KAUFMAN DOLOWICH

Mansfield Rule
Certified 2022-2023

KD Professional Liability Alert: Limitation on Lawyer's Continuing Representation

By Scott Murch

The California Court of Appeal recently provided guidance as to when a law firm's representation ends so as to start the statute of limitations running. In *GoTek Energy, Inc. v. SoCal IP Law Group, LLP (2016) __ Cal.App.4th __, 2016 WL 5929908 (10/12/16), the Second Appellate District held that representation ends when the client has no reasonable expectation that the law firm will perform further legal services for the client even though the law firm still owes the client some remaining duties.*

In GoTek, the client put the law firm on notice that it intended to make a legal malpractice claim against it for failing to file certain patent applications for the client. Following receipt of that notice, the law firm emailed the client on November 7, 2012, stating that it must withdraw from the client's representation and that the attorney-client relationship was immediately terminated. That email also asked the client where the law firm should send the client's files. The client responded on November 8, 2012 by directing the law firm to send its files to replacement counsel by November 16, 2012. The law firm transmitted the client's files to replacement counsel on November 15, 2012 and notified the client of the file transfer that day. The client filed a legal malpractice action against the law firm on November 14, 2013.

California Code of Civil Procedure §340.6 provides that a legal malpractice action must be commenced "within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission . . . ." (California Code of Civil Procedure §340.6(a).) However, the statute is tolled while the "attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." (Id.§340.6(a)(2).) This tolling is called the "continuous representation exception." (Beal Bank v. Arter & Hadden, LLP (2007) 42 Cal.4th 503, 511.)

GoTek held that the tolling provided by the continuous representation exception ended no later than November 8, 2012, and the legal malpractice action was therefore time-barred under Section 340.6. "An attorney's representation of a client ordinarily ends when the client discharges the attorney or consents to a withdrawal, the court consents to the attorney's withdrawal, or upon completion of the tasks for which the client retained the attorney." (Gonzalez v. Kalu (2006) 140 Cal.App.4th 21, 28.) Applying the Gonzalez rule, GoTek concluded that the law firm's representation ended no later than November 8, 2012 when the client consented to the law firm's withdrawal and directed the transfer of its files to replacement counsel.

In reaching that holding, GoTek rejected the client's arguments that the law firm's filing of withdrawal papers with the United States Patent and Trademark Office or that the law firm's possession and transfer of its files constituted legal services so as to toll the statute under the continuous representation exception. Because failing to withdraw as counsel of record, without more, will not toll the statute under the continuous representation exception (Shapero v. Fliegel 1987) 191 Cal.App.3d 842, 846), GoTek reasoned that the act of withdrawing does not constitute the provision of legal services. GoTek also concluded that the transfer of files was a clerical, ministerial activity and likewise not the provision of legal services.

A California lawyer owes an ethical obligation to the client to "promptly release to the client, at the request of the client, all the client papers and property" upon termination of services. (California Rules of Professional Conduct, Rule 3-700(D)(1).) Although a lawyer is required to satisfy that ethical duty following termination, GoTek strongly suggests that the statute is not tolled simply because the lawyer has not yet fulfilled that obligation, but GoTek did not address this precise issue.