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SHOULD THE THREAT OF A MALPRACTICE CROSS-COMPLAINT DERAIL YOUR SUIT FOR FEES?

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Many attorneys find it difficult to know when to sue a client who refuses to pay attorneys' fees. The difficulty is due, in part, to the fear of a malpractice cross-complaint. As will be discussed below, such fear is often entirely unfounded. However, before describing a structure for effectively analyzing when to sue, it is first necessary to review the statutory background.

The attorney Malpractice Statute, C.C.P. 340.6, provides a time limitation on suits for wrongful acts or omissions (other than fraud) of earlier than (1) one year from the time of discovery of the act or omission (or when discovery through the use of reasonable diligence should have occurred) or (2) four years from the date of the act or omission.

In certain circumstances, these periods do not immediately begin to run. The most notable of these are (1) the client has not sustained actual injury or (2) continued representation of the client by the attorney with regard to the specific subject matter in which the alleged wrongful act or omission occurred.

With respect to sustaining actual injury, case law traditionally held that injury occurs upon entry of an adverse judgment, settlement or final dismissal.[1] However, a bright line test described in *Laird* and *ITT* was dimmed considerably by the California Supreme Court decision in *Jordache v. Brobeck et al*.[2] The Court held (in explicitly overruling *ITT*) that actual injury could occur before a judgment, settlement or final dismissal. Although making the law less clear-cut, the ruling was positive for attorneys as the Malpractice Statute can begin to run earlier than was previously thought.

With respect to continued representation, the subject matter must be the same; i.e., representation in a second, unrelated matter or lawsuit will not toll the Malpractice Statute regarding the initial matter. However, even representation regarding a matter tangential to the subject matter in which the alleged wrongful act or omission occurs is sometimes enough to toll the Malpractice Statute.[3] A substitution of attorney is not necessary (although desirable) to end the representation and begin the running of the Malpractice Statute. [4] A client's consultation with a new attorney to correct a problem generally terminates the representation and begins the running of the Malpractice Statute.[5]

The determination of whether and when to sue for fees involves an analysis where one weighs the malpractice statute (i.e., the time within which the client must sue the attorney) and the likelihood, and potential amount, of an adverse finding against the statute of limitations applicable to the potential causes of action for fees (i.e., the time within which the attorney must sue the client) and the likelihood, and potential amount, of a favorable finding, and factors in any concern that there may be a dissipation of the client's assets should suit be delayed.

The causes of action commonly asserted for fees and their respective statutes of limitations are: breach of written contract (4 years), breach of oral contract (2 years), quantum meruit (2 years) and open book account (4 years).

Following is a discussion of various possible scenarios. Having analyzed hundreds of cases, the authors believe the following guidelines may prove useful when analyzing your specific factual situation:

THE REPRESENTATION ENDED WITH A CLEARLY FAVORABLE RESULT

Where your representation ended with a clearly favorable result for the client, there is no real downside to a suit for fees (although any cross-complaint, albeit unfounded, might have to be reported to your malpractice carrier). Prior to, or contemporaneously with, filing suit, be sure to provide the client with a Notice of Client's Right To Arbitration in accordance with the provisions of the Mandatory Fee Arbitration Act (B&P Code §6200 et. seq.).

THE RESULT IS NEITHER CLEARLY FAVORABLE NOR UNFAVORABLE

You've done your work. The result was neither clearly favorable nor unfavorable. This scenario represents the vast majority of fee dispute cases.

For example:

1) in a litigated case the Plaintiff settles for less than he had

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hoped to receive or the Defendant pays more than he had hoped to pay or 2) you assist a client in a sale transaction where he obtains less than he thought he should get, but more than the minimum figure at which he was willing to sell.

The first step in the analysis is to determine if the client is asserting any issue that colorably constitutes malpractice. In response to a claim for fees, a client will often assert that, because of something the attorney did or failed to do, the case resolved (or the transaction concluded) less favorably for the client than it should have. Is the client simply upset with (or just wishes to avoid paying) the amount of the fees charged or does he have a legitimate complaint? Keep in mind that an assertion of malpractice is often nothing more than a negotiating ploy. If the amount of fees is the client's real issue and a settlement cannot be reached, you should sue now.

If there is a colorable malpractice claim, determine whether the Malpractice Statute has run by considering when the claimed act or omission occurred and when the client discovered (or should have discovered) it and whether any facts existed which tolled the Malpractice Statute.

If the Malpractice Statute has run, there really is no reason to fear a malpractice cross-complaint as the client's claim may now only be properly asserted as an offset. You should sue now unless the client's damages, multiplied by your best estimate of the percentage that these damages were actually caused by attorney malpractice (i.e., the client's potential offset), exceed your fees or renders a fee suit uneconomical.

IF THE MALPRACTICE STATUTE HAS CLEARLY NOT RUN

If the Malpractice Statute has clearly not run, you need to determine whether the client has, in fact, suffered actual injury.

THE CLAIMED ERROR HAS NOT YET RESULTED, AND MAY NEVER RESULT, IN INJURY

When the claimed error has not yet resulted in damages, there can be no legitimate malpractice cross-complaint because no cause of action has yet accrued. Therefore, you should sue now unless some ongoing litigation or other event will determine if the client will or will not sustain actual injury (since, by definition, the Malpractice Statute is tolled until then). If that is the case, consider awaiting such outcome before determining whether or not to sue, unless one of the statutes of limitations applicable to your causes of action for fees is about to run or the client's assets are about to be dissipated.

THE CLAIMED ERROR HAS RESULTED IN ACTUAL INJURY

If the claimed error actually injured the client, you will need to evaluate the disparity between your potential recovery and the amount of your potential liability. If your potential recovery is greater, you should wait until the Malpractice Statute expires and then file suit (thereby relegating the client's claim to offset potential only), unless one of the statutes of limitations applicable to your causes of action for fees is about to run or the client's assets are about to be dissipated.

It is a common misunderstanding that the Malpractice Statute runs after 1 year after the date representation ended. In fact, continued representation is only one of the grounds for tolling. The end of that 1-year period does, however, represent the earliest date by which the Malpractice Statute can have run.

If the potential liability is greater, do not sue even if the client's Malpractice Statute has already run since the client can always assert his damages as an offset to your claim for fees.

IF YOU ARE UNCERTAIN WHETHER THE MALPRACTICE STATUTE HAS RUN

In contrast to those situations where it is clear that the Malpractice Statute has or has not run, you may confront a situation where you are uncertain whether the Statute has run because you do not know whether the client sustained actual injury. In this event, you will have to make your best estimate as to whether (and, if so, when) the client sustained injury and the amount thereof and discount that figure by the percentage chance that the Malpractice Statute may have already run. Then compare that figure against your potential recovery in determining whether to sue.

THE REPRESENTATION ENDED WITH A CLEARLY UNFAVORABLE RESULT

The reluctance to file a suit for fees tends to be even greater when the representation ended in an unfavorable result. Once again, however, this reluctance is often unfounded. Often a client

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will come to you with a bad set of facts. The result may prove adverse to the client, but that result is not unexpected and certainly is not necessarily due to attorney error.

Whether the client can present a colorable malpractice claim and, if so, whether and when to sue, should be analyzed in the same manner as where the result is neither clearly favorable nor unfavorable. The result of your representation should not, by itself, be determinative.

CONCLUDING REMARKS

In response to claims for fees, clients will threaten malpractice cross-complaints far more times than they will actually file one. As a practical matter, you can "likely" drop your suit for fees if a malpractice cross-complaint is, in fact, filed and the Malpractice Statute has not clearly run (or you are then unwilling to report the claim to your carrier). The authors' experience is that the other side rarely will decline your offer to allow both sides to "walk away" at the early stages of litigation.

As the foregoing suggests, knowledge of the statutes and applicable case law, together with an understanding of their practical application to the various factual scenarios are important in analyzing when (or whether) to proceed with an action to collect the attorneys' fees which you have previously earned.

1. *Laird v. Blacker, (1992) 2 C4th 606, 7 CR2d 550, ITT Small Business Finance Corp. v. Niles, (1994) 9 C4th 245, 36 CR2d 552.*
2. *Jordache Enterprises, Inc. v.Brobeck, Phleger & Harrison, (1998) 18 C4th 739, 76 CR2d 749.*
3. *Gurkewitz v. Haberman, (1982) 137 CA3d 328, 187 CR 14.*
4. *Shapero v. Fliegel, (1987) 191 CA3d 842, 236 CR 936.*
5. *Bennett v. McCall, (1993) 19 CA4th 122, 23 CR2d 268.*

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