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Clarification is needed on malpractice law

Recent decision helps but creates conundrum on whether to have a written fee contract

By David N. Lefkowitz, Special to the Daily Report

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What is the statute of limitations for a legal malpractice claim? On Nov. 22, 2010, the Georgia Supreme Court issued an opinion which flew under the radar of most attorneys, but may have significant ramifications to their law practice. Newell Recycling of Atlanta Inc. v. Jordan Jones and Goulding Inc. (S09G1974., Supreme Court of Georgia, 2010 Ga. Lexis 884; 2010 Fulton County D. Rep. 3793) dealt with the statute of limitations for a professional liability claim and appears to have modified (and clarified) two decades of legal malpractice law.

Newell Recycling involved a lawsuit filed by a client against a professional (as defined by O.C.G.A. §9-11-9.1) for malpractice. The complaint was filed against an engineering firm four years and three months after the claim accrued. The engineering firm filed a motion for summary judgment arguing that the statute of limitations for professional liability claims is four years (breach of an oral/implied contract per O.C.G.A. §9-3-24). The plaintiff argued that the statute of limitations should be six years because there was a written contract setting forth the terms of the work, and therefore O.C.G.A. §9-3-24 should apply. ("All actions upon simple contracts in writing shall be brought within six years after the same become due and payable.")

The trial court agreed with the plaintiff. On appeal, the Court of Appeals reversed, holding that "[u]nder Georgia law, all malpractice claims sounding in contract are governed by the four-year statute of limitation found in O.C.G.A. §9-3-25." This quoted language, incidentally, has been used repeatedly, in multiple professional liability opinions (lawyers, accountants, engineers, etc.), without regard for whether a written fee contract existed. It was as if it didn't matter.

The case was appealed to the Georgia Supreme Court, which addressed this basic question: "Whether the Court of Appeals erred in holding that a professional malpractice claim premised on a written contract is governed by the four-year statute of limitations in O.C.G.A. §9-3-25, rather than the six-year statute of limitations in O.C.G.A. §9-3-24."

The Supreme Court answered as follows: "The Court of Appeals was incorrect when it concluded that the four-year statute of limitations of O.C.G.A. §9-3-25 applies even to those professional malpractice claims premised on the breach of a written contract for professional services. It is instead the six-year statute of limitations of O.C.G.A. §9-3-24 that would apply to such a claim."

The Supreme Court went on to hold that "[b]y its plain terms, the four-year statute of limitations contained in O.C.G.A. §9-3-25 does not apply where a contract is evidenced by a sufficient writing. The statute only applies where no sufficiently written contract exists and a cause of action can therefore be based solely on the breach of an express oral or implied promise."

So, what does this mean for lawyers practicing in Georgia? Based on this ruling, we should assume (unless/until the Supreme Court revisits or the Legislature visits the issue) that the statute of limitations for legal malpractice claims is six years, if there is a written fee contract between the attorney and the client.

But this creates quite the conundrum. Is it now better not to have a written fee contract? Clients will have only four years to bring a claim if the contract is oral. And what about contingency fee cases in which the agreement must be in writing pursuant to Rule of Professional Conduct 1.5? Does this create an unfair burden on contingency fee attorneys who must have a fee agreement as compared to many other attorneys who are not required to have a fee contract? From a risk management standpoint, attorneys who do not handle contingency fee cases are now faced with this decision: Should we avoid a fee contract, thereby ensuring that the statute of limitations for a legal malpractice claim is a maximum of four years, or should we continue to use fee contracts whenever possible, so that the scope of our work, and the client's obligations, are clearly defined … but at the same time giving our clients six years to file suit?

In my view, the benefits of having a fee contract outweigh any potential benefit of not having a fee contract. The fact of the matter is that most legal malpractice claims and bar complaints can be avoided by having a clear, comprehensive fee contract.

When the client alleges that you agreed to do "that," and you contend you agreed to do "this," how can you resolve the he-said/she-said? With a written agreement proving what the terms of agreement were. When your client does not want to pay an invoice, and you contend that the services rendered were precisely those which were requested, how do you prove what you agreed to do? With the fee contract. When a grievance is pending at the State Bar, the most important document for consideration is often the fee contract. To this observer, the risk-benefit balance tips clearly to the side of having a fee contract. It's your most important defense if a claim is brought against you.

While we are on the topic of the statute of limitations for legal malpractice, it should be noted that the law is confusing and often unfair to clients who have been harmed. There are two aspects of the statute of limitations: (a) how long is it, and (b) when does it begin to run?

With regard to the length, hopefully Newell Recycling has added some clarity.

With regard to when the statute of limitations begins to run, the current state of the law is—to put it gingerly—a mess.

The Court of Appeals states in its opinions, again and again, that the statute of limitations begins to run immediately when the error is made. There is generally no analysis as when the damage occurred, when the client learned of the error, when the lawyer disclosed the error, when the attorney-client relationship ended, etc. This creates some remarkably unfair circumstances.

For instance, what if the case was on appeal when the statute of limitations ran, with the lawyer who committed the error trying to fix it? Absent a tolling agreement or a separate act of fraud by the attorney, the client's claim can expire while the case is on appeal. What if the actual damage did not occur for more than four (or six) years? Under current Georgia jurisprudence, the client may have no remedy.

Consider this situation: A 43-year-old woman is getting divorced from her husband. She hires a lawyer and does not sign a fee contract. The marital estate is very large, thanks to the wife's contribution to the family business. The wife agrees that the husband will keep the business, and in return, the wife will receive $10,000 monthly alimony for the rest of her life. The lawyer drafts the divorce Settlement Agreement, but fails to include a provision that alimony will continue even in the event of remarriage. The lawyer also fails to tell the wife that alimony automatically ceases upon remarriage (unless the divorce agreement says otherwise).

Five years later, the wife remarries, and her ex-husband stops paying alimony. Her alimony, which should have continued for another 30-plus years, is terminated, for the sole reason that the lawyer negligently failed to insert a clause in her divorce agreement (and failed to advise the wife that remarriage would end the alimony).

In this situation, the wife suffered no actual damages until she remarried five years after the divorce agreement was executed. She had no idea that the agreement was negligently drafted for five years. She could not possibly have sued her lawyer. Yet her claim may be barred.

The genesis of this analysis goes back to Jankowski v. Taylor, Bishop & Lee, 246 Ga. 804 (1980), in which the Georgia Supreme Court ruled that a right of action for legal malpractice arises immediately upon the wrongful act having been committed, even though there are no special damages. Only three justices joined in the Jankowski opinion, so it was not binding precedent. In fact, the three who did join in the opinion cited the rule that the "true test to determine when the cause of action accrued is to ascertain the time when the plaintiff could first have maintained his action to a successful result."

This would be a fair and reasonable statement of the law, if the court had not immediately thereafter stated that "A right of action has its inception from the time there has been a breach of duty; and this would entitle the party to file suit for the breach, without regard to whether any actual damage had in fact resulted."

Can you imagine the wife who was denied her alimony suing her lawyer before she remarried and actually lost it? She would be laughed out of court. She could not possibly have "maintained her action to a successful result." Nonetheless, since the Jankowski case was decided, the Court of Appeals has cited to it, and its capricious deadline, dozens of times, without once noting (or noticing) that Jankowski is not binding precedent.

It is good news that the Supreme Court has clarified the law as to the length of the statute of limitations for legal malpractice. Now it is time to revisit the issue of when it starts to run. We are supposed to put the client's interests above our own, right? So let's have a statute of limitations that protects clients, and not lawyers.

How about a simple threshold: The statute of limitations begins to run when the client knew, or reasonably should have known, that the lawyer's error caused the damages. The rights of injured clients depend on a fair application of the law.

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