

# AHERN Update



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## Protecting the Malpractice Statute of Limitations Defense

**By Daniel W. Hager, Corporate Counsel, Ahern Insurance Brokerage**

Properly understanding the legal malpractice statute of limitations is critical to both preserving the defense should a claim ever arise, and to the timing of filing any suit for fees against a client (a last resort with a high risk of drawing a responsive malpractice claim).

Code of Civil Procedure § 340.6 provides in relevant part that:

- (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first... Except for a claim for which the plaintiff is required to establish his or her factual innocence, in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
- (1) The plaintiff has not sustained actual injury.
  - (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred...

Thus, except in relatively rare situations—for example where a claim arises from representation in a criminal case (which carries an additional requirement that the client obtain post-conviction exoneration establishing actual innocence)—a client generally has one year from the date he or she discovers, or reasonably should have discovered, the purported acts of malpractice in which to bring a claim. The client does not have to know what legal theories might apply, just that some acts or omission of the lawyer injured the client. To help establish the discovery date, client complaints should be confirmed in writing, at least in a memo to the file.

The statute is then tolled until the client suffers actual injury. However, the full extent of the injury need not be known. Once any damage has been suffered the one-year period starts running. A client incurring fees to hire a second lawyer to undo harm caused by a previous lawyer constitutes actual injury that starts the clock.

The other common tolling period is while the attorney continues to represent the client regarding the specific matter in which the alleged malpractice occurred. Clients should therefore be sent "end of engagement" letters

when matters conclude. By documenting the end of the representation, such a letter can defeat an untimely malpractice claim. On the other hand, providing any related services after a representation has ended can establish continuous representation tolling that can defeat an otherwise valid statute of limitations defense.

The statute is also tolled while the client is under a disability restricting the ability to commence legal action.

The referenced four-year statutory period provides an outside limit. It runs from the date of the wrongful act or omission itself, regardless of whether the client discovers the facts constituting the wrongful act or omission. However, the four-year period is subject to "actual injury" and "continuous representation" tolling. It is also tolled if the attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney.

Proper analysis of the statute of limitations is particularly important if a firm is considering suing a client for fees. Firms should always be cautious about suing a client, since doing so will typically generate a responsive malpractice claim. Thus, matters should always be carefully evaluated for malpractice exposure before deciding whether to sue for fees.

Also, since the breach of contract statute of limitations is generally longer than the legal malpractice statute, firms that decide to sue for fees should only file suit after the malpractice statute has already run. If the statute has run, the client can still assert malpractice as a defense seeking a set-off against the fee claim; but the client is barred from asserting an affirmative malpractice claim seeking damages.

Understanding and taking actions that protect the statute of limitations defense is crucial for reducing the risk and expense of malpractice claims.