

Understanding the “Continuous Representation” Doctrine – How to Prevent Unduly Perpetuating an Attorney’s Exposure to Suit

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I. INTRODUCTION

Many courts and litigants alike seem to have lost sight of the policy underpinnings which supported the rule that a legal malpractice claim would be “tolled” during the pendency of the attorney-client relationship.

All too often we see the rigid application of this “continuous representation” rule resulting in decisions which suggest that a legal malpractice action will not accrue (and hence the statute of limitations begin to run) until one year after the attorney-client relationship terminates. The following article will examine some fundamental misconceptions regarding the “tolling” feature of the continuous representation doctrine for attorney malpractice claims.

In Ohio and other jurisdictions, the statute of limitations on a claim for legal malpractice is one-year. The simplest application of the rule holds that the statute of limitations will begin to run (i.e. the “accrual” of a legal malpractice claim) on the date that the negligent act or omission is committed. However, unscrupulous attorneys could hide the error until one-year from the expiration of the negligent act thereby quashing the client’s potential malpractice claim. Hence, the “termination rule” developed which equitably tolls the statute of limitations (or the “accrual” of the client’s claim), until the attorney-client relationship terminates. However, should this equitable principle be applied where the client has actual knowledge of the error but continues the attorney-client relationship simply to toll the statute of limitations and perpetuate the attorney’s exposure to suit? Of course not. This would obliterate the very public policy supporting a statute of limitations.

The more sound approach, and coincidentally the approach championed in this article, is to apply this equitable doctrine with flexibility depending on the particular facts and circumstances surrounding the attorney-client relation-

ship. The “continuous representation” or “termination rule” should not apply in many factual circumstances, such as those instances where a client has actual knowledge of the alleged error or is investigating the alleged error and potential malpractice remedies. In many circumstances, a client will hire outside counsel or utilize in-house counsel to investigate the questionable activities or practices of the target attorney. In such circumstances should the client reap the benefit of the “continuous representation” doctrine to perpetuate the attorney’s liability for suit until the hard and fast termination of the attorney-client relationship? In such circumstances, hasn’t the client’s trust and confidence in the attorney’s ability been destroyed such that the relationship has *de facto* ended and the statute of limitations began to accrue?

As this article will examine below, it is these very situations which render the rigid application of the “termination rule” and “continuous representation” doctrines unworkable in many factual circumstances. All attorneys, whether practicing in professional liability defense or not, should be aware of the correct and pragmatic application of the continuous representation doctrine analyzed in this article. After all, it is only a matter of time before a knowledgeable practitioner sets an appellate court straight as to the correct application of the rule.

II. THE STATUTE OF LIMITATIONS – SOME INTRODUCTORY POINTS

Prior to delving into the intricacies of the continuous representation doctrine, a refresher on some basic statute of limitations maxims is instructive. Pursuant to Ohio Revised Code Section 2305.11(A), a plaintiff must commence an action for legal malpractice within one year from the date upon which the cause of action accrued. The Ohio Supreme Court has held that the statute of limitations begins to run or the legal malpractice action has “accrued”:

* * * [1] when there is a cognizable event whereby the client discovers or should have discovered that his injury