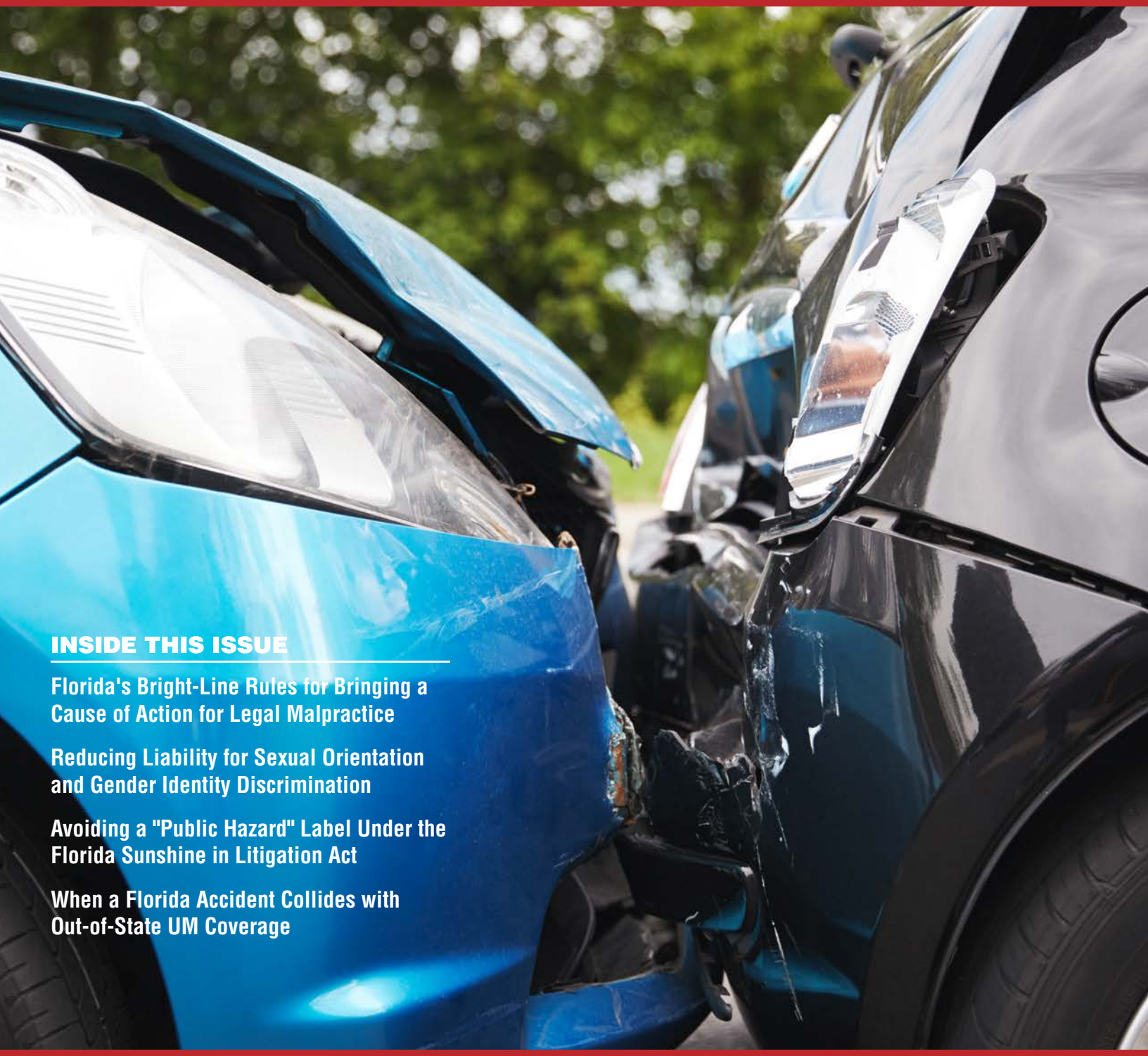
Volume 41 • Number 1

THE TRIAL ADVOCATE

A PUBLICATION OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION



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Florida's Bright-Line Rules for Bringing a Cause of Action for Legal Malpractice

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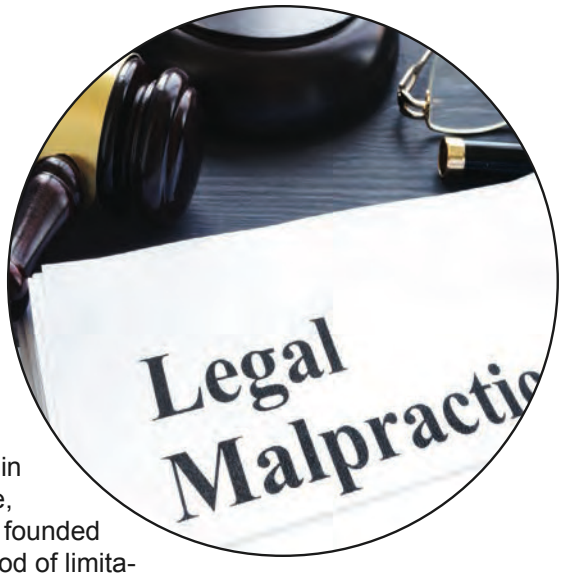

Despite the Florida Legislature's attempt to provide aggrieved clients with direction on when they can bring a cause of action against their attorneys — and also to assure attorneys that such a threat will not last indefinitely — exactly when the cause of action for attorney malpractice accrues has not always been clear.

The Legislature set a two-year statute of limitations for professional malpractice actions:

> Actions … shall be commenced … [w]ithin two years … for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence.

In interpreting this statute, Florida courts have created and continue to define bright-line rules regarding when a cause of action for legal malpractice accrues.

Clients wishing to bring a cause of action against their former counsel need to be aware of these rules in order to bring a claim in a timely fashion and to recoup any damages to which they are entitled. Counsel need to be aware of the bright-line rules in order to protect themselves from stale claims. This article looks at the progression of the case law and discusses the nuances of the accrual of claims, whether they arise out of litigation or pre-litigation claims, as well as some more recent cases clarifying these rules.

Malpractice During Litigation

In *Silvestrone v. Edell*, the Florida Supreme Court reviewed the Fifth District Court of Appeal's decision in *Silverstone v. Edell*, 701 So. 2d 90 (Fla. 5th DCA 1997), which the Florida Supreme Court found to expressly and directly conflict with the Second District Court of Appeal's decision in *Zakak v. Broida & Napier, P.A.*, 545 So. 2d 380 (Fla. 2d DCA 1989), on "the issue of whether the two-year statute of limitations for legal malpractice, in a litigation context, begins to run when the verdict is entered or when final judgment is entered."

In the earlier *Zakak* case, the Zakaks retained counsel to defend them in a personal injury action. During the litigation, their attorney represented to the other parties that he had authority up to $15,000 to contribute to an overall settlement of $20,000. The plaintiff accepted the offer, but the Zakaks refused to contribute the $15,000, claiming that their attorney had no settlement authority from them. Nevertheless, the plaintiff moved to enforce the settlement agreement, and the trial court entered an order granting the motion on February 12, 1985. The order provided in part that the Zakaks had to pay the $15,000 within 20 days of the date of order and also addressed what would happen should a default occur: "in default thereof, final judgment for such amount shall be entered against [the Zakaks]…." When the Zakaks made no payment, the trial court entered a final judgment for damages on October 29, 1985. No appeal was taken from the judgment.

EDITOR'S NOTE: Clients who believe they have a cause of action for legal malpractice, as well as counsel, need clear guidance regarding the two-year limitations period for professional malpractice. This article explains some of the nuances in Florida law regarding when these claims accrue.

The Zakaks filed their legal malpractice lawsuit on February 16, 1987. The trial court found that the statute of limitations began to run with the entry of the February 12, 1985 order and dismissed the lawsuit with prejudice. On appeal, the Second District Court of Appeal found the February 12, 1985 order confirming the settlement agreement to be an interlocutory order contemplating further action from the trial court and that further action occurred in the form of the entry of final judgment on October 29, 1987. Until the final judgment was entered, the Second District Court of Appeal found "[t]he trial court had the inherent authority to reconsider and modify or vacate the order confirming settlement at any time up to the point of entry of final judgment." So even though the Zakaks knew their liability was probably fixed on February 12, 1985, that liability did not become confirmed until the entry of the final judgment. The Second District Court of Appeal cited to section 95.031(1), Florida Statutes, for the proposition that a "period of limitations does not begin to run until there is in existence a fully matured cause of action which may be prosecuted."

The Second District Court of Appeal then held that "when a cause of action for legal malpractice is predicated on errors and omissions committed in the course of litigation, the statute of limitations does not begin to run until that litigation is concluded by final judgment, or, if appealed, until a final appellate decision is rendered." The Zakaks thus filed their lawsuit well within the statute of limitations period and their complaint for legal malpractice should not have been dismissed by the trial court.

In the second conflict case, Art Silvestrone hired an attorney to represent him in a federal antitrust action. On February 27, 1990, the jury returned a verdict and awarded Mr. Silvestrone damages, but it did not award any damages to his co-plaintiff. Over the next two years, Mr. Silverstrone's and his co-plaintiff's post-trial motions were filed and heard, resulting in a February 4, 1992 final judgment with an increased award of damages and attorney's fees and costs for Mr. Silvestrone and an award of attorney's fees and costs for his co-plaintiff. There was no appeal of the final judgment.

Mr. Silvestrone filed his legal malpractice lawsuit on January 19, 1993 — more than two years after the jury verdict, but less than two years after final judgment was entered. The trial court granted summary judgment to Mr. Silverstrone's attorney on the basis that the two-year statute of limitations had expired. The Fifth District Court of Appeal affirmed, holding that the limitations period began to run when the jury returned its verdict, because that was when Mr. Silvestrone "knew about the allegedly insufficient damage award and any malpractice which may have caused it."

After taking into consideration section 95.11(4)(a), the Florida Supreme Court set a bright-line rule that the statute of limitations for legal malpractice "does not commence to run until the final judgment becomes final." The Florida Supreme Court then explained: "a judgment becomes final either upon the expiration of the time for filing an appeal or postjudgment motions, or, if an appeal is taken, upon the appeal being affirmed and either the expiration of the time for filing motions for rehearing or a denial of the motions for rehearing." The Florida Supreme Court made this bright-line rule to provide certainty and reduce litigation over when the statute starts to run. It also did so to ensure that "courts would [not] be required to make a factual determination on a case by case basis as to when all the information necessary to establish the enforceable right was discovered or should have been discovered."

The Florida Supreme Court applied that bright-line rule to the facts in *Silvestrone* and determined that "the motion for a new trial filed by the coplaintiff, if granted, could have affected Silvestrone's rights and liabilities. Therefore, Silvestrone's rights and liabilities were not finally and fully adjudicated until the presiding judge resolved these matters and recorded final judgment and this final judgment became final." This bright line rule also applies in the criminal arena.

Malpractice Without Litigation

In *Glucksman v. Persol North America, Inc.*, the Fourth District Court of Appeal determined when the statute of limitations for legal malpractice begins to run for disputes that are not litigated, but rather settled without the need to resort to litigation. There, two companies entered into a distributorship agreement, a dispute arose over the distributor agreement, and the distributor agreement was terminated on April 18, 1995. The dispute was resolved by a written settlement agreement executed on June 1, 1995. One of the companies then sought to sue the attorney who prepared and negotiated the distributorship agreement and filed suit on May 9, 1997.

Ultimately, the Fourth District Court of Appeal determined that the suit against the attorney was timely filed, because the limitations period on the dispute between the two companies began not on April 18, 1995, when the distributor agreement was terminated, but on June 1, 1995, when the company suing its attorney suffered redressable harm at the conclusion of the dispute. In support of this finding, the Fourth District Court of Appeal stated: "A legal malpractice cause of action accrues not necessarily when the client first suspects that the attorney might have committed malpractice, but rather, when the client incurs damages at the conclusion of the related underlying judicial proceeding or, if there are no related or underlying judicial proceedings, when the client's right to sue in the related or underlying proceeding expires." The Fourth District Court of Appeal went on to explain that "[t]here was no injury until [the companies'] dispute was resolved. The dispute was never litigated, so there was no related underlying judicial proceeding to determine whether the distributorship agreement could be terminated as a matter of right. However, upon the June 1, 1995 execution of the out-of-court settlement between the disputing parties, [the] right to sue … expired." The cause of action against the attorney who prepared the distributorship agreement accrued when the underlying dispute came to an end.

The Potential Blurring of the Lines: Litigation Cases that are Settled

In 2014, the Fourth District Court of Appeal decided *Arrowood Indemnity Co. v. Conroy Simberg*, which presented a situation where the underlying case was litigated but ended by settlement agreement executed by the parties. The parties agreed to dismissal of the litigation with prejudice; the

settlement documents were executed between December 15 and 18, 2008; the parties were required to wire payments on or before December 22, 2008; a stipulation of dismissal was filed on January 12, 2009; and an order of dismissal was formally entered by the trial court on January 12, 2009. No party appealed the order of dismissal.

Arrowood later sued its attorneys on December 22, 2010 for attorney malpractice in connection with the underlying litigation. The attorneys moved to dismiss the case on the basis that the statute of limitations for attorney malpractice had run before the date Arrowood filed suit. The attorneys primarily relied on *Glucksman*, arguing that the date of the settlement agreement controlled. Despite Arrowood's opposition to the motion to dismiss, the trial court agreed with the attorneys, found that *Glucksman* controlled, with Arrowood filing the malpractice case past the statute of limitations period, and dismissed the case.

Which bright-line rule governs the limitations period for a malpractice claim depends on whether the underlying matter was litigated, including whether it was settled after litigation.

On appeal, the Fourth District Court of Appeal discussed *Silvestrone*'s bright-line rule with regard to cases that proceed to final judgment and the fact that the two-year statute of limitations for litigation-related malpractice begins to run when the final judgment becomes final. It also discussed *Glucksman*'s rule that when a dispute is not litigated, the cause of action for legal malpractice accrues when the client's right to sue in the related or underlying proceeding expires, *i.e.*, when the settlement agreement is executed if the dispute ends in a settlement.

The Fourth District Court of Appeal went on to explain, however, that in the *Arrowood* case, the "malpractice action [was] predicated upon errors or omissions committed in the course and scope of litigation," so the cause of action accrued "when the client incurr[ed] damage at the *conclusion* of the related or underlying judicial proceeding." The Fourth District Court of Appeal therefore held, consistent with *Silvestrone* and its bright-line rule, that "the statute of limitations period began to run when the trial court's order dismissing the underlying … litigation became final," *i.e.*, 30 days after entry of the order of dismissal because the order was not appealed.

Be warned when moving for dismissal, though. As with any other defense, the statute of limitations for legal malpractice must be clear on the face of the complaint.

The Impact of Estoppel, Delayed Discovery, or Fraud.

As with any rule, there are exceptions. The doctrines of estoppel and delayed accrual may still impact the statute of limitations in a legal malpractice claim. Attorney malpractice claims may be subject to estoppel, but all of the elements of estoppel must be plead and proven. But where both parties had the same means of ascertaining truth, no party can claim ignorance of the law. The delayed discovery doctrine may also be a factor in any legal malpractice statutory analysis. That doctrine generally provides that a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious conduct giving rise to a claim. For legal malpractice claims, the delayed discovery doctrine is statutorily based.

Fraud claims related to legal malpractice have a different statute of limitations — and rule — for statute of limitations. The four-year statute of limitations for fraud applies. The Second District Court of Appeal distinguished the bright line rule of legal malpractice from the statute of limitations for fraud in *Hurley v. Lifsey*.

Conclusion

While this article does not address every scenario by which a legal malpractice claim may arise, it addresses a great majority of them. Other claims may be subject to a redressable harm analysis until more bright-line rules can be established. But for now, the bright-line rules that are in place guide parties on how to protect themselves from losing the right to sue for legal malpractice or from being subject to stale claims. They are construed strictly: parties and practitioners alike must be aware of both the statute of limitations and the rules interpreting it.

[1] § 95.11(4), Fla. Stat.
[2] 721 So. 2d 1173 (Fla. 1998).
[3] *Id.* at 1174.
[4] 545 So. 2d at 381.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Zakak*, 545 So. 2d at 380
[17] *Id.*
[18] *Id.* at 382.
[19] *Silvestrone*, 721 So. 2d at 1174.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 1175; *see also Hurley v. Lifsey*, 310 So. 3d 1030 (Fla. 2d DCA 2020)
[27] *Id.*
[28] *Id.* at 1176.
[29] *Id.* at 1175.
[30] *See, e.g., Vega v. Rier*, 321 So. 3d 900 (Fla. 3d DCA 2021) (finding that plaintiff filed his legal malpractice action against his prior counsel in a criminal case brought by the state well within the statute of limitations, where the appeal of the criminal case was not final until after all appellate court post-decision motions were denied and his attempted appeal to the Florida Supreme Court was resolved).
[31] 813 So. 2d 122 (Fla. 4th DCA 2002).
[32] *Id.* at 123.
[33] *Id.* at 123-24.
[34] *Id.* at 124.

[35] *Id.*
[36] *Id.* at 126.
[37] *Id.*
[38] 134 So. 3d 1079 (Fla. 4th DCA 2014).
[39] *Id.* at 1080-81.
[40] *Id.* at 1081.
[41] *Id.* at 1080, 1081.
[42] The suit was originally filed in federal court, but by agreement of the parties, they executed a tolling agreement for any claims that had arisen by December 22, 2008, until March 1, 2012, the federal case was dismissed without prejudice and it was re-filed in Florida circuit court.
[43] *Arrowood*, 134 So. 3d 1079.
[44] *Id.*
[45] *Id.* at 1082.
[46] *Id.*
[47] *Id.* (original emphasis) (citing *Glucksman*, 813 So. 2d at 124).
[48] *Id.* at 1082-83. *But see Pharma Supply, Inc. v. Stein*, No. 14-80374-CIV, 2015 WL 3486469, at *11-12 (S.D. Fla. June 2, 2015) (explaining that under Federal Rule of Civil Procedure 41(a)(1)(A)(11) and (a)(2), a stipulation for voluntary dismissal is effective upon filing without the need for subsequent court order).
[49] *Enlow v. Wright*, 274 So. 3d 1192 (Fla. 5th DCA 2019) (reiterating that, in order to dismiss a legal malpractice claim based on the statute of limitations, the accrual date must be clear on the face of the complaint).
[50] *Riverwood Nursing Ctr., LLC v. Gilroy*, 219 So. 3d 996 (Fla. 1st DCA 2017).
[51] *Id.*
[52] *Hearndon v. Graham*, 767 So. 2d 1179, 1184 (Fla. 2000).
[53] *R.R. v. New Life Cmty. Church of CMA*, 303 So. 3d 916, 921 (Fla. 2020).
[54] 310 So. 3d 1030, 1032-33 (Fla. 2d DCA 2020).
[55] *See, e.g.*, *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So. 2d 1323 (Fla. 1990).