PROBATE LAW JOURNAL OF OHIO

MARCH/APRIL 2025 | VOLUME 35 | ISSUE 4

UPDATE ON OHIO'S ENACTMENT OF A LEGAL MALPRACTICE STATUTE OF REPOSE*

By Mark M. Mikhaiel Esq. and M. Elizabeth Monihan Esq.

By Mark M. Mikhaiel, Esq.
Schneider Smeltz Spieth Bell, LLP, Cleveland
and
M. Elizabeth Monihan, Esq.
Schneider Smeltz Spieth Bell, LLP, Cleveland
Member, PLJO Editorial Advisory Board; Past Chair, OSBA Estate Planning Probate and Trust Law Section

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 probably felt a burden lifted from your shoulders on June 16, 2021, when Ohio S.B. 13 became effective. Ohio S.B. 13 modified several statutes of limitations. The new statute of repose for legal malpractice claims is the modification of greatest interest to attorneys. This will particularly interest 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 sometimes mistakes happen. In Ohio, the parameters of how long an attorney should be held accountable for a mistake are now more clearly defined, and House Bill 179, effective January 1, 2025, makes the parameters even more clear as to the statute of repose. This is a significant change for Ohio attorneys' professional liability risks.

Old Law. Under the old Ohio R.C. 2305.11(A), a claim for legal malpractice in Ohio was subject to a one-year statute of limitations which encompassed both a "termination rule" and a "discovery rule." A client had one year from the latter 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" was that a claim of legal malpractice could be made against an Ohio lawyer long after the work was done. A claim could be raised at any time after he or she leaves the practice of law or retires. This was 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.

*An original version of this article originally appeared in Mikhaiel and Monihan, Ohio Enacts A Legal Malpractice Statute Of Repose, 31 No. 5 Ohio Prob. L.J. NL 2 (May/June 2021). This updated version now includes the statutory revisions enacted in HB 179 (2024 Ohio Laws File 44 (Am. H.B. 179)), which addresses the Supreme Court of Ohio's ruling in *Elliot v. Durrani,* 171 Ohio St. 3d 213, 2022-Ohio-4190, 216 N.E.3d 641 (2022) clarifying that Ohio's "absconded defendant statute" (*i.e.*, R.C. 2305.15) does not apply to any statute of repose contained with the Ohio Revised Code.

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 estate planning attorneys awake at night. Financial security in retirement is an important consideration for everyone when an attorney retires or otherwise leaves private practice for greener pastures. An attorney may consider whether to purchase a "tail" insurance policy to cover potential claims which might arise after leaving the practice.

Under the prior law, an estate planning attorney who leaves private practice would be forced to purchase a long "tail" liability insurance policy 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 fifteen- or twenty-year old matter might become the subject of a claim.

2021 Statute of Repose. Prior to the passage of Senate Bill 13 (2021 Ohio Laws File 1 (S.B. 13)), only Kentucky, New York, and Ohio did not have a statute of repose for claims against attorneys. Senate Bill 13 amended R.C. 2305.11 and enacted R.C. 2305.117 to create a four-year statute of repose for legal malpractice actions. The new law became 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 2021 legislative session to arrive at the Governor's desk for signature. S.B. 13 brought 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 through retirement or otherwise.

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

1. The one-year statute of limitations for legal malpractice still is 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 bars 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 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).

At the time of the enactment of R.C. 2305.117, while there were some concerns on whether the statute was prospective or retroactive application, no one had anticipated that Ohio's highest court might find that the "absconded defendant statute" tolled the statute of repose. But that is exactly what happened in December 2022 in *Elliot v. Durrani*, 171 Ohio St. 3d 213, 2022-Ohio-4190, 216 N.E.3d 641 (2022).

In a split decision, the Supreme Court of Ohio held that the cutoff date to file a medical malpractice lawsuit is extended if a medical practitioner flees the state within the four-year lawsuit deadline. *Elliot v. Durrani*. As detailed below, the Supreme Court of Ohio's majority opinion was relatively broad, in that it essentially tolled the statute of repose for all tort claims whenever a defendant was no longer in the state, even if voluntarily.

Specifically, Justice Michael P. Donnelly, writing for the Court majority, explained that the Ohio law allowing for an extended filing period when a defendant absconds or conceals their identity also applies to the "statute of repose" for medical claims. Meanwhile, in her dissenting opinion, Chief Justice Sharon L. Kennedy argued that R.C. 2305.113(C), the statute of repose, outlines only three specific exceptions that allow the filing period to be extended or "tolled." She emphasized that absconding is not among these exceptions and does not permit extending the time to file a medical malpractice case beyond four years. Justice Kennedy warned that, under the Court's decision, "a medical provider who leaves Ohio to practice in another state or to retire could face indefinite exposure to lawsuits for injuries that occurred years or even decades ago."

In short, *Durrani* applied Ohio's "absconded defendant statute" (R.C. 2305.15) in a medical malpractice case to the statute of repose and, consequently held that the statute of repose is tolled when a defendant has absconded the state. Though it was a medical malpractice case, the wording of the majority opinion in *Durrani* extended to all statutes of repose, including the statute of repose for legal malpractice. This was of great concern to retiring lawyers and lawyers who may merely wish to relocate their practice to another state.

As a result, in early 2023, efforts were

made to clarify that the statute of repose is not tolled for legal malpractice claims (as well as other additional unrelated tort claims). Ultimately, in House Bill 179, in a 92-0 vote—signed by Governor DeWine on July 25, 2024—the Legislative Assembly clarified what the *Durrani* court inadvertently expanded: while the statute of limitations may be tolled if a defendant flees the state in certain situations, in the case of legal malpractice, the statute of repose is not tolled. With H.B. 179 and the updated R.C. 2305.15 (savings clause), Ohio lawyers can now safely retire to warmer climates and not worry about a tolling of the statute of repose.

ENDNOTES:

[1]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, 2008-Ohio-2012, 887 N.E.2d 1167, ¶ 1 (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, 512 N.E.2d 636, 638 (1987); *Robinson v. Benton*, 842 So. 2d 631, 637 (Ala. 2002); *Pettus v. McDonald*, 343 Ark. 507, 36 S.W.3d 745, 751 (2001); *Nevin v. Union Trust Co.*, 1999 ME 47, 726 A.2d 694, 701 (Me. 1999); *Noble v. Bruce*, 349 Md. 730, 709 A.2d 1264, 1278 (1998);*Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554, 555 (1983); *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996); *Copenhaver v. Rogers*, 238 Va. 361, 384 S.E.2d 593, 595 (1989). See *Begleiter*, First Let's Sue All the Lawyers-What Will We Get: Damages for Estate Planning Malpractice, 51 Hastings L.J. 325, 364 (2000).

Mark M. Mikhaiel

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M. Elizabeth Monihan

Scan the QR code for Elizabeth's bio, or visit https://www.mysblaw.com/professionals/m-elizabeth-monihan/