The Kentucky Malpractice Statute of Limitations

The Supreme Court Clears The Air

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In the Winter 1992 *Bench & Bar* an article titled "Do You Know The Rules?" appeared in this space. It was intended to provide you with a walking around feel for the Kentucky malpractice statute of limitations. Several of the opinions expressed then were necessarily tentative because of the dearth of Kentucky cases on point and the few that did exist were stale. That is no longer the case. Beginning in 1992 with *Hibbard v. Taylor*, [1] and followed in 1994 by *Michels v. Sklavos* [2] and *Alagia, Day, Trautwein & Smith v. Broadbent* [3] the Kentucky Supreme Court has provided the necessary guidance to avoid stumbling over the malpractice limitations rules. The rules on the occurrence and discovery of malpractice, damages, and continuous representation of clients are treated in detail in these decisions. This update is intended to provide you with key holdings and significant *dicta*.

A Quick Review of the Rules

- **The Basic Rule**: The limitation period for legal malpractice in Kentucky is "...one (1) year from date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured ...." [4]

- **Discovery**: Our statute adopts the discovery rule which recognizes that the client is at a disadvantage in the attorney-client relationship and may not appreciate that malpractice has occurred. Thus, the limitations period is tolled until the client has or reasonably should have learned of the malpractice. This rule's effect is to lengthen malpractice exposure in many cases well beyond one year.

- **Damages**: "The fact of damages is an indispensable element of an ordinary negligence action, and it likewise is required in a malpractice action against an attorney." [5] The rule is that there must be damage, irrevocable and non-speculative, before a malpractice cause of action arises and the statute of limitations begins to run. [6]

- **Continuous Representation**: The effect of the continuous representation rule "... is to toll or defer accrual [of the malpractice cause of action]. Its premise is that 'the cause of action in an attorney malpractice case should not accrue until the attorney's representation concerning a particular transaction is terminated.'" [7]This is a policy of judicial economy which gives the lawyer a chance to repair the error, but not place the client at a disadvantage because the limitation period is running. Conversely, it deters clients from filing premature malpractice actions.

The Context of *Hibbard, Michels, and Algia*

Hibbard and *Michels* involved allegations of malpractice in cases in litigation while *Alagia* concerned an IRS tax dispute settled administratively. The trial court ruled in favor of the accused lawyers' affirmative defense of the malpractice statute of limitations in all three cases. Once on the basis that the malpractice occurred and was discovered at the time of the directed verdict at trial against the client which was more than a year before the malpractice suit. Twice because the client was held to have discovered the malpractice more than a year before bringing the malpractice action. The Court of Appeals ruled in favor of the client in all three cases. The Supreme Court ruled in favor of the client in all three cases, but agreed with the Court of Appeals' rationale only once.

If nothing else, this track record suggests we were ripe for some definitive guidance from our highest court on the malpractice statute of limitations and now we have it. It is not the purpose of this article to cover these cases law review style, rather what follows is a synthesis of their key points for overall understanding.

Lessons Learned from *Hibbard, Michels, and Algia*

1. THE FIRST QUESTION IS -- HAS MALPRACTICE OCCURRED AS CONTEMPLATED IN THE STATUTE OF LIMITATIONS?

We all have the erroneous tendency to think of a malpractice action and lawyer negligence as being synonymous. As a result, when trying to calculate the date the limitations period begins to run, many incorrectly conclude that the date the negligence happened is the date the malpractice occurred. This is the emotionally significant event to the accused lawyer, but it overlooks the basic point that until the client suffers damages there is no cause of action for malpractice for which the limitation period could run.

The lesson to remember is that actionable malpractice has two components -- negligence and damages. It is possible to have lawyer negligence long before the client suffers damages. Only after damages are sustained is there an *occurrence* of malpractice within the meaning of the statute of limitations. The Supreme Court summed up this point well in *Alagia* by observing that" ... there are actually two periods of limitation, the first being one year from the date of occurrence and the second being one year from date of discovery if it is later in time." The Court then stressed that occurrence and cause of action are synonymous. There can be no cause of action without damages. Since the underlying claim was not yet final, damages were speculative, there was as yet no cause of action, and thus, no occurrence starting the statute of limitations. Under these circumstances the discovery period of limitation is irrelevant.

2. DAMAGES MUST BE IRREVOCABLE AND NON-SPECULATIVE.

All three cases stand for the proposition that damages are required which must be irrevocable and non-speculative before the limitation period starts. In *Hibbard* and *Michels*, litigation malpractice claims, damages remained speculative until the appellate

process was final and damages became real. In *Alagia*, a tax matter in administrative channels, the Court chose to the client's advantage the settlement date with the IRS as the time damages were realized. This date thus became the malpractice occurrence date. This was within a year of the date the malpractice suit was filed and mooted any question of applying the discovery rule.

Interestingly, the reported facts in *Alagia* suggest that there may have been a good argument for a much earlier date for starting the limitations period. The client consulted another lawyer shortly after receiving the deficiency notice from the IRS which was several years before the malpractice action was brought. Subsequently, the accused lawyers continued to represent the client on the tax matter until they were discharged a little less than a year before the malpractice suit was filed. *Northwestern Nat. Ins. Co. v. Osborne* [8] , cited favorably by the Court in *Michels*, holds that irrevocable, non-speculative damage was sustained when the client incurred modest expense by consulting an independent counsel about the accused lawyer's malpractice. One cannot help but wonder what advice was sought from independent counsel by the client in *Alagia* and what billing, if any, resulted. It seems plausible that malpractice was discussed. If that is the case, perhaps *Alagia* should have turned on the continuous representation rule instead of the occurrence rule.

While most questions about damages and the statute of limitations are answered in these three decisions, the open question on damages is how to reconcile *Northwestern* with them. They center on finality of the underlying case and refer to "principal" damages [9] but tell us little about irrevocable, non-speculative incidental damages that under *Northwestern* also start the limitation period.

3. IN A LITIGATION MALPRACTICE CLAIM THE KEY QUESTION IS WHETHER THE APPEAL IS FINAL.

As the first lesson teaches, the date a client suffers damages proximately caused by lawyer negligence is the time when actionable malpractice occurs and is subject to being discovered. *Hibbard* holds in a litigation malpractice action that time is when the appeal of the matter becomes final. The opinion fell short of declaring a strict finality of appeals tolling rule for litigation malpractice claims, but just barely. It is difficult to conceive an exception to it, especially in light of the support given to that interpretation in the other two decisions. [10]

4. ONLY THINK ABOUT THE DISCOVERY RULE AFTER YOU ARE SURE THAT THE ACTION WAS NOT BROUGHT WITHIN ONE YEAR OF THE OCCURRENCE OF THE MALPRACTICE.

The discovery rule becomes relevant only after a date is fixed for the occurrence of the malpractice and only if the malpractice action is not brought within one year of the occurrence date. As the Court explained in *Michels*:

The 'discovery rule' appended to the statute of limitations found in KRS 413.245 is merely a codification of the common law principle .... It presumes that a cause of action has accrued, i.e., both negligence and damages has occurred, but that it has accrued in circumstances where the cause of action is not reasonably discoverable, and it tolls the running of the statute of limitations until the claimant knows, or reasonably should know, that injury has occurred.

5. IT MAY BE *DICTA* BUT THE CONTINUOUS REPRESENTATION RULE LIVES IN KENTUCKY.

Ironically, all three decisions refer to continuous representation, but not one was decided on that basis. Thus, it is all *dicta*, but such strong *dicta* that there can be little doubt of this Supreme Court's favorable view of the rule. Both *Michels* and *Alagia* analyze the rule in some detail summed up best in this quote from *Alagia*:

The continuous representation rule is a branch of the discovery rule. In substance, it says that by virtue of the attorney-client relationship, there can be no effective discovery of the negligence so long as the relationship prevails. This recognizes the attorney's superior knowledge of the law and the dependence of the client, and protects the client from an unscrupulous attorney. We believe it to reflect the intent of the General Assembly with its enactment of the discovery rule. Moreover, we perceive a practical advantage in the continuous representation rule. In a proper case, a negligent attorney may be able to correct or mitigate the harm if there is time and opportunity and if the parties choose such a course. Without it, the client has no alternative but to terminate the relationship, perhaps prematurely, and institute litigation. Finally, without the continuous representation rule, the client may be forced, on pain of having his malpractice claim become time-barred, to automatically accept the advice of a subsequent attorney, one who may be mistaken, over the advice of the current attorney. In such a circumstance, the client may be without any assurance that the latter attorney's views are superior to those of the former, but must nevertheless choose between them.

6. JUDICIAL POLICY ON THE MALPRACTICE STATUTE OF LIMITATIONS TILTS TOWARD THE CLIENT (AS IT SHOULD).

The discovery and continuous representation rules both serve to lengthen the limitations period. Considerations of judicial economy favor a finality of appeals rule before a litigation malpractice suit is ripe -- again extending the lawyer's window of exposure to a malpractice claim. What we now have in Kentucky is a "virtual finality of appeals" rule. Lastly, the Court in *Alagia* made clear its determination to protect a client when the circumstances warrant by observing "...we have shown no reluctance to construe such [limitation] statutes in a manner which prevents parties from profiting from their own machinations." While it is risky to extrapolate too much from the policy implications of a few decisions, it seems likely that the trial judiciary will dramatically curtail the past success of the affirmative defense of the malpractice statute of limitations for Kentucky lawyers.

Endnotes

1 Ky., 837 S. W. 2d 500 (1992)

2 Ky., 869 S.W.2d 728 (1994)

3 SupCt of Ky., 93-SC-631-DG, June 23, 1994

4 Ky. Rev. Stat. 413.245

5 ABA/BNA Lawyers' Manual on Professional Conduct , p.301:130

6 Northwestern Nat. Ins. Co. v. Osborne, 610 F. Supp. 126, 129 (D.C. Ky. 1985)

7 Section 18.12, Continuous Representation Rule, 2 Legal Malpractice 115, 3rd Ed (Mallen & Smith)

8 610 F. Supp. 126 (D.C. Ky. 1985).

9 See Hibbard

10 *Hibbard* is couched in terms of both occurrence and discovery considerations. Based on *Michels and Alagia*, *Hibbard* could have been decided with no reference to "discovery." The malpractice action was brought within one year of occurrence, i.e., within one year by one day of the appellate decision becoming final.