liability.[2]

In each of the above cases a statute of limitations for attorney malpractice barred the client's claim.

In almost all jurisdictions the statute of limitations for the malpractice of an attorney is between one and three years. Although some argue that this is too short a period, the main problem is not in the statute but in its application. Difficulty arises when a court must decide at what point the statute of limitations *begins* to run. To appreciate a court's problem, the nature and reasons behind statutes of limitations must be understood.

Statutes of limitations are designed to prevent undue delay in bringing suits, so that neither party will gain advantage nor be disadvantaged by the passage of time.[3] Such statutes give a defendant a fair chance to investigate a claim and prepare a defense while the facts and evidence are still fresh.[4] Statutes of limitations are founded on the theory that valid claims are usually not allowed to rest for very long.[5] Thus, by compelling action within a reasonable time,[6] the

---

*B.A., Ohio State University; Second-year student, Cleveland State University College of Law.

1 Goldberg v. Bosworth, 29 Misc.2d 1057, 215 N.Y.S.2d 849 (Sup. Ct. 1961).

2 Eckert v. Schaal, 251 Cal. App. 2d 1, 58 Cal. Rptr. 817 (1967).

3 Vason v. Nickley, 438 F.2d 242 (6th Cir. 1971).

4 Mosby v. Reese Hospital, 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964); Hackworth v. Ralston Purina Co., 214 Tenn. 506, 381 S.W.2d 292 (1964).

5 Weber v. Board of Harbor Comm'rs., 85 U. S. (18 Wall.) 57 (1873).

6 Law's Adm'r. v. Culver, 121 Vt. 285, 155 A.2d 855 (1959).

statute aims to prevent fraudulent and stale claims[7] and operates against those who neglect their rights.[8]

Commencement Rules

Several rules of law have emerged throughout the various jurisdictions as to when the statute of limitations for the attorney malpractice begins to run.

First, in the absence of fraudulent concealment or misrepresentation by an attorney of his negligence, the statute begins to run at the time of the attorney's negligent act.[9] Second, regardless of fraudulent concealment or misrepresentation by an attorney, the statute begins to run at the time of the negligent act.[10] Third, the statute begins to run, not at the time of the attorney's negligent act, but when the client incurs some damage.[11] Fourth, the statute does not begin to run until the termination of the attorney-client relationship.[12] Fifth, where the malpractice involves a delay or non-feasence by the attorney, the statute does not begin to run until the delay results in some damage to the client.[13] Sixth, where an attorney's malpractice results in the statute of limitations barring a client's cause of action, the statute of limitations for the attorney's malpractice does not begin to run until the client's cause of action becomes barred[14] or until the attorney has had a reasonable time to act on the client's claim.[15]

The majority rule, which appears to be losing favor, is that the statute of limitations for legal malpractice, in the absence of fraud or concealment (and in some jurisdictions regardless of fraud or concealment), begins to run at the time of the attorney's negligent act.[61] The rationale for this rule is weak.

In a California case recognizing the rule, the court reasoned that if the "time honored rule" seemed harsh, it should be changed by the legislature with appropriate conditions that would still limit the time that an attorney may be held liable.[17]

In the previously described New York case[18] concerning the invalid devise, the court tenuously reasoned that at the time of the attorney's negligent act, damage, although nominal, was sustained and

---

[7] Hinkle v. Hargens, 76 S.D. 520, 81 N.W.2d 888 (1957).

[8] Seitz v. Jones, 370 P.2d 300 (Okla. 1962).

[9] Ft. Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967).

[10] Troll v. Glantz, 57 Misc.2d 572, 293 N.Y.S.2d 345 (Sup. Ct. 1968).

[11] Marchand v. Miazza, 151 So.2d 372 (La. App. 1963).

[12] Bland v. Smith, 197 Tenn. 683, 277 S.W.2d 377 (1955).

[13] Jensen v. Sprigg, 84 Cal. App. 519, 258 P.683 (1927).

[14] Bernard v. Walkup, 272 Cal. App.2d 595, 77 Cal. Rptr. 544 (1969); Shelly v. Hansen, 244 Cal. App.2d 210, 53 Cal. Rptr. 20 (1966).

[15] Buchanan v. Hudson, 39 Ga. App. 734, 148 S.E. 345 (1929); Rhine's Admrs. v. Evans, 66 Pa. 192 (1870).

[16] Ft. Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967); Troll v. Glantz, 57 Misc.2d 572, 293 N.Y.S.2d 345 (Sup. Ct. 1968).

[17] Griffith v. Zavlaris, 215 Cal. App.2d 826, 30 Cal. Rptr. 517 (1963).

[18] Goldberg v. Bosworth, 29 Misc.2d 1057, 215 N.Y.S.2d 849 (Sup. Ct. 1961).

the attorney could have been sued when the will was wrongfully attested. The damage—"the cost... of having a new will prepared and executed."[19] How could the mother or son reasonably have been expected to ascertain the invalidity of the devise before the will was probated? In a situation such as this, it cannot be said that the evidence is not fresh. The negligently attested will is clear and convincing evidence. And it cannot be said that the son neglected his right. As a layman, he was in no position to realize the consequences of his attestation. This rule seems to favor a wrongdoer over a duly diligent client.

A minority rule that offers some relief to clients as well as protecting attorneys is that the statute of limitations for the malpractice of an attorney begins to run not at the time of the attorney's negligent act, but when the client incurs damage.[20] In a Louisiana case[21] the plaintiff engaged the defendant attorney to assert her rights to her paternal grandmother's will and also to her father's will. When she became unhappy with the way the suits were progressing, she released the attorney and obtained different counsel to continue the suits. While the suits were still pending, she sued the first attorney for malpractice in conducting the litigation. The appellate court affirmed the trial court's judgment of prematurity but assured the plaintiff that her action for damages would not be barred by the statute of limitations if her causes of action upon the wills were lost as a result of the first attorney's negligence. This rule not only protects an attorney from a premature lawsuit but also gives him an opportunity to correct his negligent mistakes where possible, or as in this instance, have someone else correct them.

Although California follows the rule that the statute of limitations runs from the time of the negligent act, one case held that for a cause of action to be complete, the client must suffer a loss or injury as the proximate result of the attorney's negligence. Therefore the statute of limitations begins to run against the cause of action only when the action is complete.[22]

Reasoning that it is illogical to distinguish between malpractice suits and other negligence actions, a District of Columbia court decided the statute of limitations in a malpractice suit should begin to run when the client suffers an injury.[23] There an attorney advised the plaintiff on May 16, 1962, that it could lawfully send its boats to fish in Venezuelan waters. The attorney had negligently misinterpreted the law and the boats were impounded on July 25, 1962. The plaintiff commenced his malpractice suit against the attorney

---

[19] *Id.*

[20] Ft. Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967); Marchand v. Miazza, 151 So.2d 372 (La. Ct. App. 1963).

[21] Marchand v. Miazza, 151 So. 372 (La. App. 1963).

[22] Eckert v. Schaal, 251 Cal. App.2d 379, 58 Cal. Rptr. 817 (1967).

[23] Ft. Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967).

on July 22, 1965. Since the injury was suffered on July 25, 1962, the action was timely brought within the three year statutory period.

A frequent argument made in behalf of a client is that the statute does not begin to run until the termination of the attorney-client relationship.[24] Although almost all of the earlier cases rejected this contention, some recent cases have adopted it.

In the 1971 Ohio case *Keaton Co. v. Kolby*,[25] the defendant attorney was employed by the plaintiff in January, 1966. A lease was executed on behalf of the plaintiff in May, 1966. The attorney negligently failed to exercise the plaintiff's options to renew in February, 1968. In August, 1969, plaintiff filed his petition against the attorney for malpractice. The court noted the Ohio rule that a cause of action for medical malpractice accrues, at the latest, when the physician-patient relationship terminates. The reason for this rule, the court said, is that it strengthens the relationship. The patient may rely on the physician's ability during the relationship, and the physician has the opportunity to give full treatment and also to immediately correct any errors of judgment on his part. Reasoning that there should be no distinction between malpractice of physicians and attorneys and that justification for the rule as to physicians applies with equal force to attorneys, the court held that in an action against an attorney for malpractice, the statute of limitations begins to run, at the latest, when the attorney-client relationship terminates. The statute of limitations in Ohio is one year.

Keaton adopted the rule of *McWililams v. Hackett*[26] and reversed the frequently relied upon decision in Ohio of *Galloway v. Hood*,[27] which held that the statute begins to run at the time of the attorney's negligent act. In *Galloway* an attorney was sued for failing to timely file the plaintiff's claim for workmen's compensation. There the Court of Appeals had reasoned that " . . . harsh as the law may be in its application to the individual, the contention of the plaintiff [that the statute does not begin to run until the attorney-client relationship had terminated] cannot be sustained for it is not the law to be applied in cases for malpractice of attorneys, though it is generally the rule applied in cases arising between patient and physician or surgeon."

Whether the attorney's negligent act constitutes misfeasance or non-feasance has affected courts' rulings as to the commencement of the statute of limitations. One view is that the statute does not begin to run until the delay or nonfeasance causes an injury to the client. In *Jensen v. Sprigg*[28] an attorney delayed the bringing of a suit against a defendant who owed his client money until after the defendant was

---

[24] Bland v. Smith, 197 Tenn. 683, 277 S.W.2d 377 (1955).
[25] 27 Ohio St.2d 234, 271 N.E.2d 772 (1971).
[26] McWilliams v. Hackett, 19 Ohio App. 416 (1923).
[27] Galloway v. Hood, 69 Ohio App. 278, 43 N.E.2d 631 (1941).
[28] Jensen v. Sprigg, 84 Cal. App. 519, 258 P.683 (1927).

adjudged a bankrupt. The court held that it was at that point that the attorney's negligence occurred and the statute of limitations began to run.

A frequent problem involving the delay or non-feasance by an attorney occurs when the client's cause of action becomes barred by the statute of limitations as a result of the attorney's inaction. One view is that the statute of limitations does not begin to run until the client's cause of action becomes barred.[29] In the leading Pennsylvania case of *Moore v. Juvenal,*[30] the court's rationale for this view was that the attorney's negligence began when his client directed him to bring an action on his claim and the attorney failed to do so. The negligence then became complete when the statute of limitations had run upon that action.

Another view is that where an attorney's inaction causes his client's claim to become barred by the statute of limitations, the statute of limitations against the attorney for malpractice begins to run as soon as the attorney has had a reasonable time to act upon the claim but failed to do so.[31] The rationale for this rule is based upon breach of contract rather than negligence.[32] An attorney violates his contract of employment when he does not act upon his client's claim within a reasonable time.[33]

Fraudulent Concealment of Negligence

There is a necessary exception to the majority rule that the statute of limitations for the malpractice of an attorney begins to run at the time of the negligent act. Where a client does not or cannot reasonably realize that he has a cause of action against his attorney for malpractice because the attorney misrepresents or fraudulently conceals his negligence, the statute of limitations does not begin to run until the client discovers the attorney's negligence.[34]

This exception gained support in a recent California appellate decision.[35] The court reasoned that the relationship between an attorney and client is one of trust and confidence. Where such a relationship exists, any concealment of a material fact constitutes fraud. A client cannot be expected to hire a second attorney to keep watch on the first attorney and so on ad infinitum.

There are two requisites to the application of the rule that the fraudulent concealment or misrepresentation by an attorney of his

---

[29] Bernard v. Walkup, 272 Cal App.2d 595, 77 Cal. Rptr., 544 (1969); Shelly v. Hansen, 244 Cal. App.2d 210, 53 Cal. Rptr. 20 (1966).

[30] Moore v. Juvenal, 92 Pa. 484 (1880).

[31] Buchanan v. Hudson, 39 Ga. App. 734, 148 S.E. 345 (1929); Rhine's Adm'rs. v. Evans, 66 Pa. 192 (1870).

[32] McArthur v. Baker, 7 Ky. L. Rptr. 440 (1885).

[33] *Id.*

[34] Fortune v. English, 226 Ill. 262, 80 N.E. 781 (1907).

[35] Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 14 Cal. App.3d 813, 92 Cal. Rptr. 814 (1971).

negligence extends the statute of limitations. First, the fraud must be a substantive part of the cause of action and not incidental to it.[36] But this can reach unfair results and protect an intentional wrongdoer. In a leading Kansas case,[37] a client gave his attorney a note for collection. The attorney told his client that the debtor could no longer be found. The attorney concealed the fact that before receiving the note for collection, he, the attorney, had agreed with the debtor to pay the note as a downpayment for the debtor's house. Because of this, the attorney never attempted to collect the note. By the time the client discovered the fraud, the two-year statute of limitations for legal malpractice had run. The court held that because the fraud was not related to the contract to collect the note but merely incidental to the cause of action, it did not extend the statutory period.

The second requisite is that if the client could have discovered the attorney's fraud in the exercise of reasonable care and did not, he is precluded from recovery.[38] A typical example is that an attorney delays in bringing suit and attachment proceedings against his client's debtor. By the time the attorney finally commences the suit, other creditors have secured liens on the property sought to be attached and the attorney conceals his lack of diligence. The client is precluded from recovery because such information is a matter of public record and is charged in law to be within his knowledge.[39]

Another common situation is that in which an attorney obtains a judgment on his client's claim but fails to issue execution upon it, although the judgment could have been collected. Over a period of years the attorney represents to the client that the judgment will be collected. The rule is that the client is not justified in waiting such a long period of time before investigating the matter.[40]

Other jurisdictions take the view that the fraudulent concealment by an attorney of his negligence does not toll the statute of limitations.[41] These jurisdictions hold that the statute begins to run at the time of the negligent act. However, the reasoning for this rule is weak. In one New York case,[42] the attorney's negligence and his fraudulent concealment of it were obvious, but the court quickly disposed of the issue of fraud simply stating "nor did the concealment of the facts toll the statute." There was a dissenting opinion in the case which stated that the reasons for the attorney's dismissal were "without merit." Another New York case reasoned that the fraudulent concealment by an attorney of his negligence does not extend

---

[36] Cornell v. Edsen, 78 Wash. 662, 139 P.602 (1914).
[37] Stinson v. Aultman, Miller & Co., 54 Kan. 537, 38 P.788 (1895).
[38] Wilmot v. Moody, 47 Cal. App. 156, 190 P.639 (1920).
[39] Wheaton v. Nolan, 3 Cal. App.2d 401, 39 P.2d 457 (1934).
[40] Presnall v. McLeary, 50 S.W. 1066 (Tex. Civ. App. 1899).
[41] Cornell v. Edsen, 78 Wash. 662, 139 P.602 (1914).
[42] Troll v. Glantz, 57 Misc.2d 572, 293 N.Y.S.2d 345 (Sup. Ct. 1968).

the statutory period but merely goes to the enhancement of damages.[43]

Even though the fraudulent concealment or misrepresentation by an attorney of his negligence extends the statute of limitations, most jurisdictions hold that an attorney has no duty to advise his client of his negligence, nor must he advise the client of a possible action of malpractice against himself.[44]

Time of Discovery Rule

Reflecting an undercurrent of dissatisfaction, the Law Revision Commission of New York in 1962 proposed a statute to revise that state's rule so that periods of limitations for bringing of malpractice actions in such cases should not begin to run until the discovery of the injury, but the statute was not enacted.[45]

Almost universally, regardless of the factual particulars, clients contend that the statute of limitations does not begin to run until they have discovered the attorney's negligence.[46] Except where fraud is involved, the courts have overwhelmingly rejected this view. The result has been hardship and unfairness to countless clients.

The root of the evil appears to be found in the 1830 case of *Wilcox v. Plummer*.[47] The case uses the principle that the statute begins to run when the negligent act of the attorney occurs. It rejected the client's contention that the statute did not begin to run until some damage had been incurred by the client, reasoning that the moment damages were shown to exist, perhaps no more could be had but nominal recovery. But, on the other hand, the damages caused by the attorney's negligence could grow, even up to the day of the verdict. Thus the negligence and not the damage is the cause of action.

Although the case discusses the time at which damage is incurred and not the discovery of the attorney's negligence, in many cases the client discovers the attorney's negligence when he finds that he has been damaged. In such cases there is no distinction in point of time between discovery and damage. Thus, in rejecting the client's contention of discovery many courts cite *Wilcox*.[48] Again, the courts' rationale for this rule is weak or no rationale is given and just the rule is stated.

A recent Florida case offers hope that the discovery rule is gaining favor. Although the attorney in *Downing v. Vaine*[49] did not

---

[43] Seigel v. Kranis, 52 Misc.2d 78, 274 N.Y.S.2d 968 (Sup. Ct. 1966).

[44] Fortune v. English, 226 Ill. 262, 80 N.E. 781 (1907).

[45] 1962 Report of N.Y. Law Rev. Comm. at 231-233, McKinney's 1962 Session Laws at 3392.

[46] Goldberg v. Bosworth, 29 Misc.2d 1057, 215 N.Y.S.2d 849 (Sup. Ct. 1961); Yandell v. Baker, 65 Cal. Rptr. 606 (Ct. App. 1968).

[47] Wilcox v. Plummer, 4 Pet. 172, 7 L. Ed. 821 (1830).

[48] Budd v. Nixen, 15 Cal. App.3d 157, 92 Cal. Rptr. 899 (1971).

[49] Downing v. Vaine, 228 So.2d 622 (Fla. Ct. App. 1969).

conceal his negligence, the client did not discover it until more than three years after the negligence act. The statute of limitations for legal malpractice in Florida is three years.

In affirming the trial court's verdict for the client, Judge Wigington wrote:

> A careful examination of the decisions which adopt the general rule (that in the absence of fraudulent concealment the statute of limitations for the malpractice of an attorney begins to run at the time of the attorney's negligent act) fails to disclose the rationale which gives credence to and justifies the rule. The effect of the rule is to hold that an injured client must commence the action against his attorney for malpractice within the period of limitations after the negligent act is committed, even though the client is totally unaware of the fact that the negligent act giving rise to the cause of action had occurred. We find it impossible to rationalize how an injured client can be required to institute an action within a limited time after his cause of action accrues if he has no means of knowing by the exercise of reasonable diligence that the cause of action exists. It occurs to us that one should be held in fault for failing to timely exercise a right only if he knows, or by the exercise of reasonable diligence should have known, that such right existed. It is our view that the general rule above elucidated casts upon a client an unfair burden of knowing as much about the intricacies of the law as does the attorney whom he employs to protect his legal rights. In order to comply with the rule, the injured client would have to be sufficiently versed in the law to know exactly how and on which date his attorney committed an act of negligence in the prosecution or maintenance of the legal matters entrusted to his care in order that an action against the attorney might be instituted before being barred by the statute of limitations. We cannot agree with legal philosophy which adheres to such an unreasonable principle of law.[50]

Conclusion

Statutes of limitations are founded on the theory that valid claims should not be allowed to rest very long. Thus, by preventing undue delay in the bringing of a suit, the statute operates against those who neglect their rights. In jurisdictions where the time of discovery rule is not followed as to attorney malpractice, such statutes have a harsh effect. An attorney's services, by their nature, affect his client over a long period of time. The effects of the attorney's acts often are not fully known for many years. Since the law is such a sophisticated field, a layman cannot immediately ascertain that his attorney has been negligent. The effect is that the client's innocent ignorance protects the attorney from liability for his negligent acts.

In the area of medical malpractice the trend is that the statute of limitations begins to run from the discovery of the malpractice.[51]

---

[50] *Id.* at 625.
[51] Staley v. U.S., 306 F.Supp. 521 (M.D.Pa. 1969).

Since both the physician-patient and attorney-client relationships are ones of trust and dependency upon professional judgment, there should be no distinction between the two areas. Attorneys who press malpractice actions against medical practitioners frequently argue that the ready availability of the malpractice remedy makes doctors more cautious and certain in their diagnoses and procedures. Can it not be said with equal conviction that the very attorneys who make this argument, as well as their brothers in law, would be more diligent in conducting *their* clients' affairs were it more difficult for them to avoid liability?

In this age of professional liability insurance, client security funds, expanded law curricula, continuing legal education, accessible practice seminars, and a system that commands flexible justice, the legal profession suffers loss of respect when courts rule for the wrongdoer instead of for the duly diligent client. Since the rule of discovery has been judicially imposed upon the medical profession, is it not unfair for that same judiciary to demand less vigilance of its own profession?

The law is one of several professions, and just as the Earth is not the center of the universe, as Ptolemy contended, the law cannot make rules favoring its own profession. It is hoped that it will not take another Copernicus to show that an attorney's profession revolves around the bright light of logic. A few attorneys have blazed the more equitable path in medical malpractice cases. The time is now at hand for the courts to follow that path in legal malpractice. The courts should now adopt the rule that the statute of limitations for professional negligence begins to run when the negligent act is discovered by the victim.