

Asking for Whom the Statute Tolls: Continuing Representation and the Statute of Limitations

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A. Continuing Representation and Tolling.

As a general rule, the statute of limitations for legal malpractice claims is tolled during the time that an attorney continues to represent a client. A recent Court of Appeal decision, *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, 91 Cal. App. 4th 875, 110 Cal. Rptr. 2d 877 (2001), demonstrates that where there is objective evidence of a continuing attorney-client relationship, tolling becomes an indefinite proposition.

Lockley involved plaintiff Kim David Lockley, a former City of Seal Beach police officer of Korean descent who was subjected to racial taunts and harassment at work. When his brother became involved in legal problems out of state, the City targeted Lockley in an April 1988 internal affairs investigation and terminated him. Lockley appealed the firing to the civil service board, filed a workers' compensation claim and filed an Equal Employment Opportunity Commission complaint alleging racial discrimination.

Cantrell, Green, Pekich, Cruz & McCort ("Cantrell") represented Lockley on his workers compensation claim. The City and Lockley entered into a compromise and release agreement ("C&R") under which Lockley agreed to relinquish all claims against the City. For its part, the City agreed to process an application for retirement benefits for Lockley, treating him as having a non-work related disability and to notify the Public Employees Retirement System ("PERS") that Lockley was entitled to retirement benefits. With the C&R in hand, Lockley resigned from the force and dropped all his claims.

The City reneged on its agreement. It notified PERS that Lockley was terminated for misconduct and delayed notifying PERS of Lockley's entitlement to retirement benefits for four months, long enough to disqualify him.

Lockley revived his workers' compensation claim. After a long episode of legal wrangling, the matter worked its way up to the Fourth District Court of Appeal, where Justice Sonenshine's concurring opinion wondered aloud why Lockley's attorney had not pursued a breach of contract claim after the City breached the C&R agreement.

Cantrell filed a petition for rehearing, asking that Justice Sonenshine's remarks be deleted or clarified. The Court of Appeal ordered a modification of the opinion to add a footnote stating: "Lockley's attorney on this appeal did not represent him at the time."

Lockley sued Cantrell for legal malpractice on February 8, 2000. The trial court sustained a demurrer without leave to amend based on the statute of limitations after taking judicial notice of the modified opinion. The Second District Court of Appeal reversed.

B. The Statute of Limitations.

The statute of limitations for legal malpractice is found at Code of Civil Procedure section 340.6, which states:

(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. 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;
- (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four year limitation; and
- (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

The statute was adopted in 1997 as the Legislature's response to the companion cases of *Neel v. Magana, Olney, Levy, Catchcart & Gelfand*, 6 Cal. 3d 176, 98 Cal. Rptr. 837 (1971) and *Budd v. Nixen*, 6 Cal. 3d 195, 98 Cal. Rptr. 849 (1971), which established that delayed discovery and lack of actual (called "appreciable") harm both acted to toll the statute of limitations.

In *Neel*, the Supreme Court acknowledged that introducing tolling into the limitations equation came with a cost.

We recognize that the instant ruling will impose an increased burden upon the legal profession. An attorney's error may not work damage or achieve discovery for many years after the act, and the extension of liability into the future poses a disturbing prospect. On the other hand, when an attorney raises the statute of limitations to occlude a client's action before that client has had a reasonable opportunity to bring suit, the resulting band of the action not only starkly works an injustice upon the client but partially impugns the very integrity of the legal profession.

The solution, the high court suggested, was for the Legislature to provide a limitation period for legal malpractice similar to that found in Section 340.5, the medical malpractice statute, which has a one year from date of discovery, four year absolute limit.

Section 340.6 adopted the one year/four year scheme as suggested in Neel. However, along with the notion of defined time limits are specific tolling mechanisms designed to extend the time frames in (1) absence of actual damage, (2) during continuing representation, (3) where there is misrepresentation by the attorney and (4) where physical or legal disability restricts the client.

An attorney's special fiducial relationship with the client, combined with the reality that defective legal work will not always cause appreciable harm for sometime are the primary reasons why tolling is specifically incorporated in Section 340.6.

C. Continuing Representation is Interpreted Broadly

The purpose of the "continuous representation" rule is to avoid disrupting the attorney-client relationship by a lawsuit and to enable an attorney to correct or minimize an apparent error, while at the same time preventing lawyers from defeating malpractice claims by continuing to represent the client until the statute has run. *Laird v. Blacker*, 2 Cal. 4th 606, 618, 7 Cal. Rptr. 2d 550 (1992).

The Court of Appeal in *Lockley* applied an objective standard in analyzing whether Cantrell's representation of Lockley met the standard for tolling.

"Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship." The general rule is that the attorney's representation does not end "until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal." [Emphasis in original.] *Lockley*, supra, 91 Cal. App. 4th at 887-888, 110 Cal. Rptr. 2d 877.

Using the objective standard, the Court held that *Lockley's* complaint stated a claim that avoided the statute of limitations by virtue of its allegations that Cantrell had continued to represent him until within one year of filing. "On appeal, *Lockley* contends that statute of limitations governing attorney malpractice claims was tolled while [Cantrell] continued to represent him. This is a correct statement of the law." 91 Cal. App. 4th at 887.

In reaching its holding, the Second District panel decided it was not bound by the Fourth District's earlier footnote implying that Cantrell's representation of Lockley was not continuous. In a lengthy discussion of judicial notice doctrine, the Second District concluded that the additional footnote added to Justice Sonenshine's concurring opinion did not meet the standard of being based on an adversary proceeding adjudicating a fact question and found no substantial evidence in the record to support the conclusion. The question of whether or not Cantrell's representation was continuous, the Second District determined, remained in dispute.

Cantrell, for its part, argued that during the relevant period, it represented Lockley only on his workers' compensation claim, not the C&R agreement. Since the two items were not the same specific subject matter, the continuing representation doctrine did not apply.

The Court of Appeal rejected that argument without difficulty. Distinguishing *Foxborough v. Van Atta*, 26 Cal. App. 4th 217, 229, 31 Cal. Rptr. 2d 525 (1994) ("the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff"), in which a continuing representation was held as not occurring where the attorney was discharged, then rehired as an expert witness, the court found that Cantrell's argument attempted to draw too fine a line in defining the limits of representation.

On its face, Lockley's complaint alleges [Cantrell] continuously represented appellant's legal interests on the same specific matter of "claim for worker's compensation from 1988 until March 1999." We may reasonably infer from the amended complaint that Lockley hired [Cantrell] in only one capacity, that of legal representative. [Emphasis in original.]
Lockley, supra, 91 Cal. App. 4th at 889, 110 Cal. Rptr. 2d 877.

D. Applying Lockley's Lesson

The moral of the story is that in analyzing whether there is a continuing representation that will toll the statute of limitations, look to see if the attorney has continued to represent the client without interruption in the same capacity throughout the relationship.

As a practical matter, Lockley means that as long as there are objective facts pointing to the continuation of an attorney-client relationship past what would otherwise be a time barred by the statute of limitations, there will be an argument that the Section 340.6(a)(2) tolling provision applies and a claim is timely.

In your own practice, Lockley underlines the importance of documenting precisely the outlines of the attorney-client relationship in a fee agreement and the termination of that relationship in writing.

As counselors-at-law who are privileged to represent people in California's legal system, we carry great responsibility. Section 340.6 and decisional law such as Lockley underline that a breach of that responsibility carries with it a consequence that the prudent lawyer should not ignore.

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