

Attorney's Death Before Statute of Limitations Has Expired Does Not Necessarily Preclude Malpractice Claim

The attorney-client relationship terminates upon the solo attorney's death and with the closing of his or her law firm. This raises the question of whether the attorney's death before the statute of limitations has run precludes a malpractice claim for the attorney's failure to file suit when no attorney-client relationship existed at the time the now former client was damaged? This issue was recently addressed in a New York state appeal in *Cabrera v. Collazo*, 979 N.Y.S.2d 326 (Sup.Ct., A.D. 2014), wherein the attorney representing an estate in a wrongful death claim died 11 days before his client's claim would have become time barred. The court's answer as to whether a malpractice claim is precluded when the attorney-client relationship is terminated in this manner is that it depends upon the circumstances of each case.

In *Cabrera* the underlying claim was for wrongful death where the plaintiff decedent died allegedly "as a result of negligent care and treatment that was rendered by her doctors and nurses." In fact the New York State Department of Health, in disciplinary proceedings against one of the physicians in question, found that he "exhibited wanton disregard for basic medical practice, resulting in the revocation of his license to practice medicine" in New York state.

The decedent's sister, in her representative capacity, retained two attorneys: the one who later died and another attorney, who would not have been active in the litigation but would have split the fee with the decedent attorney upon any recovery. The record does not reflect whether the decedent attorney had taken any steps to draft a complaint or engage other counsel to cover for him if needed. Thereafter the plaintiff estate sued both the decedent attorney's estate and the other attorney for malpractice for missing the statute of limitations on the wrongful death claim.

The deceased attorney's estate filed a motion to dismiss the plaintiff estate's complaint for failure to state a cause of action. It contended "that since the attorney-client relationship was terminated by [the decedent attorney's] death ... [the decedent attorney] and his law firm cannot be held liable for any damages sustained by plaintiff as a result of the subsequent running of the statutory limitations period. ..." The trial court rejected what the appellate court later would characterize as a "remarkable defense," denying the motion to dismiss, and the attorney's estate appealed. A unanimous panel of five judges in the Supreme Court, Appellate Division, affirmed.

The court noted, "That a cause of action might accrue when the plaintiff actually sustains a loss, however, does not require the conclusion that an attorney is absolved of responsibility for any and all consequences of his neglect of the matter simply because it occurred *prior* to accrual of an actionable claim."

The court found that the complaint alleged sufficient facts to allow the case to go forward with discovery, since plaintiff receives "the benefit of every possible favorable inference that can reasonably be drawn from the pleadings." It found that, "Plaintiff is entitled to the inference that [decedent attorney] died as a result of a chronic, terminal illness that he knew, or should have known, presented the immediate risk that his ability to represent his clients' interests might be impaired." It also noted that the record reflects that the decedent attorney knew he could not depend on his co-counsel, who was later convicted of immigration fraud and later disbarred as a result, to cover for him.

The court recognized that the "expansion of the record," which discovery will allow, may lead to "a 'more embrative and exploratory motion for summary judgment.'" This would depend upon whether the discovery "disclose[s] facts demonstrating that [decedent attorney] was suddenly struck by a fatal and totally incapacitating episode of cancer rendering him unable to engage the services of another attorney to file a timely complaint on behalf of plaintiff or to communicate the necessity to do so." In the court's view, with only 11 days remaining on the statute of limitations following the decedent attorney's death, "the running of the statute of limitations against his client was a foregone conclusion because intervention by substitute counsel was not possible."

The court distinguished New York case law (unlike Pennsylvania case law) that says the statute of limitations begins to run when the client has sustained injury on the basis that these cases do not say that the attorney-client relationship must still exist when the injury occurs. "The holding in these cases is not a bar to a legal malpractice claim against [decedent attorney] for alleged failure, while he was alive, to notify plaintiff that he would be unable to

Avoiding Liability



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file the summons and complaint in time or to enlist the attorneys in his firm to assist in this endeavor." Instead, the court held that a legal malpractice claim must be premised upon the existence of an attorney-client relationship, but it need not be premised upon the existence of such a relationship at the time the client sustains injury.

The holding in Cabrera does not stand for the proposition that duty of care requires that the practitioner must anticipate that he or she might get hit by a bus when crossing the street and, therefore, must have a Plan B in place, although to have a Plan B would certainly constitute a best practice.

One example of this was an instance where an attorney had withdrawn from the representation without informing the client of the time remaining in which to commence suit on his claim. The holding in *Cabrera* does not stand for the proposition that duty of care requires that the practitioner must anticipate that he or she might get hit by a bus when crossing the street and, therefore, must have a Plan B in place, although to have a Plan B would certainly constitute a best practice. This case does stand for the proposition that "[w]here ... the expiration of the statute of limitations is imminent and the possibility that another attorney might be engaged to commence a timely action is foreclosed, there is a duty to take action to protect the client's rights."