

Clear Termination Of Attorney-Client Relationships Is Key

By Geoffrey Macbride and Jason Fellner

Law360, New York (August 15, 2017, 12:09 PM EDT) --

The one-year statute of limitations for legal malpractice claims is a powerful tool to limit an attorney's liability. However, this protection can be blunted or entirely eliminated if an attorney does not take protective steps to document the end of representation.

The limitations period is tolled while an attorney continues to represent a client in the specific subject matter in which the purported malpractice occurred. (Code of Civ. Proc., 340.6(a)(2).) Failure to document the end of representation allows former clients to create triable issues of fact regarding when representation actually terminated.

This turns what once was a bright line wall against liability into a factual issue that must be determined by a jury. This factual quagmire can be avoided by documenting the conclusion of representation.

The importance of clear and detailed documentation to an effective statute of limitation defense was recently demonstrated in *Flake v. Neumiller & Beardslee* (2017) 9 Cal.App.5th 223. In this case, the timeliness of the action turned on whether the attorney-client relationship ended when an attorney served a client with a motion to withdraw as counsel, or when the motion was granted. (*Id.* at pp. 229-230.)

The Third District affirmed a grant of summary judgment, finding that the action was time-barred, based on the attorney's end of representation documentation.

Whether the action was timely centered on the conclusion of representation after judgment was entered following trial. (*Flake*, *supra*, 9 Cal.App.5th at p. 226.) The attorney filed a motion to be relieved as counsel because the client would not sign a substitution of attorney form and another attorney was already handling all post-judgment matters. (*Id.* at pp. 226-227.)

The attorney contended representation ended once the motion was served because the client could not reasonably expect the attorney to continue to perform legal work. (*Id.*) The client argued that representation continued until the court granted the motion. (*Id.* at p. 230.) This argument was based, in



Geoffrey Macbride



Jason Fellner

part, on his subjective belief that representation continued. (*Id.* at p. 232.)

The court found that representation ended when the motion was served because the client could not have a reasonably objective belief that representation continued after he received the motion to withdraw. (*Id.*) While the client “may have (subjectively) thought otherwise, any objectively reasonable client would have understood on receipt of the motion to withdraw that [the attorney] had stopped working on the case.” (*Id.* at p. 231 (emphasis in original).) Simply put, “The client’s reasonably objective belief controls in all cases.” (*Id.*)

The court focused on the whether there was objective evidence of an ongoing mutual attorney-client relationship and activities in furtherance of that relationship. (*Flake, supra*, 9 Cal.App.5th at p. 231.) *Flake*’s ruling is based on the standard that when an attorney unilateral withdraws from an attorney-client relationship, the representation concludes when the client actually has, or reasonably should have, no expectation that the attorney will provide further legal services. (*Id.*)

This standard is derived from the purpose of the tolling provision, i.e., a client should not be forced to file a malpractice suit while he still relies on the attorney’s representation and requiring a client to file a malpractice action will disrupt the attorney-client relationship. (*Id.*) Once the client does not reasonably expect the attorney will provide further legal services, the client is not relying on further representation and there is no relationship to disrupt. As the purpose for tolling provision is no longer served, the statute is no longer tolled. (*Id.*)

There are a number of ways an attorney can effectively document the end of representation to draw a bright line that a court can use to determine when representation ended and whether a legal malpractice action is timely. An attorney would be wise to remember the following points when ending an attorney-client relationship.

Conclude the Representation

A client can, and will, argue that representation continued after the formal conclusion of representation if an attorney continues to work on a matter. This can be as simple as a phone call or presentation of a case summary to successor counsel.

If this happens, document that your communications do not represent further work on the matter and that the representation has concluded.

Memorialize Phone Calls and Meetings

If the representation was concluded during a meeting or a phone call, memorialize it in a letter or email to the client.

Be sure to include the date the call or meeting occurred and all the objective facts which would show to your client, and later the court, that there cannot be a reasonable belief that representation could continue. This should be reflected in billings to the client.

Do Not Rely on the Conclusion of Agreed Tasks to Automatically Signal the End of Representation

An often repeated standard is that the representation ends when the objects of litigation are concluded, which lays a trap for the unprepared litigator.

Even if the matters within the scope of representation have ended, leaving nothing left for the attorney to do, the former client may not be aware of this important fact. Prompt written communication to the client confirming the end of representation is essential.

View Everything From the Objective Client's Perspective

The end of representation analysis is conducted from the viewpoint of an objective client. When documenting the end of representation, always review your correspondence from the client's perspective. If the client is not objectively aware representation has not ended, then it likely has not ended for the purposes of tolling the statute of limitations.

If You Still Represent a Client in a Separate Matter, Be Sure the Client Knows the Representation Is Separate

The statute is tolled only so long as the attorney continues to represent the client in the same subject matter in which the purported malpractice occurred. If the attorney continues to represent the client in other matters, it is important that the client is objectively aware of the distinction between the two matters.

If this is not done, the client can later claim that he believed that the representation in one matter meant that he was still represented in the other matter.

An attorney can create a potentially solid statute of limitations affirmative defense by creating detailed documents memorializing the end of representation. By following these precepts and learning from the standards applied in Flake, an attorney will better his or her chance of eliminating a malpractice case based on statute of limitations, so long as the claim is filed after one year from the date of the termination of the attorney-client relationship. (see Code of Civ. Proc., § 340.6.)

Geoffrey T. Macbride is an associate, and Jason E. Fellner is a shareholder, at Murphy Pearson Bradley & Feeney PC in San Francisco.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.
