



## Alerts

### Continuous Representation May Toll the Statute of Limitations in Washington

June 2, 2011

*Lawyers for the Profession® Alert*

*Hipple v. McFadden*, \_\_\_ P.3d \_\_\_, 2011 WL 1653194 (Wash. 2011)

#### Brief Summary

A Washington appellate court held that the “continuous representation” rule applied only if the client actually had or reasonably should have had no expectation that the attorney would provide further legal services.

#### Complete Summary

On January 8, 2004, a court found plaintiff father in contempt of court for failing to comply with a child support order, and a bench warrant was issued for his arrest. The father was arrested on April 15, 2005, and placed in jail. The Washington Department of Assigned Counsel (DAC) determined that he was eligible for appointed counsel. On May 9, 2005, the father received a letter from the DAC notifying him that a first attorney had been appointed to represent him. On May 10, 2005, a second DAC attorney filed an appearance on the father’s behalf.

The father had previously, on May 5, 2005, had a hearing, at which he was not represented by counsel, to review his release conditions. Child support arrearages were calculated to be in excess of \$20,000. Continued confinement was ordered, and release was conditioned upon payment of the arrearages. On June 28, 2005, the father’s confinement was changed to electronic home monitoring.

The father claimed that he had contact with the first attorney a few days after May 9, 2005, and again about a month later. He claimed that thereafter, he attempted to contact the first attorney and the second attorney numerous times in writing and by telephone regarding his case, to no avail. On June 21, 2006, a third attorney filed an appearance on the father’s behalf, and on September 18, 2006, that lawyer secured the father’s release.

On June 18, 2009, the father filed the legal malpractice claim against the first and second attorneys. Defendants moved to dismiss based, in part, on the the statute of limitations. The trial court denied the motion, and the appellate court granted discretionary review to review the proper application of the continuous representation rule.

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In Washington, the statute of limitations for an attorney malpractice action is three years. Wash. Rev. Code § 4.16.080(3). However, the “continuous representation” rule tolls the statute of limitations until the end of a lawyer’s representation of a client in the same matter in which the alleged malpractice occurred. The court noted that the test for determining whether an attorney’s representation of a client regarding a specific subject matter continues or ends was a matter of first impression in Washington. The court further noted that in general, the determinative event for the continuous representation rule is when the representation ended.

The court recognized that the test for deciding when representation ends varies by jurisdiction. The court noted that if the measure of a terminated relationship is a client’s objective step toward ending a relationship, an attorney can too easily exploit the client’s reliance and escape liability. The *Hipple* court then noted that consistent with the purposes of the rule, other authorities state that representation may still end if the attorney withdraws unilaterally, but only if the client has no reasonable expectation of continued representation. In *Gonzalez v. Kalu*, 140 Cal. App. 4th 21, 43 Cal. Rptr. 3d 866 (2006), the lawyer claimed to have ended the attorney-client relationship, but the client disputed receiving notice of the termination and alleged that she still believed that the attorney was pursuing her claim. The *Gonzalez* court concluded that resolution of when the representation ended was a question of fact, and that where there is unilateral withdrawal or abandonment, the representation ends “when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.”

The *Hipple* court adopted the *Gonzalez* approach, stating that running the statute of limitations from the first break in continuity of the relationship does not protect an injured client where the attorney abandons representation. The court concluded that the *Gonzalez* rule, which accounts for the client’s reasonable expectations, is an appropriate standard to apply because it furthers the stated objective of preventing a lawyer from being able to wait out an alleged malpractice claim.

Defendants argued that the continuous representation rule cannot apply where the malpractice action is based on a claim of lack of representation. They did not, however, contest that an attorney-client relationship was formed. Thus, in applying the continuous representation rule, the court concluded that there was a factual question of when the relationship ended. At what point the father could no longer have reasonably expected to receive services from defendants was not a question for the court to answer as a matter of law.

### **Significance of Opinion**

This decision underscores the importance of communication with clients about the subject matter of the representation, including the significant event of an attorney’s withdrawal from representation. In Washington, the statute of limitations will not commence until the client actually has or reasonably should have no expectation that the lawyer will provide further legal services.

For more information, please contact [Terrence P. McAvoy](#) or your regular [Hinshaw attorney](#).

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