

PROFESSIONAL LIABILITY

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This article examines the “continuous representation” toll of the legal malpractice statute of limitations. In New York, defense practitioners should cite to the recent appellate case [Farina v. Katsandonis, P.C.](#) to establish that a consent to change attorney form can constitute the end date of the defendant attorney’s continuous representation, regardless of other ongoing activities. If the defendant attorney can successfully argue that the attorney-client relationship ended or was terminated before the consent to change attorney was executed or filed, the continuous representation toll may be deemed to run only to the date of the actual discharge, and not to the date that the consent to change attorney form was filed.

Statute of Limitations in Legal Malpractice Claims – Consent to Change Attorney Forms and Establishing the End of the Continuous Representation Toll

ABOUT THE AUTHORS



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The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves to: (1) update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership, and the insurance industry. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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One of the most effective pre-answer defenses to professional malpractice cases is the expiration of the statute of limitations. Defense practitioners in New York should cite to the recent First Department case *Farina v. Katsandonis, P.C.*, 2021 N.Y. Slip Op. 05078 (September 21, 2021) to support the proposition that a consent to change attorney form can constitute the end date of the defendant attorney's "continuous representation," regardless of other, attenuated, ongoing activities. Click [here](#) for the full Decision.

I. Background

In New York, an action to recover damages for legal malpractice must be commenced within three years from the accrual of the claim, which is measured from the commission of the alleged malpractice, not from when the malpractice is discovered. See *Shumsky v. Eisenstein*, 96 N.Y.2d 164 (2001); see also, e.g., *Ackerman v. Price Waterhouse*, 84 N.Y. 2d 535, 541 (1994); *Glamm v. Allen*, 57 N.Y.2d 87, 95 (1982). To invoke tolling of the statute of limitations pursuant to the "continuous representation" doctrine, a plaintiff is required to establish, by sufficient evidentiary facts, "an ongoing, continuous, developing and dependent relationship between the attorney" or a "mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim." See *Matter of Merker*, 18 A.D.332, 332-333 (1st Dept 2005); *Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoebel & Conway*,

52 A.D.3d 566 (2d Dept. 2008). The retention of other counsel breaks the ongoing, continuous, developing, and dependent relationship between the client and his or her attorney, thus breaking the chain of continuous representation. *Amusement Industry, Inc. v. Buchanan Ingersoll & Rooney, P.C.*, 2013 U.S. Dist. LEXIS 8569, 2013 WL 264684 (S.D.N.Y. 2013) citing *Croce v. Kurnit*, 565 F. Supp. 884 (S.D.N.Y. 1982)

II. *Farina v. Katsandonis, P.C.*, 2021 N.Y. Slip Op. 05078 (September 21, 2021)

The recent First Department case *Farina v. Katsandonis, P.C.*, 2021 N.Y. Slip Op. 05078 (Decided on September 21, 2021) for the proposition that the date a fully executed consent to change attorney form is filed can constitute the end date of the defendant attorney's "continuous representation" of the plaintiff, regardless of other attenuated activity.

In *Farina*, the Court held that the defendant attorneys established, as a matter of law, that their representation of plaintiff ended no later than April 7, 2016, notwithstanding the defendant attorneys' pending motion to be relieved and for a charging lien (see CPLR 321[b][1]).

In opposition, the plaintiff failed to allege sufficient facts showing that there was a "mutual understanding" of the need for further representation of the plaintiff by the

defendant attorneys after April 7, 2016 (*cf. Unger v Horowitz*, 8 AD3d 62, 62 (1st Dept 2004)). The plaintiff's successor counsel had previously opposed the defendants' motion for a charging lien and received the plaintiff's file.

III. Analysis

The *Farina* holding is helpful because it supports the notion of a "bright line" occurring with the filing of the consent to change attorney form.

We note that if the facts indicate that the attorney-client relationship ended *before* the consent to change attorney was formally executed or filed, a defense practitioner can argue that the continuous representation toll runs only to the date of the actual discharge and not to the "ministerial" date that the later consent to change attorney was filed. In *Farage v. Ehrenberg*, 124 A.D.3d 159, 160 (2d Dept 2014), the defendant law firm submitted evidence establishing that the parties' attorney-client relationship had terminated when the plaintiff had asked him to "stop handling the matter" and when the plaintiff's incoming counsel stated that the plaintiff "regard[ed] [defendant prior counsel] as her discharged attorney," unauthorized to continue to act on her behalf. *See id.* at 161. Reasoning that "the essence of a continuous representation toll is the client's confidence in the attorney's ability and good faith" (quoting *Shumsky v Eisenstein*, 96 N.Y.2d 164, 167 (2001); *Gamm v Allen*, 57 N.Y. 2d 87, 93-94 (1982); *Greene v Greene*, 56 NY2d 86, 94

(1982)) and that "one of the predicates for the application of the application of the doctrine is continuing trust and confidence in the relationship between the parties" (quoting *Aseel v Jonathan E. Kroll & Assoc., PLLC*, 106 AD3d at 1038 (2d Dept 2013)), the Appellate Division held that the execution of the consent to change attorney form was "a mere ministerial task" of informing the court and other parties that the defendant was no longer authorized of acting as counsel on the plaintiff's behalf. *Id.* at 168. Thus, the Court held, "the consent to change attorney does not identify for continuing representation purposes, the benchmark date that the parties' attorney-client relationship was actually terminated by the plaintiff." *Id.* Rather, in these factual circumstances, the Court held that the submitted evidence demonstrated that the attorney-client relationship terminated within a time frame that preceded the consent to change attorney form, more than three years prior to the commencement of the action. *Id.* *See also Consol. Edison Co. of New York, Inc. v. Armienti*, 2019 WL 1789862 (N.Y. Sup. Ct. Apr. 17, 2019), in which our firm successfully argued that the attorney-client relationship ended when the plaintiff directed the defendant law firm to transfer its legal file to successor counsel.

IV. Conclusion

To successfully invoke the continuous representation toll of the statute of limitations, a plaintiff is required to establish "an ongoing, continuous, developing and dependent relationship between the

attorney” or a “mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim.” If the facts indicate that the attorney-client relationship was definitively terminated *before* the consent to change attorney was executed or filed, the continuous representation toll may be deemed to run only to the date of the actual discharge and not to the date that the consent to change attorney form was filed.

*** The authors trust that the article was useful and thought-provoking; however, please note that it is intended as a general guide and opinion only, not a complete analysis of the issues addressed, and readers should always seek specific legal guidance on particular matters.*

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