NYPRR | December 2008

Fixing the Date When the Client Relationship Ends

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We all know that the statute of limitations for legal malpractice actions is three years.

And now we know – at least, in the First Department – that the only way to be sure that the statute is running is to establish in clear and unequivocal terms the date upon which the lawyer/client relationship has ended. Leave nothing to chance or to judicial interpretation, because you may not like the result.

The facts in *Gotay v. Breitbart,* 2008 NY Slip Op, 08432 (A.D.1st Nov. 6, 2008) are long and tortuous, but they led the majority, in an opinion by Justice Jonathan Lippman, P.J., to conclude that the plaintiff could sue for malpractice more than eight years after a face-to-face meeting which her lawyers construed as the end of the lawyer/client relationship.

Plaintiff Gotay was injured during her birth in 1977 – she was thirty-one on the day of Judge Lippman's decision. In 1978, her mother retained a law firm which is now defunct but which began an action for medical malpractice within a few months after the firm was retained. The action lay dormant for many years, and in 1993, fifteen years ago, the mother substituted defendant Breitbart as her attorney.

One year later, three Breitbart associates left Breitbart to form their own firm, Handwerker, Honschke & Marchelos (HHM), apparently taking the Gotay claims with them. One of the associates was Michael Handwerker. Handwerker's new firm was dissolved, and Handwerker took the Gotay claims with him to the firm of Ross Suchoff. Mark Hankin, a partner at the Ross firm, began an evaluation of the Gotay claims and concluded that the firm could not undertake the matter because no index number had ever been purchased. After July 1, 1992, the purchase of an index number was required before an action could be instituted in the New York Courts.

Defendants Rely on Notice at Meetings

Defendant lawyers argued that at a meeting with plaintiff and her father in 1998, one of the HHM partners had advised them that the firm considered the medical malpractice claim dead and that their claims, if any, were for legal mal-practice against the law firm they had originally retained in 1978. Judge Lippman rejected this argument on the grounds that there was no evidence that the lawyer had conveyed to the clients that their representation was definitely concluded or that he had offered to deliver their file to them. On the contrary, the file remained in the firm's possession and was one of the files that attorney Handwerker took with him when he joined the Ross firm.

In 1999, attorney Hankin, representing the Ross firm to which Handwerker had delivered the file, had another meeting with plaintiff and her father. Again, Judge Lippman rejected the defendants' claim that clear and unequivocal notice of termination had been given to the clients during the meeting. True, Hankin did tell them that the Ross firm could not represent them, but Handwerker was not present at the meeting, and "there is no proof that either plaintiff or her father was then aware that Handwerker had

…become a member" of the Ross firm. Hankin's statement that the Ross firm was unwilling to represent them was "insufficient to signal to plaintiff that her representation by HHM had terminated." Plaintiff's attorney/client relationship was with Handwerker and HHM, not with Ross, and "her interaction with Hankin, a new attorney at a new firm, cannot reason-ably be viewed as having placed her on notice that her attorney/client relationship with her own attorneys at HHM had concluded."

Moreover, Judge Lippman rejected defendants' claim that plaintiff's father had requested the return of her files during the meeting. "The record does not permit us to conclude that such a request was in fact made." Indeed, the file was not returned and, later, Hankin acknowledged that his firm was still holding the file.

Representation Continues

Judge Lippman reasoned that the attorney/client relation-ship cannot be concluded ambiguously. Both the lawyer and the client must be made to understand that the relationship is really over. This conclusion was mandated, Judge Lippman said, by the reasoning of the Court of appeals in *Shaw v. Manufacturers Hanover Trust Company,* 68 NY2d 172 (1986), i.e.,: It is "essential that the terms of [attorney-client] representation be set down with clarity." As Judge Lippman wrote:

> …. it is no less critical [than in fee disputes] to have an explicit and accurate understanding of … other fundamental issues pertaining to the attorney-client relationship, including, obviously, the elemental issue of whether there is a relationship at all. There is no room for uncertainty on these matters, especially where, as here, attorneys deal with laypersons unversed in the nuances and intricacies of legal practice and expression… If the attorney-client relationship has come to an end, that fact should be absolutely clear to all parties involved.
>
> An attorney is required to provide reasonable notice to the client when withdrawing from representation (see CPLR 321[b][2]; Rules of App Div, 1st Dept [22 NYCRR] § 604.1[d][6]), and no definition of reasonable notice would require a client to infer, from ambiguous action or inaction on the part of her attorneys, much less on the part of an attorney with whom she had no relationship, that she is no longer represented. Particularly under the circumstances obtaining here, where the entire course of the litigation had been fraught with delay and a lack of communication between client and counsel, and where there had been a series of largely inactive yet persistent attorney-client relationships, more than equivocal behavior was required to sever the representational relationship…

The majority granted the motion of attorney Breitbart for summary judgment because, although the firm of HHM was never formally substituted for Breitbart, the parties all apparently agreed that HHM was the firm retained by plaintiff in the medical malpractice action.

As for the HHM defendants, who submitted expert testimony that the plaintiff would not have succeeded in the underlying action for medical malpractice, the majority found that evidence submitted by the plaintiff raised an issue of fact whether there was a causal link between plaintiff's damages and defendants' failure to obtain the requisite index number or to ask for *nunc pro tunc* relief. Accordingly, the Court denied the defendants' application for summary judgment. At the same time, it denied plaintiff's cross-motion for summary judgment.

A Strong Dissent by Justice Friedman

Judge David Friedman disagreed with the majority and expressed his dissent in a long and detailed opinion. He relied essentially on the affidavit of lawyer Hankin of the Ross firm, in which Hankin described his meeting on January 28, 1999 with plaintiff and her father. The affidavit stated:

> Although the Ross Suchoff Firm was never retained by the plaintiff and did not have an attorney-client relationship with her or her parents, I met with the plaintiff and her father on January 28, 1999 to advise of the situation, as well as, my Firm's decision not to undertake representation of the plaintiff in the underlying medical malpractice action. At that point, the plaintiff's father requested the immediate return of the file.
>
> Soon thereafter, I understand that the complete file in the underlying medical malpractice action was sent directly to the plaintiff's father.

Judge Friedman argued that the continuous representation doctrine applied to the plaintiff's claims throughout the many years between the original agreement between plaintiff and her lawyers and the meeting with Hankin in January 1999. As he wrote,

> At the outset, I note that, whenever plaintiff's legal malpractice claim against a given attorney or law firm accrued, the three-year statute of limitations governing that claim did not begin to run until the attorney's or firm's representation of plaintiff on the medical malpractice matter ended. This is the result of the continuous representation doctrine… The Court of appeals has explained the rationale for the continuous representation doctrine as follows:
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> '[T]he rule recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered. …' [*Glamm v Allen,* 57 NY2d 87, 94 (1982)]
>
> Consistent with its purpose, '[t]he continuous representation doctrine tolls the statute of limitations only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim' [*McCoy v Feinman,* 99 NY2d 295, 306 (2002]. Thus, 'even when further representation concerning the specific matter in which the attorney allegedly committed the complained of malpractice is needed and contemplated by the client, the continuous representation toll would nonetheless end *once the client is informed or otherwise put on notice of the attorney's withdrawal from representation'* [*Shumsky v Eisenstein*, 96 NY2d 164, 170-171 (2001)] (emphasis added). The uncontroverted record evidence establishes that, here, plaintiff was "informed" and" put on notice" that the HHM defendants were withdrawing from her representation more than three years before she commenced this lawsuit [for legal malpractice].

Judge Friedman accused the majority of "adopting the fanciful hypothesis conceived by Supreme Court - but never advanced by plaintiff, and without support in the record - that plaintiff was not aware of the relationship between Handwerker and the firm that rejected her case at the January 28, 1999 meeting (i.e.,

Ross Suchoff). The illogic of this position is astonishing. …plaintiff has not submitted an iota of evidence to suggest that this was the case. Thus, the majority… is essentially injecting a factual issue into the case that the parties themselves have not raised. I do not believe that this is properly within the scope of the judicial function."

For its part, the majority, as expressed in the opinion of Judge Lippman, characterized Judge Friedman's conclusions as follows:

> The elaborate inferential constructs which the dissent finds so irresistible are not appropriately utilized to impute knowledge of the status of an attorney-client relation. … In as much…as the HHM defendants failed to meet their burden as proponents of the summary judgment motion to show prima facie that…unequivocal notice had been afforded, the motion was properly denied.

Conclusion

When the Court is divided so openly, it behooves us as lesser mortals to pursue the safest course. In this case, that would obviously be to confirm the end of a client/lawyer relationship unequivocally and in terms which are as irrefutable as our language permits. Obviously, this means, PUT IT IN WRITING AND MAKE IT CLEAR, viz:

> Our relation as lawyer and client has come to an end for the following reasons….. (rejection of matter; matter resolved or services completed; disagreement over fees; dissatisfaction with results or services; inability to agree on tactics; complaint to grievance committee or court, etc.)
>
> Accordingly, we give you notice that our lawyer/client relationship is terminated, effective immediately and that your files, which are your property, are available for delivery to you.

Lazar Emanuel is the publisher of NYPRR.

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