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The Professional Liability Newsletter from

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# PROFESSIONAL UPDATE

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## SURVEY OF REPORTED 2003 DECISIONS IN NEW YORK ON LEGAL MALPRACTICE

**THE STATUTE OF LIMITATIONS DEFENSE – MALPRACTICE ACCRUES ON DATE OF ACT OR OMISSION AND NOT DATE OF DISCOVERY.**

In 2003, the Appellate Division, Second Department, of the New York Supreme Court definitively established - in no less than *five (5) decisions* - that, for the purpose of the three year statute of limitations in CPLR 214(6), a cause of action for legal malpractice accrues on the date of the negligent act or omission of the attorney, not on the date of the discovery of that malpractice by the client. *See Barbieri v Shayne Dachs Stanisi Corker & Sauer*, 757 N.Y.S.2d 583 (2d Dep't 2003); *Adler v Gershman*, 757 N.Y.S.2d 890 (2d Dep't 2003); *N&S Supply, Inc., v. Simmons*, 761 N.Y.S.2d 668 (2d Dep't 2003); *Venturella-Ferretti v Kinzler*, 762 N.Y.S.2d 254 (2d Dep't 2003); *Alicanti v Bianco*, 767 N.Y.S.2d 815 (2d Dep't 2003). While New York Courts recognize a "continuous representation" toll of the statute of limitations, which stays the statutory period until the point of termination of the attorney-client relationship, New York does not recognize a further toll when the malpractice is not obvious to the client and is discovered at some point after termination of the attorney-client relationship. *Id.*

The exact opposite rule applies just across the Hudson River, in New Jersey, where the New Jersey Supreme Court has held, since the case of *Grunwald v Bronkesh*, 621 A.2d 459 (1993), that a discovery toll applies in legal malpractice claims. Thus, a litigant in a legal malpractice action involving conduct in New York and in New Jersey should keep in mind conflict of law analysis in evaluating the application of a statute of limitations defense.

**THE 'BUT FOR' STANDARD / EXPERT AFFIDAVITS INSUFFICIENT**

In eleven reported decisions in 2003, New York Courts have uniformly reaffirmed the 'but for' standard for a plaintiff's burden to prove proximate causation in a legal malpractice action. *See Keeley v Tracy*, 753 N.Y.S.2d 519 (2d Dep't 2003); *Zelenaya v Rosengarten*, 753 N.Y.S.2d 116 (2d Dep't 2003); Gonzalez *v Lombardino*, 752 N.Y.S.2d 881 (1st Dep't 2003); *Reibman v Senie*, 756 N.Y.S.2d 164 (1st Dep't 2003); *Magnacoustics v Ostrolenk, Faber, Gerb & Soffen*, 755 N.Y.S.2d 726 (2d Dep't 2003); *Aversa v Safran*, 757 N.Y.S.2d 573 (2d Dep't 2003); *Wester v Sussman*, 757 N.Y.S.2d 500 (2d Dep't 2003); *Perks v Lauto & Garabedian*, 760 N.Y.S.2d 231 (2d Dep't 2003); *Laventure v Galeno*, 762 N.Y.S.2d 270 (2d Dep't 2003); *A&R Kalimian, LLC., v Breger Gorin & Leizzi, LLP*., 763 N.Y.S.2d 52 (1st Dep't 2003); *Caires v Siben & Siben*, 767 N.Y.S.2d 785 (2d Dep't 2003).

It is noteworthy that in *Magnacoustics*, *supra*, the Second Department dismissed a legal malpractice action against an attorney who failed to communicate a settlement offer to his client because the client could not prove damages proximately caused by the lack of communication of the settlement offer. The plaintiff could not prove that he would have accepted the settlement offer before trial and, in fact, the underlying action was ultimately settled by another attorney representing the plaintiff only after an adverse outcome at trial of the underlying action. *Id*.

It also should be noted that the Courts in two (2) decisions specifically held that the 'but for' standard cannot be satisfied by an affidavit from an expert claiming that, in his or her professional opinion, the alleged departure of the defendant from the applicable standard of care is the cause of the plaintiff's damages. *See Gonzalez* and *Caires, supra.* A plaintiff has to prove the 'case within the case' by submitting to the Court factual evidence, in admissible form, to prove that 'but for' the alleged error or omission on the part of the defendant attorney, the plaintiff would not otherwise have been adversely impacted in the prior proceedings. *Id*.

**WORKER'S COMPENSATION ATTORNEYS ARE NOT OBLIGATED TO PURSUE THE CLIENT'S PERSONAL INJURY OR ESTATE'S WRONGFUL DEATH CLAIMS**

The First Department held, in *Block v Brecher, Fishman, Feit, Heller, Rubin & Tannenbaum*, 753 N.Y.S.2d 84 (1st Dep't 2003), that a law firm retained to represent an injured employee in a worker's compensation claim had no duty to the employee, or ultimately to his estate, to prosecute a personal injury or wrongful death action for the same injury. The Court noted that the attorney was not aware of the death of his client and had neither contact nor any retainer agreement with the estate of the decedent. *Id*.

**REFERRING ATTORNEYS' ACCOUNTABILITY IN MALPRACTICE**

The First Department also held, in *Reed v Finkelstein Levine Gittlesohn & Tetenbaum*, 756 N.Y.S.2d 577 (1st Dep't 2003), an attorney who referred a medical malpractice client to another attorney, could be held accountable in legal malpractice depending upon "the nature and extent of [referring attorney's] responsibilities in the underlying action."

**COVERAGE LITIGATION**

In *Steadfast Insurance Co., v Stroock & Stroock & Lavan*, 277 F.Supp.2d 245, (S.D.N.Y. 2003), Judge Scheindlin re-affirmed the rule that, in the context of a professional liability policy, a carrier's issuance of a reservation of rights letter serves as a bar to a claim of waiver of the coverage defenses.

The First Department similarly upheld a reservation of rights and subsequent disclaimer under a directors and officers liability policy in *National Restaurants Management, Inc., v Executive Risk Indemnity, Inc.,* 758 N.Y.S.2d 624 (1st Dep't 2003).

The same was echoed by Judge Sweet in *Chicago Insurance Co., v. Kreitzer & Vogelman*, 265 F.Supp.2d 335 (S.D.N.Y. 2003), where the Court also held that a law firm's failure to disclose pending disciplinary proceedings in a policy application constituted misrepresentation sufficient to void the policy.

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Statute of Limitations:

Note the distinction between New York and New Jersey law. In New York, a cause of action for legal malpractice accrues on the date of the negligent act or omission of the attorney, not on the date of discovery of that malpractice by the client. New Jersey, however, applies a discovery toll when the client proves that he or she did not know of the malpractice until some point after the termination of the attorney client relationship.

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'But For ' Defense:

Failure to communicate settlement offer is not, in and of itself, sufficient to sustain legal malpractice case.

Law firm retained for worker's compensation claim had no duty to the employee or estate to prosecute a personal injury or wrongful death action for the same injury.

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Coverage Cases:

Reservation of rights as safeguard against waiver argument.

Disciplinary proceedings must be disclosed on application or policy may be voided.