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Malpractice Decision Focuses on When Attorney-Client Relationship Ended

The English novelist and playwright John Galsworthy once wrote "The beginnings and endings of all human undertakings are untidy." This observation, which Galsworthy applied to "the building of a house, the writing of a novel, the demolition of a bridge" and "the finish of a voyage," could also describe many attorney-client relationships. In the best of all possible worlds, such relationships start with a well-drafted retainer agreement, duly executed after an appropriate conflict-checking process; when they end, they do so with a happy client and a zero A/R balance. Most of the time, however, lawyers neither live nor practice in the best of all possible worlds.

The "untidiness" problem can be particularly challenging when it comes to figuring out when an attorney-client relationship ends. Yet, pinpointing the end of the relationship is critical for at least two reasons. First, it distinguishes between a "current" client and a "former" client for conflicts purposes. Since conflicts with current clients are subject to a much higher standard and – in some cases – are unwaivable, knowing whether someone is a former or current client is essential to getting the conflict analysis right. Second, it cuts off the "continuous representation" tolling period, which is necessary in many legal malpractice cases to calculate the statute of limitations. Although the limitation period is three years from the *act of malpractice* (at least in New York),[1] that period may be tolled while the attorney continues to represent the client in the same matter.

Given these important considerations, confusion about when an attorney-client relationship has ended can lead to serious – even devastating – professional and economic consequences, including disqualification, legal malpractice liability, or even disciplinary charges. Nevertheless, identifying the end of an attorney-client relationship can bedevil even experienced legal ethics practitioners. Consider the following examples:

1. A lawyer lists her name and address in the "Notices" provision of a contract she negotiates for a client. After the contract is signed, the lawyer performs no further services for the client.

2. Ten years ago, a lawyer represented a client in a negotiation. Seven years ago, the client asked the lawyer to represent her in a new matter, and he did. Three years ago, another new matter. In the years between each transaction, there was no communication from the client.

[1] The rule may different in other jurisdictions.

3. A litigator represents a plaintiff in a lawsuit. During the course of the litigation, the client stops communicating with and paying the lawyer. After many months of trying to contact the client by phone, email, and snail mail, the lawyer sends a final letter terminating the relationship and enclosing a substitution of counsel form, to which the client does not respond. The lawyer neglects to formally withdraw from the case, which continues to lie dormant.

Which of these attorney-client relationships ended and when? At least one court has held that listing oneself as the notice recipient on an executory contract may continue the relationship. *See Jones v. Rabanco Ltd.*, No. C03-3195P, 2006 WL 2237708, *3 (W.D. Wash. Aug. 3, 2006) (inclusion of law firm in "notice provision" created "reasonable belief on the part of the client that the firm named in the contract was still representing it on matters related to the contract").

Courts grappling with the second scenario reach different, and arguably inconsistent, results. *See, e.g.*, *id.* at *4 (three years without contact is not "inconsistent with representation"); *Oxford Systs Inc. v. Cellpro, Inc.*, 45 F. Supp.2d 1055, 1060 (W.D. Wash 1999) (13-year client relationship continued despite 11-month gap in projects). *But see Med. Diagnostic Imaging, PLLC v. CareCore Nat'l, LLC*, 542 F. Supp. 2d 296, 307 (S.D.N.Y. 2008) (where attorney performed work on "as needed" basis for client over 15 years, relationship ended on date attorney last performed formal legal work); *Artromick Int'l, Inc. v. Drustar, Inc.*, 134 F.R.D. 226 (S.D. Ohio 1991) (one-year gap sufficient to end relationship).

Finally, the failure to file a formal substitution of counsel in a lawsuit may – or may not – suggest a continuing relationship, depending on the circumstances. *See, e.g.*, *Frenchman v. Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP*, 24 Misc. 3d 486, 501, 884 N.Y.S.2d 596, 609 (Sup. Ct. 2009) (absence of a formal substitution or withdrawal of counsel is not dispositive); *U.S. v. Levy*, 25 F.3d 146, 156 (2d Cir. 1994) (questioning whether representation ended after client fled to Israel where counsel never formally withdrew).

Given the stakes and the uncertainty, any effort to draw a clear line in the sand is a welcome development. In *Aseel v. Jonathan E. Kroll & Assoc. PLLC.*, a New York case decided on May 29, 2013, the client in a divorce action sued his law firm for malpractice. The law firm moved to dismiss the complaint. The firm argued that the three-year statute of limitations for legal malpractice barred the claim: its representation of the plaintiff ended on November 5, 2007, when the plaintiff "surreptitiously" removed his file from the firm's office. The plaintiff filed his complaint on November 8, 2010 – more than three years later. The trial court agreed with the law firm and dismissed the case.

On appeal to the Second Department, the plaintiff argued that his claim should proceed because the law firm continued to represent him after November 5, 2007. Thus, the "continuous representation" doctrine "tolled" the statute of limitations.

The appeals court disagreed with the plaintiff and affirmed dismissal. The court explained that the continuous representation doctrine applies only "where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim." In addition, "there must be a clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney"; and that "[o]ne of the predicates for the application of the doctrine is continuing trust and confidence in the relationship between the parties."

To the court, the plaintiff's surreptitious removal of his file made clear he lacked "trust and confidence in the parties' relationship," and intended to discharge the defendants as his attorneys. The court held that "the relationship necessary to invoke the continuous representation doctrine terminated more than three years prior to the commencement of this action."

Analysis. In *Aseel*, the law firm was able to prove the attorney-client relationship ended on a particular date. But clients don't often "surreptitiously remove" their files from their lawyer's offices. Accordingly, lawyers should not leave the matter of when an attorney-client relationship ends to chance. Rather, they should take affirmative steps to clarify when the relationship begins and ends.

Not surprisingly, the two best opportunities to do this occur at the beginning and end of the relationship. A retainer agreement that specifies in clear terms the scope of the legal matter for which the attorney is being hired may later serve as evidence that the relationship ended when work on that legal matter was completed. In addition, a courteous "disengagement" letter sent at the conclusion of the legal matter will help pinpoint the end of the representation. These precautions benefit clients as well, because they minimize the risk that clients will mistakenly believe their legal interests are being protected when they are not. They also put clients on notice that they may need to secure new representation if appropriate. Both of these considerations inure to the benefit of clients and lawyers.

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