



MALPRACTICE ALERT!

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Ohio Bar Liability
Insurance Company

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DECLINING REPRESENTATION AND STATUTES OF LIMITATIONS

The question sometimes arises, in declining representation, whether or not a lawyer should advise when the relevant statute of limitations runs. There may not be a simple response to this situation.

Some commentators believe that an attorney should not advise regarding the statute of limitations under any circumstance. A few jurisdictions require a lawyer to advise regarding possible statute of limitations when declining representation, Ohio is not one of those. However, it is conceivable that not alerting someone to a pending statute of limitations might give rise to a claim as well. We suggest that whether or not to advise regarding a statute of limitations depends upon the circumstance.

For example, if representation of an adult for an auto accident case that occurred in Ohio involving Ohio residents, one should be able to advise that the statute of limitations for personal injuries arising out of such an incident is two years from the date of the accident. We suggest that a specific date not be provided, since errors can occur in recognizing the actual date of the accident, particularly if representation is being declined. Providing such advice may be critical where the two-year limitation is approaching. Lawyers should note that if representation is declined involving an auto accident or other injury claim that occurred outside of Ohio, then the statute of limitations may well differ from Ohio's. Such persons can be advised that the lawyer does not practice in that

state, and that time limitations are running that could prohibit the filing of any claim, and the person should seek appropriate legal counsel immediately. The same advice may be true regarding any matter outside the lawyer's knowledge or expertise. The client should be advised to seek other representation immediately.

Other types of claims, such as medical malpractice or other professional liability claims, may have limitation periods that are more difficult to define. In those matters, it may be prudent to advise the person that the statute of limitations is generally one year (medical malpractice) from the date the problem is discovered, or the doctor's last treatment for that condition, whichever is later. But, the person should also be advised that the legal definition of when a problem is discovered is subject to interpretation in the legal process, thus, the actual date the statute runs may be impossible to clearly define, and for that reason, they should seek another opinion as soon as possible.

To summarize the above, it is suggested that when declining representation, avoid giving a specific date when the statute of limitations runs. However, we believe that for Ohio matters, an explanation of what the statute of limitations is in general is appropriate, assuming the lawyer knows what the law is with respect to the legal matter in the first place. When the representation involves an out-of-state matter, or legal matter outside the lawyer's usual knowledge or practice areas, it is probably best to advise the person to seek another opinion immediately, or to direct them to a lawyer who may be better able to assist them with the matter.

New Life to Old Pontzer Claims?

In late December 2002, the Ohio Supreme Court decided the case of Ferrando vs. Auto-Owners Insurance Company, et al. (2002),
O.S.3d _____.

In that case, a plaintiff had settled claims with a tortfeasor. The plaintiff then later attempted to assert claims against his employer's insurer. The Court of Appeals, in reversing the trial court, ruled that the plaintiffs had not timely notified the Pontzer insurer of their claims, and had also breached the policy's subrogation provision by settling with the tortfeasor.

The Supreme Court had to answer two questions. Is late notice of a claim always fatal to bring a claim against a Pontzer insurer in Ohio? And when a tortfeasor has been previously released, destroying subrogation rights of any insurer, does such action absolutely prohibit recovery under the insurance policy?

The Court adopted reasoning from other jurisdictions that create a presumption in favor of the insurer that late notice of a claim is prejudicial

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to an insurer, but a claimant may submit evidence to rebut such a presumption in presenting a claim. The Court also applied similar reasoning regarding prior release of a tortfeasor and subrogation rights. Prejudice is presumed to an insurer, but a claimant can rebut the presumption by showing that in fact no actual harm resulted to the insurer from release of the tortfeasor.

The decision leaves unclear when release of a tortfeasor is or is not prejudicial. Case law will have to develop in the future interpreting exactly what level of collectibility is required before release of a tortfeasor is deemed prejudicial to an insurer. Attorneys who previously determined that Pontzer claims could not be pursued due to late notice or tortfeasor release issues may wish to review those files again, in light of the Ferrando decision. Also, attorneys should review this decision, as it may not apply to only Pontzer claims, but to other claims as well. One example might be when one seeks to bring an underinsured claim against the client's own insurance company, and there is a defense of late notice, or violation of that insurer's subrogation rights.