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OHIO ENACTS A LEGAL MALPRACTICE STATUTE OF REPOSE

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A cosmic shift occurred on March 16, 2021, when Governor DeWine signed Ohio Senate Bill 13. If you are an attorney in private practice, you may feel a burden lift

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from your shoulders on June 16, 2021, when Ohio S.B. 13 becomes effective. Ohio S.B. 13 modified several statutes of limitations. The modification of greatest interest to attorneys is the new statute of repose for legal malpractice claims. This will be of particular interest to attorneys who may be thinking about retirement or otherwise leaving private practice.

Good attorneys work hard not to make mistakes in their legal work. But mistakes happen. How long an attorney should be held accountable for a mistake is now more clearly defined in Ohio. This is a significant change for Ohio attorneys' professional liability risks.

Current Law. Under current Ohio R.C. 2305.11(A), a claim for legal malpractice in Ohio is subject to a one-year statute of limitations which encompasses both a "termination rule" and a "discovery rule." A client has one year from the later of the termination of the attorney-client relationship (the "termination rule") or the date the alleged injury was discovered (or should have been discovered) (the "discovery rule") to file suit. The effect of the "discovery rule" is that a claim of legal malpractice could be made against an Ohio lawyer long after the work is done. A claim could be raised at any time after he or she leaves the practice of law or retires. This is a worry that a lawyer could carry for the rest of his or her life. A claim could even be raised against that lawyer's estate after death. The "discovery rule" applies only to attorneys and not to other professionals such as architects, engineers, doctors, dentists, and other health care providers.

The "discovery rule" provides that the statute of limitations on a potential claim begins to run when there is a "cognizable event" whereby the client discovers or should have discovered that an injury was related to an attorney's act or omission. See *Zimmie v. Calfee, Halter and Griswold*, 43 Ohio St. 3d 54, 538 N.E.2d 398 (1989). The "discovery" of a drafting error might take decades to come to light for an estate planning attorney who drafts provisions into trust agreements and wills which might not become effective for a long time. This endless open window for a potential claim by a client[1] has kept many an estate planning attorney awake at night. Financial security is an important consideration for everyone

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in retirement. An attorney may consider whether to purchase a "tail" insurance policy to cover potential claims which might arise after leaving the practice.

Under current law, an estate planning attorney who leaves private practice should consider that a long "tail" liability insurance policy be obtained to ensure coverage of any claim arising out of past legal services. However, even minimum annual premiums for tail coverage can sometimes amount to several thousand dollars annually. This can be cost prohibitive for an attorney who is retired or no longer in private practice. This potentially unlimited time for malpractice claims may also prompt attorneys to hang on to files indefinitely, since you cannot predict when a 15- or 20-year old matter might become the subject of a claim.

New Statute of Repose. Prior to passage of Senate Bill 13, only Kentucky, New York, and Ohio did not have a statute of repose for claims against attorneys. Senate Bill 13 amends R.C. 2305.11 and enacts R.C. 2305.117 to create a four-year statute of repose for legal malpractice actions. The new law becomes effective June 16, 2021. This change was proposed by the Senior Lawyers Section of the Ohio State Bar Association and was approved by the OSBA's Council of Delegates as an OSBA priority bill. This law earned unanimous bipartisan support in both chambers of the Ohio Legislature. S.B. 13 was the first bill in the new legislative session to arrive at the Governor's desk for signature. S.B. 13 will bring Ohio lawyers in line to be held accountable for their mistakes on the same basis as other Ohio professionals, including doctors, architects, and engineers.

A statute of limitations takes into consideration when an error is discovered or should have been discovered. In contrast, a statute of repose will bar claims after the passage of a specified period of time, regardless of when an error is discovered. This new statute of repose should provide a time certain for closure and should provide peace of mind to attorneys leaving the practice of law.

When amended R.C. 2305.11 and new R.C. 2305.117 become effective on June 16, 2021, the window for a claim against an attorney and his or her law firm is clear:

1. The one-year statute of limitations for legal malpractice still will be in effect under new R.C. 2305.117(A). An action for legal malpractice must be commenced within one year after the cause of action accrued.

2. In addition, under new R.C. 2305.117, the statute of repose will bar all claims commenced more than four years "after the occurrence of the act or omission constituting the alleged basis of the legal malpractice claim" *regardless of when the attorney's error or omission is discovered*.

Two exceptions are provided under the new statute of repose. First, a potential legal malpractice claim is tolled for "persons under the age of minority or of unsound mind" as provided by R.C. 2305.16, and the claim may be brought after the disability is removed. See R.C. 2305.117 (B). The second exception is a client proving by clear and convincing evidence that the claim could not have been discovered with reasonable care and diligence within three years of the occurrence of the act or omission, provided the client discovers the error before the expiration of the four-year time period. In

that case, the claimant may file an action not later than one year after discovery. R.C. 2305.117(C)(1) and (2).

Some have suggested that R.C. 2105.117 is not clear on whether it is merely prospective in application, i.e., applying only to future acts, or whether the statute also applies to work done previously. As currently written, some lawyers read R.C. 2105.117 as applying only to acts or omissions occurring after June 16, 2021. This is not, however, the result that was intended by the parties who worked on getting the statute of repose passed. The Senior Lawyers Section and other OSBA representatives are considering whether additional clarification is required, either by amendment of the statute or otherwise. Stay tuned for further developments!

ENDNOTES:

[1]Even under the current malpractice statute, however, Ohio estate planning attorneys do have some significant protection from claims made decades later for a mistake made during the estate planning process: Only a client may sue the attorney for a mistake. The privity defense is alive and well in Ohio, and a beneficiary or an intended beneficiary under a will or trust agreement may not sue for alleged errors in drafting wills and trusts. *Shoemaker v. Gindlesberger*, 118 Ohio St. 3d 226, 226, 2008-Ohio-2012, ¶ 1, 887 N.E.2d 1167, 1168 (2008). Although a minority position, there are nine states, including Ohio, which adhere to a rule barring claims against estate planning lawyers by beneficiaries. For examples of cases from the nine states that have upheld strict privity in legal malpractice actions. See, e.g., *Simon v. Zipperstein*, 32 Ohio St. 3d 74, 76, 512 N.E.2d 636, 638 (1987); *Robinson v. Benton*, 842 So. 2d 631, 637 (Ala. 2002); *Pettus v. McDonald*, 343 Ark. 507, 516, 36 S.W.3d 745, 751 (2001); *Nevin v. Union Trust Co.*, 1999 ME 47, ¶ 37, 726 A.2d 694, 701 (Me. 1999); *Noble v.*

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