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## *Statutes of Limitations in Legal Malpractice*

Norman T. Baxter\*

**S**TATUTES OF LIMITATIONS exist in the civil law of all the states and the federal government. Depending on the type of action, a limitation period may vary anywhere from a year or less up to twenty-one years or more.

Not all states agree on which actions need a limitation statute, and not all states apply the same limitation period for similar actions; *e.g.*, the limitation period for applying the statute of limitations in legal malpractice is three years in New York,<sup>1</sup> two years in California,<sup>2</sup> and only one year in Ohio.<sup>3</sup>

The first step in understanding the differences in the various state laws is to answer the question as to what statutes of limitations are, and what are they intended to do.

Basically, statutes of limitations are barriers erected in the law to bar a plaintiff from getting a judgment after an undue lapse of time from when the original action arose.<sup>4</sup> Statutes of limitations are designed so that the required litigation must be brought while the facts and circumstances may still be proved<sup>5</sup> and before prosecution of the claim has become stale.<sup>6</sup> Statutes of limitations try to prevent what would amount to a surprise attack on the defendant after the passing of time in which he may no longer be able to find facts with which to defend himself. Fortunately for defendants, statutes of limitation are founded on the presumption that valid claims are not normally neglected.<sup>7</sup>

Statutes of limitations theoretically set out that which is a reasonable time for bringing an action. This *defined* "reasonable time" is designed to do away with the general inconvenience which can result from a threatened lawsuit where the necessary facts are no longer available.<sup>8</sup> Modern courts, therefore, accord the statute of limitations the

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<sup>1</sup> N.Y. Civ. Prac. Laws and Rules § 214, subd. 6 (1963). As to forms of pleading in such cases, see, Oleck, *Negligence Forms of Pleading*, 717-766 (1957 rev. ed.).

<sup>2</sup> Cal. Code Civ. Proc. § 339, subd. 1 (1963).

<sup>3</sup> Ohio Rev. Code § 2305.11 (1953).

<sup>4</sup> *Christmas v. Russell*, 72 U.S. (5 Wall.) 290 (1866).

<sup>5</sup> *People ex rel. Mendes v. Pennyfeather*, 11 Misc.2d 546, 174 N.Y.S.2d 766 (Child. Ct. 1958).

<sup>6</sup> *Weber v. State Harbor Comm'n.*, 85 U.S. (18 Wall.) 57 (1873).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Lenawee County v. Nutten*, 234 Mich. 391, 208 N.W. 613 (1926).

same consideration as any other defense, due to the statute's beneficial effect of promoting the best interests of society.<sup>9</sup>

A major problem in any discussion of *legal malpractice* is understanding of what is meant by the term. When used in general terms, *malpractice* can refer to the negligence of a member of *any* professional group. This can, however, be limited to the professional misconduct of any one group or groups, depending upon the legal definition of the term when a specific statute is enacted.<sup>10</sup>

The problem of defining the term would then seem to be resolved rather easily, *i.e.*, all that would be required is to study the state statutes concerning malpractice and discern whether or not legal malpractice is included therein. Unfortunately, as late as 1962, only 17 states had special statutes of limitations for malpractice actions, and of these only 12 list what groups are included under the statute.<sup>11</sup>

It becomes apparent from an analysis of cases and law that many jurisdictions, when using the term malpractice, limit the term strictly to physicians and surgeons. It is not so much the fact that legal malpractice is excluded from the term malpractice but rather that it is never even mentioned.

A reference to dictionaries does not necessarily resolve the problem. In an Ohio case,<sup>12</sup> plaintiff's counsel tried to show that lawyers were *not* included under the term "malpractice," by citing Webster's Dictionary, Anderson's Law Dictionary, Standard Dictionary, Century Dictionary, Bouvier's Law Dictionary, and other sources. At the same time, opposing counsel cited American Digest, Century Digest, Ohio Digest, and other pleading and practice volumes to show that lawyers *were* included under the term.

The problem of defining terms in the above case was resolved by referring to the legal meaning of the term as used by the state legislature when the statute was enacted. This solution points out the real problem with the term, *i.e.*, the definition of legal malpractice in any state depends on how that state has cared to define or not to define the term.

But why have so few legislatures cared to define and use the term legal malpractice? Perhaps the answer is that malpractice actions against attorneys are comparatively few, due to the high ethical standards maintained by the great majority of lawyers.<sup>13</sup> On the other hand,

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<sup>9</sup> Guy F. Atkinson Co. v. State, 66 Wash.2d 570, 403 P.2d 880 (1965).

<sup>10</sup> Richardson v. Doe, 176 Ohio St. 370, 199 N.E.2d 878 (1964).

<sup>11</sup> Lillich, The Malpractice Statute of Limitations in New York and Other Jurisdictions, 47 Cornell L.Q. 339 (1962).

<sup>12</sup> Long v. Bowersox, 8 Ohio N.P. (n.s.) 249, 19 Ohio Dec. 494 (C.P. 1909).

<sup>13</sup> Gardner, Attorneys' Malpractice, 6 Clev.-Mar. L. Rev. 264 (1957).

perhaps cases are few because of the difficulty of proving that the lawyer has failed to use reasonable care and diligence in his work.<sup>14</sup>

Since legal malpractice appears to be a matter of state definition, it would seem that perhaps the best approach to understanding legal malpractice would be to examine (as typical) the statutes of three of our leading states, to see what is the present status of their laws on the subject.

### Malpractice in Ohio

Ohio is one of the states which has a limitations statute which includes malpractice actions. The statute reads as follows: "An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, malpractice, . . . shall be brought within one year after the cause thereof accrued. . . ." <sup>15</sup>

Although Ohio is not one of the states to list those groups that are included under the statute,<sup>16</sup> as early as 1909, the courts maintained that legal malpractice is included under the term "malpractice."<sup>17</sup>

The statute, however, did not always include malpractice. It was in 1894 that Ohio General Assembly amended the statute in order to include the actions for malpractice. This was done presumably to defeat "the possibility of unwarranted claims which would be difficult to disprove."<sup>18</sup> The courts early concluded that the term *malpractice* "whatever the definition the dictionary gave it, had a particular legal meaning in Ohio when the section was amended, with which the legislature dealt, and that actions against attorneys were included in that amendment."<sup>19</sup>

After it was generally held that legal malpractice was included under the statute, problems arose about *when* the period of limitation begins to run. The leading Ohio case on the subject concerned an action by a client against an attorney for nonfeasance for failure to file a workmen's compensation claim within the necessary time. The court here upheld the accepted view in Ohio, *i.e.*, that the limitation period begins to run at the time the nonfeasance occurred, and the claim was therefore barred by the statute if not brought within one year from that time.<sup>20</sup>

The time at which the period begins to run is especially important when it is uncertain in what capacity the defendant was acting. In a

<sup>14</sup> Hodges v. Carter, 239 No. Car. 517, 80 S.E.2d 144 (1954).

<sup>15</sup> Ohio Rev. Code § 2305.11 (1953).

<sup>16</sup> Lillich, *op. cit. supra* note 11.

<sup>17</sup> Long v. Bowersox, *supra* note 12.

<sup>18</sup> Richardson v. Doe, 176 Ohio St. 370, 372, 199 N.E.2d 878, 880 (1964).

<sup>19</sup> Long v. Bowersox, 8 Ohio N.P. (n.s.) 249, 254, 19 Ohio Dec. 494, 497 (C.P. 1909).

<sup>20</sup> Galloway v. Hood, 69 Ohio App. 278, 43 N.E.2d 631 (1941).

case involving an action against a defendant for alleged malpractice, an examination of the evidence was necessary to disclose that the defendant was acting not as a Justice of the Peace but as a lawyer, and that the limitation period would therefore expire in one year from the time of the acts constituting malpractice.<sup>21</sup>

Although malpractice can refer to the professional negligence of a member of any group,<sup>22</sup> Ohio Court decisions generally limit the terminology to lawyers, physicians and surgeons. However, some Ohio court decisions have allowed malpractice actions against dentists,<sup>23</sup> pharmacists<sup>24</sup> and veterinarians,<sup>25</sup> while at the same time barring actions against nurses<sup>26</sup> and surveyors.<sup>27</sup>

Although the statute of limitations as to malpractice is applied to both attorneys and the medical practice, there is an important distinction as to how the statute is applied to each of these groups. Whereas in legal malpractice the statute begins to run at the time of the act, in medical malpractice the statute in Ohio does not begin to run until the relation of physician and patient has terminated.<sup>28</sup> This is the latest time at which the action will begin to run.<sup>29</sup> This is so regardless of whether or not the act was known or unknown at the time, by the person upon whom it was committed.<sup>30</sup>

This is the rule in Ohio, although some courts of other jurisdictions have followed a rule in medical malpractice similar to the Ohio rule on legal malpractice, *i.e.*, the statute begins to run at the time the patient is harmed.<sup>31</sup>

The theory that the Ohio malpractice statute should be applied to attorneys in the same way as it is applied to the medical practice was argued in the case of *Galloway v. Hood*.<sup>32</sup> The court's reply was that this was simply "not the law" in malpractice cases by attorneys, no matter how harsh the law may appear to be. In furthering its opinion, the court cited the medical malpractice case of *Bowers v. Santee*<sup>33</sup> where it was said:

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<sup>21</sup> Bickel v. Whitacre, 29 Ohio L. Abs. 256 (Ct. App. 1939).

<sup>22</sup> Richardson v. Doe, *supra* note 10.

<sup>23</sup> Cox v. Cartwright, 96 Ohio App. 245, 121 N.E.2d 673 (1953).

<sup>24</sup> Boudot v. Schwallie, 114 Ohio App. 495, 178 N.E.2d 599 (1961).

<sup>25</sup> Storozuk v. W. A. Butler Co., 31 Ohio Op. 2d 91, 203 N.E.2d 511 (C.P. 1964).

<sup>26</sup> Richardson v. Doe, *supra* note 10.

<sup>27</sup> Wishnek v. Gulla, 67 Ohio L. Abs. 49, 114 N.E.2d 914 (C.P. 1953).

<sup>28</sup> Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902).

<sup>29</sup> Pump v. Fox, 113 Ohio App. 150, 177 N.E.2d 520 (1961).

<sup>30</sup> De Long v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952).

<sup>31</sup> Graham v. Updegraph, 144 Kans. 45, 58 P.2d 475 (1936).

<sup>32</sup> 69 Ohio App. 278, 43 N.E.2d 631 (1941).

<sup>33</sup> 99 Ohio St. 361, 368, 124 N.E. 238, 240 (1919).

. . . manifestly the subsequent care and treatment was as essential to full recovery and restoration of usefulness as was the initial setting.

. . . The surgeon should have all reasonable time and opportunity to correct the evils which made operation or treatment necessary, and even reasonable time and opportunity to correct the ordinary and usual mistakes incident to even skilled surgery.

The court therefore reasoned that there was little need for "aftercare" or "opportunity to correct evils" on the part of the attorney, after the statute had run due to his delay.<sup>34</sup>

### Malpractice in New York

Although the Ohio law has had no changes in its malpractice statute for many years, the New York law in recent years has seen important changes in its law and in its interpretation.

The former New York law<sup>35</sup> had required that an action for malpractice must be commenced within two years after the cause of action has accrued.

The present New York law<sup>36</sup> has been revised to read as follows: Actions to be commenced within three years: for nonpayment of money collected on execution; for penalty created by statute; to recover chattel; to injury to property; for personal injury; for malpractice; to annul a marriage on the ground of fraud.

Under the older New York law (the Civil Practice Act) the term malpractice was not intended to cover attorneys and other non-medical professionals.<sup>37</sup> It has been consistently held that under the Civil Practice Act the term malpractice was limited to actions to recover damages for injuries resulting from the malpractice of physicians, surgeons, and other similar professionals.<sup>38</sup> Under this law, dentists, psychiatrists, chiropractors, pharmacists, and X-ray technicians have been included, whereas nurses, hospital employees, accountants, and attorneys have been excluded.<sup>39</sup>

The seeming disparity in the application of this malpractice statute goes back to the problem of what is meant by the term "malpractice." Generally speaking, malpractice refers to the professional negligence of any professional group.<sup>40</sup> However, in New York, unlike Ohio, the

<sup>34</sup> Galloway v. Hood, 69 Ohio App. 278, 281, 43 N.E.2d 631, 633 (1941).

<sup>35</sup> N.Y. Civ. Prac. Act § 50, subd. 1 (now N.Y. Civ. Prac. Laws and Rules § 214, subd. 6, 1963).

<sup>36</sup> N.Y. Civ. Prac. Laws and Rules § 214, subd. 6 (1963).

<sup>37</sup> Peters v. Powell, 22 Misc.2d 994, 196 N.Y.S.2d 304 (Sup. Ct. 1960).

<sup>38</sup> Seger v. Cornwell, 44 Misc.2d 994, 255 N.Y.S.2d 744 (Sup. Ct. 1964).

<sup>39</sup> Lillich, *op. cit. supra* note 11.

<sup>40</sup> Richardson v. Doe, *supra* note 10.

generally accepted and legal meaning of the term did not include attorneys.

The practice in New York had been to restrict the term malpractice to actions to recover damages for personal injuries resulting from the misconduct of physicians, surgeons, and other similar professionals similar to those enumerated.<sup>41</sup> The result was that the general practice in New York was to restrict the term malpractice to physical personal injuries as opposed to injury to property.

Therefore, since it would be almost impossible to show that the harm caused by attorneys was physical, the rule that had been applied to attorneys was that, depending on the facts of the case and whether or not there was an agreement to obtain a specific result, the three year statute of limitations for negligence or the six year statute for contracts would apply.<sup>42</sup>

Effective September 1, 1963, the New York statute which covered malpractice was revised to extend the limitation period to three years. More important, from the standpoint of attorney's malpractice, attorneys, accountants, and other similar professionals are now included under the new statute. In fact, the legislature's intention was made clear in the Advisory Committee Notes, where it was said that "an action to recover damages for malpractice was added on the suggestion that malpractice involving property damage—e.g., against an accountant—may be based on a contract theory and would otherwise be governed by the six-year provision unless specific reference was made."<sup>43</sup>

A recently reported case on this matter involved a malpractice action against a surveyor. Here, the court said that, although it had been generally understood that malpractice actions pertained only to members of the medical profession, all malpractice actions, whether they pertain to personal or property damage, are included under the present three year statute.<sup>44</sup>

The question then arises as to when the three year limitation period begins to run. Under a strict application of the New York law the action accrues at the time of the act which constitutes malpractice.

Cases decided under the Civil Practice Act had held that the cause of action accrued at the time of the malpractice and not at the time when the injury was discovered.<sup>45</sup>

The discovery doctrine has again been advocated under the law as it is at present. This argument, however, has again been rejected on

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<sup>41</sup> Federal International Banking Co. v. Touche, 248 N.Y. 517, 162 N.E. 507 (1928).

<sup>42</sup> Glens Falls Insurance Co. v. Reynolds, 3 App. Div. 2d 686, 159 N.Y.S.2d 95 (1957).

<sup>43</sup> 5th Report, N.Y. Leg. Doc. No. 15, p. 56 (1961).

<sup>44</sup> Seger v. Cornwell, *supra* note 38.

<sup>45</sup> Conklin v. Draper, 229 App. Div. 227, 241 N.Y.S. 529 (1930).

the basis that in this regard the legislature has indicated no intention to amend or abandon the present rule.<sup>46</sup>

In the face of rejection of the discovery doctrine, many plaintiffs have tried to avoid strict application of the statute by arguing one of the following theories: a. action for breach of contract; b. action for fraud; c. continuous treatment theory.<sup>47</sup> The New York courts have recognized the hardships which can be involved in strictly applying the statute, and have adopted the continuous treatment theory, at least in regard to medical malpractice. The cases have ruled that the limitation period has not begun to run until the end of post-operative care or at the conclusion of the patient's last treatment.<sup>48</sup>

By the same token, New York courts have adopted a rule similar to the Ohio rule in regard to professionals in fields other than medicine. Two recently reported decisions have borne out the distinction in the law's application. The first of these cases concerned an action against a surveyor. Here the court made it clear that, although the new law in New York would include individuals such as surveyors, the limitation period began upon the commission and not the discovery of the malpractice.<sup>49</sup> The second case concerned a plaintiff's malpractice action against his former attorney for failure of the attorney to timely file and prosecute plaintiff's personal injury claim. Here again the court ruled that plaintiff's claim was barred by the statute for failure of the plaintiff to bring his action within three years from the time the attorney failed to file. This was so despite the fact that the plaintiff alleged fraud on the attorney's part and also despite the fact that the attorney had continued to "treat" the plaintiff by attempting to get the matter settled in arbitration proceedings subsequent to the time the personal injury claim expired.<sup>50</sup>

### Malpractice in California

Although both Ohio and New York have statutes which use the term malpractice and which apply the term to legal malpractice cases, the state of California does not use these terms in its statutes.

The following are the applicable statutes with regard to malpractice in the state of California:

Within two years: An action upon a contract, obligation, or liability not founded upon an instrument of writing, other than that mentioned in Subdivision 2 § 330 of code, . . .<sup>51</sup>

<sup>46</sup> *Schwartz v. Heyden Chemical Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963).

<sup>47</sup> *Lillich*, *op. cit. supra* note 11.

<sup>48</sup> *Monko v. St. John's Queens Hospital*, 41 Misc.2d 993, 246 N.Y.S.2d 511 (Sup. Ct. 1963).

<sup>49</sup> *Seger v. Cornwell*, *supra* note 38.

<sup>50</sup> *Siegel v. Kranis*, 52 Misc.2d 78, 274 N.Y.S.2d 968 (Sup. Ct. 1966).

<sup>51</sup> Cal. Code Civ. Proc. § 339, subd. 1 (1961).



Within one year: An action for libel, slander, assault, battery, false imprisonment, seduction below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, . . .<sup>52</sup>

Although it is not clear from a mere reading of the statutes, the two year limitation statute applies to legal malpractice actions,<sup>53</sup> and the one year statute applies to medical malpractice actions.<sup>54</sup>

In a case recently decided by the California Supreme Court, the court made it clear that a malpractice action against an attorney falls within the two year period as set out in Section 339. The court cited that medical malpractice actions have been consistently held to sound in tort and therefore are covered by the one year statute, that an action against an attorney sounds in contract rather than tort, and that there was no reason why this distinction should be disturbed.<sup>55</sup>

The court also referred to the fact that the two year limitation period has been applied to attorney's negligence cases since as early as 1886.<sup>56</sup>

Although the California statutes do not mention malpractice *per se* in their statutes, as do Ohio and New York statutes, the California courts do line up with the Ohio and New York courts in agreement as to when the limitation period begins to run, *i.e.*, the limitation period for legal malpractice actions in California runs from the time of the negligent act.<sup>57</sup>

In explaining what they meant by the time of the negligent act, the court in the *Griffith* case made it clear that "the act of negligence occurred when the attorney misadvised plaintiff, even though the plaintiff did not discover the negligence nor the fact that he had been damaged thereby until later."<sup>58</sup>

In furtherance of this opinion, California courts have rejected both the theory that the cause of action accrues at the time of discovery of the negligence<sup>59</sup> and also the theory that the cause of action did not accrue until the attorney had carried out the entire plan which he was hired to do.<sup>60</sup>

<sup>52</sup> *Ibid.* § 340, subd. 3 (1963).

<sup>53</sup> *Jensen v. Sprigg*, 84 Cal. App. 519, 258 P. 683 (1927).

<sup>54</sup> *Weinstock v. Eissler*, 224 Cal.App.2d 212, 36 Cal. Rptr. 537 (1964).

<sup>55</sup> *Alter v. Michael*, 50 Cal.Rptr. 553, 413 P.2d 153 (1966).

<sup>56</sup> *Hays v. Ewing*, 70 Cal. 127, 11 P. 602 (1886).

<sup>57</sup> *Griffith v. Zavlaris*, 215 Cal.App.2d 826, 30 Cal.Rptr. 517 (1963).

<sup>58</sup> *Id.* at 828.

<sup>59</sup> *Bustamante v. Haet*, 222 Cal.App.2d 413, 35 Cal.Rptr. 176 (1963).

<sup>60</sup> *Eckert v. Schaal*, 58 Cal.Rptr. 817 (Ct. App. 1967).

In keeping with the views of other states, the limitation period rule in California *vis-a-vis* medical malpractice is quite different from the legal malpractice rule. Not only does Section 340 provide for a one year limitation period, but also in its application the limitation period is said to accrue at a different time.

With regard to medical malpractice, the rule in California is not the same as in Ohio and New York. The rule in California is that the action does not begin to run until the patient discovers his injury or through the use of reasonable diligence should have discovered it.<sup>61</sup>

Although the above is the rule followed in California, the California courts have also said that the cause of action would not normally run while the physician-patient relationship continues, unless the patient has discovered or should have discovered the injury. The rule has also been applied in California courts where the action asserted is one of fraudulent concealment by the physician.<sup>62</sup>

Plaintiffs in legal malpractice actions have tried to argue that legal malpractice actions should also run from the date of discovery of the injury. Courts have pointed out, however, that although the rule in legal malpractice actions may seem harsh, it is still the "time honored" rule in California and any changes should be made by the Legislature.<sup>63</sup>

### Summary and Conclusion

The statutes examined above presumably are representative of the leading thinking on the malpractice statutes in this country. These three states, however, reveal some large differences in both the content and application of the statutes as they affect legal malpractice.

As mentioned previously, New York has a three year limitation period in legal malpractice actions, California two years, and Ohio one year. In Ohio and New York the same statute is applied in legal and medical malpractice actions; in California different statutes apply, which have different limitation periods. In Ohio, malpractice actions have been expressly included by name; New York has recently changed its law to expressly include malpractice by name; whereas, in California, there is no specific mention made of malpractice.

The states do, however, agree on one critical point, *i.e.*, the statute of limitations in legal malpractice runs from the time of the negligent act. Courts of each of the states examined have, at various times, been confronted with the sometimes harsh effects of the application of this rule, especially when it is compared to the "continuous treatment" or the "severance of the physician-patient relationship" rule in medical malpractice in New York and Ohio and the "discovery doctrine" in Cali-

<sup>61</sup> Wohlgenuth v. Meyer, 139 Cal.App.2d, 293 P.2d 816 (1956).

<sup>62</sup> Weinstock v. Eissler, *supra* note 54.

<sup>63</sup> Griffith v. Zavlaris, 215 Cal.App.2d 826, 828, 30 Cal.Rptr. 517, 520 (1963).

ifornia. The courts' formula for these comparisons has been that any necessary changes in the law are matters of legislative (not judicial) concern.

Therefore, since any changes in the law are a matter of legislative action, it is the writer's opinion that the state legislators may find it worthwhile to consider the following suggestions:

1. Change the law so that the term *malpractice* is specifically mentioned and its meaning is defined and clear. This will help dispel the confusion and the growth of various contrived theories which can result from the use of hazy language.

2. Change the law so that the limitation period is the same for all malpractice actions whether legal, medical or otherwise. A two year limitation period would appear to be reasonable since it would give plaintiffs sufficient time to prepare and present claims, and the defendants would not be burdened with presenting facts which may no longer be available.

3. Change the law so that the limitation period accrues at the same time for all actions. The limitation period for legal malpractice actions, which runs from the time of the negligent act, is obviously unfair to plaintiffs who, being unfamiliar with the law, may not recognize when a negligent act has occurred, especially so when the attorney may continue to advise and act for his client in the same or similar matters. If the rule were the same for all malpractice actions then there could be no charges of favoritism or discrimination for any particular group.

The California rule applied in medical malpractice cases, *i.e.*, the cause of action accrues on discovery of the harm or when the harm should have been discovered, would seem to be best and most equitable rule to be adopted for all malpractice actions. Under this rule, no plaintiff will be penalized for failure to bring an action for a harm which he did not know existed. Also, such a rule may have the beneficial effect of reducing malpractice actions, since attorneys as well as other professionals may tend to be more careful in the use of their professional skills.