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DRI Resources

Featured Articles

Wading through Actual Injury and the Discovery Rule in the Wake of *Shifren v. Spiro*

by Timothy J. Halloran and Jonathan M. Blute

Regardless of your jurisdiction, the period during which a client may bring a claim for negligence against a former attorney is a moving target. Legal malpractice is a peculiar species of tort upon which commencement of the statute of limitations depends not necessarily on when the allegedly wrongful conduct occurred, but more accurately on when the client *discovered, or should have discovered*, that the wrongful conduct occurred. Complicating matters further, in most jurisdictions the clock doesn't start running until the attorney's negligence causes the client "actual injury."

But when does a client suffer "actual" injury? Not surprisingly, the answer to this question varies from state to state and from year to year. A recent California decision suggests that this analysis may be in for a significant shift, at least when the attorney's work is the subject of underlying litigation. In *Shifren v. Spiro* (2012) 206 Cal.App.4th 481, a panel of the California Court of Appeal, Second District held that because the effectiveness of the attorney defendant's preparation of a document was the issue in the underlying case, the statute of limitations as to the client's subsequent legal malpractice claim did not begin to accrue until the underlying court ruled on the *interpretation* of the document at issue.

In *Shifren*, the plaintiff asserted claims against his former counsel for negligently preparing trust documents that failed to effect characterization of certain property the client received during his marriage as "separate property." The trust documents were prepared in 2001, and in 2007, the client and his former wife began a marital dissolution action in which the wife asserted that the property at issue was community property pursuant to a transmutation agreement entered into prior to the 2001 trust. In August 2009, the court rendered judgment, in part ruling that the trust documents were ineffective in circumventing the transmutation agreement; therefore the property at issue remained community property, contrary to the client's wishes.

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Committee Chair
Frances M. O'Meara
Kaufman Dolowich Voluck & Gonzo LLP
fomeara@kdvglaw.com


Committee Vice Chair
David L. Brandon
Morris Polich & Purdy
dbrandon@mpplaw.com

In December 2009, the client filed a malpractice action against the attorneys who prepared the trust documents, alleging that the attorneys had negligently failed to draft the trust documents so as to render the property "separate." The attorneys asserted a statute of limitations defense, contending that "actual injury" occurred either in 2001, when the offending documents were prepared, or alternatively in 2007, when the client began incurring attorneys' fees in the dissolution action as a result of the documents' alleged deficiencies. According to the attorneys, the one-year statute of limitations as to the client's malpractice claim therefore expired prior to the complaint's filing date of December 2009.

The appellate court reversed the trial court's ruling that the action was time barred, holding that the client did not suffer "actual injury" until the dissolution court determined that the trust documents were ineffective. According to the Second District panel, the issues of when the offending documents were prepared and when the client began to incur attorneys' fees litigating the documents' effect were irrelevant to the analysis.

The court stated that "the analysis of actual injury differs when the underlying dispute focuses on the attorney's acts or omissions, and where the outcome of the litigation may or may not vindicate the attorney . . . The [underlying] proceedings are a means to determine whether the attorney has erred. A client's victory in such litigation is 'ipso facto exoneration of the lawyer.'" *Id.* at 488. Accordingly the attorneys' "alleged negligence in drafting the 2001 trust had no effect until the subsequent adjudication in the marital dissolution action." *Id.* at 489 (citations omitted.)

Holding otherwise would lead "to an absurd result that would compel both parties in a dispute over an attorney's written work to also file premature legal malpractice actions." *Id.* Therefore the statute of limitations did not begin to run until the dissolution court ruled the trust documents ineffective in August 2009, and did not expire until a year later. *Id.* at 490; Cal. Code Civ. Proc. § 340.6 (a)(1). Accordingly, the malpractice action was timely filed in December 2009. *Id.*

The *Shifren* decision was a departure from thirty years of California case law. Previously, courts held that a client suffers "actual harm" as soon as there is *some* certain damage caused by the lawyer's misconduct. This may occur before the client sustains all, or even a significant portion of, the entirety of eventual damages. *Budd v. Nixen* (1971) 6 Cal.3d 195, 200-202 [incurring attorneys' fees in attempting to correct the defendant attorney's malpractice constitutes "actual harm" which triggers the statute of limitations]; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 736, 752 [actual injury occurs when "events . . . have developed to a point where plaintiff is entitled to a legal remedy, not merely a symbolic judgment."]

But it remains to be seen how, or if, courts outside California (or even in other California districts) will change their analysis of what constitutes "appreciable harm" and "actual injury" in the wake of *Schifren*. Previously, courts have at least agreed that the legal malpractice statute of limitations does not begin to run until the client reasonably


Publications Chair
Daniel S. Strick
Lucas and Cavalier
(215) 751-9192
dstrick@lucascavalier.com


Publications Vice Chairs
Jeffrey M. James
Banker Lopez Gassler
(813) 221-1500
jjames@bankerlopez.com


Jonathan R. Harwood
Traub Lieberman Straus
(914) 347-2600
jhardwood@traublieberman.com

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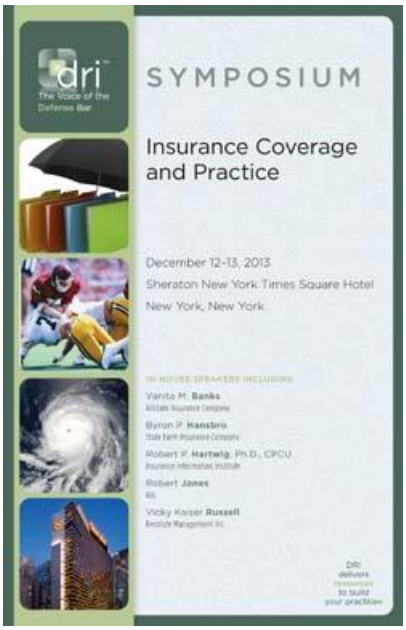

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should know that he or she has sustained appreciable harm. *See, e.g., Russell v. Black*, 1998 Mass. App. Div. 213; *Cicchini v. Streza* (2005) 160 Ohio App.3d189 ;*Keonjian v. Olcott* (Az. Ct. App. Div. 2 2007) 169 P.3d 927 (*Robbat v. Gordon* (Fla. 2000) 771 So.2d 631, 636-37.

But does appreciable harm occur when the client incurs attorneys' fees litigating the attorney's underlying actions, as in *Budd v. Nixen,* or is the statute tolled until there is a final underlying decision determining whether the attorney's actions even constituted error, as in *Schifren v. Spiro*?

There are good policy arguments on both sides of the debate. On one hand, the *Schifren* ruling may extend for potentially years the amount of time in which a lawyer must worry about the threat of a legal malpractice claim (i.e. while litigation concerning his or her work is pending). However even in such a scenario, *Schifren* could have the effect of eventually obviating unnecessary malpractice litigation. And as the *Schifren* court noted, an opposite holding would require a client to litigate two simultaneous actions with contradictory positions. Certainly a tolling agreement would decrease this problem, but there's no guarantee either party would agree to one.

Regardless of the answer, professional liability attorneys across the country now have yet another variable to worry about when assessing and litigating legal malpractice claims. For the foreseeable future, don't be surprised if you see the *Schifren* holding cited in opposing briefs, and consider citing it in your own – it may just be that the tide is indeed changing.

Timothy J. Halloran *is a senior shareholder in Murphy Pearson Bradley & Feeney's San Francisco office. He can be reached at 415-788-1900 or thalloran@mpbf.com.*
Jonathan M. Blute *is an associate, and is also located in the firm's San Francisco office. He can be reached at 415-788-1900 or jblute@mpbf.com.*
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