

## Statue Of Limitations In Legal Malpractice Actions

BY ROY SIMON

Statute of limitations questions in legal malpractice actions are tricky. If you are trying to gauge your law firm's exposure to legal malpractice actions — or if you represent plaintiffs in legal malpractice actions — you'll want to read the Third Department's recent decision in *Aaron v. Roemer, Wallens & Mineaux, LLP*, 2000 WL 637515 (3d Dept., May 18, 2000). It serves as a concise primer on the subject, especially the little-known "continuous representation" rule.

In *Aaron*, a client named Steven Aaron retained the law firm of Roemer, Wallens & Mineaux, LLP to defend him against two consolidated federal lawsuits. Aaron did not pay any fees up front and did not sign a retainer agreement, but the Roemer firm nevertheless appeared on his behalf and filed answers to the suits in July and September 1995.

After that, things went straight downhill. Aaron apparently didn't cooperate with the firm's investigation of the facts and didn't pay his legal fees, but he somehow persuaded the firm to help him file a claim with his insurer seeking "reimbursement" for those legal fees. In October 1995, the Roemer firm notified Aaron in writing that it would be seeking to withdraw. The next day, the firm sent a letter to the court seeking withdrawal based on (a) Aaron's nonpayment of his legal fees, (b) his failure to respond to the firm's requests for documents, and (c) his scheme to involve the firm in "misrepresentation and fraud in submission of a claim for insurance coverage for his Federal action legal expenses." The court notified Aaron that it would permit the Roemer firm to withdraw unless Aaron objected to the withdrawal in writing by November 6, 1995.

Now comes the crucial time sequence:

*November 8, 1995:* Aaron sends a letter to the court stating that he will not contest the firm's motion.

*November 15, 1995:* The Roemer firm signs a stipulation extending the time for the plaintiffs in the underlying action to respond to certain discovery demands.

*November 17, 1995:* The court signs an order formally permitting the Roemer firm to withdraw.

More than two years later, in April 1998, the jury in the underlying federal actions awarded the plaintiffs compensatory and punitive damages. On November 17, 1998 — three years to the day after the federal court order permitting the firm to withdraw, Aaron sued the Roemer firm for legal malpractice. The action was apparently well grounded. In post-trial motions in the action, the federal district judge had held that one of plaintiffs' claims had been time barred but that Aaron had waived this valid affirmative defense by failing to plead it in his answer.

The timing of Aaron's malpractice action set up two key questions: (1) how long is the statute of limitations for legal malpractice? and (2) when did it begin to run in this case?

### **How Long Is The Statute?**

The statute of limitations for legal malpractice in New York was the focus of litigation and legislation during the 1990's. Confusion arose because (a) the statute of limitations for breach of contract is six years; (b) the statute of limitations for a tort is ordinarily only three years; and (c) legal malpractice is both a breach of contract and a tort. In *Santulli v. Englert, Reilly & McHugh, P.C.*, 78 N.Y.2d 700 (1992), the Court of Appeals resolved this confusion by holding that a plaintiff could commence a legal malpractice action within the six-year statute of limitations — but actions commenced more than three years after the alleged malpractice could result only in contract damages, not tort damages.

The Legislature was unhappy with the *Santulli* compromise. In 1996, it amended CPLR § 214(6) to provide that the statute of limitations for legal malpractice is three years "regardless of whether the underlying theory is based in contract or tort." The amendment effectively overruled *Santulli* and attempted to force legal malpractice plaintiffs to commence their actions within three years, whether the action was based on contract or tort.

However, to compound the confusion, courts have almost uniformly held that amended § 214(6) is not retroactive. Rather, courts have held that a malpractice plaintiff whose claim accrued before § 214(6) was amended must commence the malpractice action within a "reasonable time" after the amendment's effective date (September 4, 1996).

Applying this to Aaron's malpractice suit against the firm, the statute of limitations was the longer of (a) three years after the cause of action accrued, or (b) a "reasonable time" after amended § 214(6) took effect on September 4, 1996.

The court quickly disposed of the "reasonable time" argument: "Plaintiff commenced his action 26 months after the effective date of the amendment, a period that is unreasonable as a matter of law." That left the pivotal question: When did the statute of limitations begin to run?

The rule is well settled in New York that "a cause of action for damages arising out of attorney malpractice accrues as of the date that the malpractice is committed. The critical time period is when the malpractice was committed, not when the client discovered it." *Cohen v. Law Firm of Kelly Drye & Warren*, N.Y.L.J. August 16, 1999, QDS:42701427 (N.Y. County S. Ct. 1999). However, under the so-called "continuous representation" rule, the three-year statute is tolled for as long as the lawyer continues to represent the client.

To invoke the continuous representation rule, the Aaron court noted, the legal malpractice plaintiff must show "clear indicia of an ongoing continuous, developing, and dependent relationship between the client and the attorney." Aaron argued that he had such a continuous relationship with the Roemer firm until the federal court formally granted its motion to withdraw on November 17, 1995 — three years to the day before the malpractice suit was filed. Aaron especially noted that the Roemer firm had signed a stipulation identifying itself as Aaron's attorney on November 15, 1995, and that he (Aaron) had not formally retained another attorney until after the court's order permitting the Roemer firm to withdraw.

The Supreme Court denied the Roemer firm's motion for summary judgment, but the Third Department reversed. Brushing aside the stipulation and the federal court's order on November 17, 1995, the Third Department said that Aaron's letter to the federal court "clearly evidences that no later than November 8, 1995 he perceived that the relationship with his attorneys had been irretrievably broken." Moreover, the plaintiff did not "establish that plaintiff's trust and confidence in defendants continued or was restored after November 8, 1995...." The court said:

In these special circumstances, where the attorney promptly moves to withdraw and the client acknowledges in writing an irreparable deterioration of the attorney-client relationship, we conclude that the relationship necessary to invoke the continuous treatment rule [sic] did not persist until formal termination of the nominal representation by defendants, but rather ceased with the disruption of the client's trust and reliance prior to November 8, 1995.

The lesson of *Aaron v. Roemer, Wallens & Mineaux, LLP* is simple. As long as a client has trust and confidence in his lawyers, the statute of limitations on any legal malpractice claim remains tolled. But as soon as the attorney-client relationship is "irretrievably broken," the statute of limitations for legal malpractice claims begins to run. Careful attorneys and clients will therefore document the end of the attorney-client relationship as precisely as they can. And prudent attorneys for legal malpractice plaintiffs should leave plenty of margin for error by filing suit well before the three- year statute of limitations expires. Those who wait until the last minute to file a malpractice suit may find, as Steven Aaron did, that the last minute has already passed.

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