Indiana's Development of a Definitive Legal Malpractice Statute of Limitations

Donald L. Jackson*

I. Introduction

While a number of noteworthy developments have occurred during the survey period, legal malpractice decisions lurk in the forefront.[1] In the wake of every rising lawyer's professional liability insurance premiums,[2] the crystalization of legal standards serves to stabilize these costs. After the Supreme Court of Indiana rendered its decision in *Shideler v Dwyer*,[3] many observers considered the statute of limitations applicable to legal malpractice cases a settled area of the law. However, it was necessary for the court once again to address the question of the proper statute of limitations for a legal malpractice action in *Whitehouse v. Quinn*.[4] This was made necessary by an Indiana Court of Appeals decision[5] which, contrary to *Shideler*, imposed a limitation period longer than two years. Thus, this Article will review the tortured developments of the statute of limitations as applied to legal malpractice actions recently culminating in the *Whitehouse v. Quinn*[6] case which, it is hoped, will finally be determinative in this area.

II. District Split

Prior to the Supreme Court of Indiana's decision in *Shideler v. Dwyer*,[7] the different districts of the Court of Appeals of Indiana had reached divergent results as to which statute of limitations applies to legal malpractice cases.[8] This divergence is largely explained by a lack

---

*Partner, Bingham Summers Welsh & Spilman, Indianapolis. B.S., 1960; J.D., 1966, Indiana University. The author wishes to express his appreciation to Bryan J. Collins for his assistance in the preparation of this Article.

[1]One other very recent case outside the malpractice context should be noted. In Commodity Futures Trading Com. v. Weintraub, 105 S. Ct. 1986 (1985), the United States Supreme Court held that a corporation's trustee in bankruptcy may waive the attorney-client privilege.

[2]*See* 29 Res Gestae, no. 2, at p. 22 (July, 1985).

[3]275 Ind. 270, 417 N.E.2d 281 (1981).

[4]477 N.E.2d 270 (Ind. 1985).

[5]Whitehouse v. Quinn, 443 N.E.2d 332 (Ind. Ct. App. 1982), *aff'd in part, rev'd in part,* 477 N.E.2d 270 (Ind. 1985).

[6]*Id.*

[7]275 Ind. 270, 417 N.E.2d 281.

[8]*See* Jackson, *Survey—Professional Responsibility and Liability*, 14 Ind. L. Rev. 433, 455-57 (1981).

of contemporary guidance from Indiana's highest judicial authority. Those supreme court cases which presented this question were decided in the era of Field Code pleading.[9] This uncertainty caused the various appellate districts in Indiana to develop divergent theories regarding the limitations period to be applied to legal malpractice actions.

In *Cordial v. Grim*, the Third District of the Court of Appeals of Indiana held that legal malpractice was limited by Indiana Code section 34-4-19-1.[10] That section states that an action is timely if it is filed within "two (2) years from the date of the act, omission or neglect complained of."[11] Although the statute[12] by its terms only expressly mentions professional medical misconduct, the court held the general wording of the statute evidenced an intent to cover members of the bar.[13] Ultimately, the Supreme Court of Indiana overruled this theory.[14] The court held "the doctrine of *ejusdem generis* limits the application of the term 'or others,' as used in said statute, to others of the medical care community."[15]

The court of appeals in *Cordial* also analyzed sections one and two of Indiana Code chapter 34-1-2 as an alternate ground for holding that these causes of action were barred under the statute of limitations. The court determined that when a tort arises out of a duty created by an implied contract of employment, the court must decide whether the nature of the resulting action is *ex contractu* or *ex delicto* in order to determine any limitation on the commencement of the action.[16] Were a court to accept a cause of action as arising from a breach of a promise set forth in a contract and thus conclude the action was *ex contractu*, a plaintiff would save an otherwise stale claim under the longer statute of limitations for contract actions. An action based upon "contracts not in writing" must "be commenced within six (6) years after the cause of action has accrued."[17] Actions based upon "contracts in writing"

---

[9]*See, e.g.*, Boor v. Lowrey, 103 Ind. 468, 3 N.E. 151 (1885); Foulks v. Falls, 91 Ind. 315 (1883); Burns v. Barenfield, 84 Ind. 43 (1882); Stanley v. Jameson, 46 Ind. 159 (1874).

[10]169 Ind. App. 58, 67-68, 346 N.E.2d 266, 272 (1976) (overruled by *Shideler,* 275 Ind. at 272, 417 N.E.2d at 283).

[11]IND. CODE § 34-4-19-1 provides: "No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any court of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of."

[12]*Id.*

[13]*Cordial*, 169 Ind. App. at 67-68, 346 N.E.2d at 272.

[14]*Shideler*, 275 Ind. at 272, 417 N.E.2d at 283.

[15]*Id.*

[16]*Cordial*, 169 Ind. App. at 61-64, 346 N.E.2d at 269-70.

[17]IND. CODE § 34-1-2-1 (1982).

must commence within ten years after the cause of action has accrued or within twenty years if the contract was entered into before September 1, 1982.[18]

Although the plaintiff may plead the cause of action as a breach of contract, the court held that the *substance* of the actual allegations will control the applicability of the statute of limitations.[19] The general rule is that, especially where forms of action have been abolished, as in Indiana, it is the nature or substance of the cause of action, rather than the form of the action, which determines the applicability of the statute of limitations.[20]

In *Cordial*, the attorney's actions or inactions were alleged to have rendered his client's claim worthless. Rather than analyze the conduct of the wrongful party, the court in *Cordial* appeared to consider the nature of interest harmed as being the central focus for determining the nature or substance of the cause of action. Thus, the court concluded that the "claim was a chose in action, and as such, must be considered to have been personal property of the [client]."[21] A chose in action, especially in its broadest sense, is an interest in or a right to recover by a suit recognized at law.[22] The term can encompass all rights of action whether pled in tort or contract.[23] Accordingly, a chose in action is viewed as being personal property. In *Cordial*, the interest harmed, the focal point for determining the nature of the claim, was a loss of the plaintiff's chose in action. Consequently, the trial court could have properly found the two-year statute of limitations in Indiana Code section 34-1-2-2(1), which limits actions for injuries to personal property, to be applicable.[24]

However, in *Shideler*, the First District of the Court of Appeals of Indiana reasoned that Indiana Code section 34-1-2-2 was the proper statute to apply to legal malpractice cases.[25] Without determining the applicability of the statute of limitations to the case, the First District developed an intermediate step. Before a statute of limitations may be applied, the trier of fact, or if the facts are undisputed, the trial judge must determine the proximate cause of the action.[26] Once the proximate

---

[18]IND. CODE § 34-1-2-2(6) (1982).

[19]*Cordial*, 169 Ind. App. at 61-63, 346 N.E.2d at 269.

[20]*Id.* at 63, 346 N.E.2d at 269 (quoting Koehring Co. v. National Automatic Tool Co., 257 F. Supp. 282, 292 (S.D. Ind. 1966)).

[21]*Cordial*, 169 Ind. App. at 63-64, 346 N.E.2d at 270.

[22]McNevin v. McNevin, 447 N.E.2d 611, 615-16 (Ind. Ct. App. 1983).

[23]*Id.*

[24]*Cordial*, 169 Ind. App. at 63-64, 346 N.E.2d at 270.

[25]179 Ind. App. 622, 386 N.E.2d 1211, 1216 (1979), *vacated*, 275 Ind. 270, 417 N.E.2d 281 (1981).

[26]386 N.E.2d at 1216.

cause is determined, it follows that the harm resulting from the proximate cause can be ascertained. The statute of limitations in Indiana Code section 34-1-2-2 can then be applied from the date the proximate cause manifested itself in the harm complained of by the plaintiff.[27]

Under the facts of *Shideler*, the attorney prepared a will for Robert Moore. Moore's will made a precatory request of a devisee receiving shares of stock under the will to cause the corporation to pay the plaintiff five hundred dollars per month as a retirement benefit. Within two years after the date on which the probate court entered a decree declaring the precatory provision null and void, the plaintiff filed a malpractice action against the attorney who had drafted the will. The court of appeals held it was proper for the matter to be submitted to the jury for a determination of when the causal factor manifested itself in a redressable injury for purposes of commencing the running of the statute.[28]

III. Definitive Ruling

As can be seen from the preceding discussion, two of the four Indiana appellate districts appeared to be divided both as to the particular factors which would implicate a given statute and the applicability of the professional medical care malpractice statute in the context of a claim for legal malpractice. As a result of the conflict in the districts, the mechanics of the statute of limitations in a legal malpractice case became ripe for determination by the Supreme Court of Indiana. Not only was there confusion about which statute of limitations applied, but also at what point the statute began to run for purposes of determining whether the statute barred the claim. In *Shideler v. Dwyer*,[29] the supreme court made what was considered by many observers to be an exhaustive review of the statute of limitations for legal malpractice.[30]

The supreme court first summarily disposed of the application of Indiana Code section 34-4-19-1 to legal malpractice under the doctrine of *ejusdem generis*.[31] The policy solidifying the longevity of the statute of limitations then was recounted by the court at the outset of its opinion. "Such statutes rest upon sound public policy and tend to the

---

[27]*Id.*; *accord* Anderson v. Anderson, 399 N.E.2d 391 (Ind. App. 1979).

[28]386 N.E.2d at 1217.

[29]275 Ind. 270, 417 N.E.2d 281.

[30]*See, e.g.*, Keystone Dist. Park v. Kennerk, Dumas, Burke, Backs, Long and Salin, P.C., 461 N.E.2d 749, 751 (Ind. Ct. App. 1984); Yaksich v. Gastevich, 440 N.E.2d 1138, 1139 (Ind. Ct. App. 1982).

[31]*Shideler*, 275 Ind. at 272, 417 N.E.2d at 283.

peace and welfare of society and are deemed wholesome."[32] " '[S]ince they are considered as statutes of repose and as affording security against stale claims . . . , the courts are inclined to construe limitation laws liberally, so as to effect the intention of the legislature.' "[33]

With its course established in the policies supporting statutes of limitations, the supreme court noted the plaintiff had alleged substantive causes of actions "charging: (1) breach of contract, (2) negligence, (3) fraud, (4) constructive fraud, and (5) breach of fiduciary duty."[34] The flexibility of notice pleading under the modern rules of civil procedure make such alternate pleading commonplace. Considering the ease with which a party may draft such substantive alternatives, it is not surprising that the court stated, "[S]uch method of pleading . . . will not control the limitations period."[35]

Rather than randomly selecting the statute of limitations based upon the form of the pleading as set forth by a plaintiff, the proper analysis appears to require a court to determine the nature or substance of the action. As in the alternate analysis utilized by the *Cordial* court, the supreme court evaluated the nature of the interest injured rather than relying upon the substantive theory under which the plaintiff sought to redress the harm for purposes of determining the applicable statute.[36] A claim of malpractice against an attorney alleges a loss of a chose in action. In undertaking a thorough evaluation of what interest is at stake in a malpractice claim, the court recognized that personal property " 'includes not only the thing itself but all the rights and interests of the owner.' "[37] "Property is more than the physical object which a person owns. It includes the right to acquire, possess, use, and dispose of it without control or diminution. . . ."[38] Where a plaintiff, such as Dwyer, claims a loss of a right to receive money as a result of the actions or omissions of an attorney, there is "a claim for injuries to 'rights or interests in or to' personal property."[39] This reasoning necessarily rejects a narrow definition of personal property. For purposes of the statute of limitations, it does not appear personal property will be merely

---

[32]*Id.* at 273, 417 N.E.2d at 283 (citing Horvath v. Davidson, 148 Ind. App. 203, 264 N.E.2d 328 (1970); Sherfey v. City of Brazil, 213 Ind. 493, 13 N.E.2d 568 (1938); High et al. v. Bd. of Comm'rs of Shelby County, 92 Ind. 580, 589 (1883)).

[33]*Shideler*, 275 Ind. at 273, 417 N.E.2d at 283 (quoting 51 Am. Jur. 2d *Limitations of Actions* § 50 (1970)).

[34]*Shideler*, 275 Ind. at 276, 417 N.E.2d at 285.

[35]*Id.*

[36]*Id.* at 279-81, 417 N.E.2d at 287-88.

[37]*Id.* at 279, 417 N.E.2d at 287 (quoting Rush v. Leiter, 149 Ind. App. 274, 278, 271 N.E.2d 505, 507 (1971)).

[38]Dept. of Financial Inst. v. Holt, 231 Ind. 293, 303, 108 N.E.2d 629, 634 (1952).

[39]*Shideler*, 275 Ind. at 281, 417 N.E.2d at 288.

confined to tangible chattel property as distinguished from violations of intangible rights in and to personal property.

Having determined that a claim of legal malpractice asserts a deprivation of a party's interest in personal property,[40] it follows that the injury to personal property will be limited by Indiana Code section 34-1-2-2(1). Injuries to personal property must be redressed by an action commenced within two years after the cause of action has accrued.

While the importance of the form of the action pled was clearly dispelled by the *Shideler* court as one of the indices for determining the nature of the action, the *Shideler* decision unfortunately did not prove to be dispositive of the issue. In *Whitehouse,* the Second District Court of Appeals of Indiana confronted a legal malpractice claim which alleged, among other actions, that the attorney had failed to fulfill a promise contained in a written employment contract; this cause of action was held to be covered by the statute of limitations governing written contracts.[41]

In rendering this decision, the court of appeals looked to several factors in determining that the twenty year period of section 34-1-2-2 (6) applied. The court found that the claim was predicated upon an express, written promise of an attorney to prosecute all individuals legally responsible for the plaintiff's injury. The attorney-client contract in *Whitehouse* was viewed as being distinguishable from the remote and indirect connection between the attorney and plaintiff in *Shideler.*[42] The nonperformance by the defendant-attorney of an express promise to the plaintiff was viewed as a breach of contract claim.[43] The court of appeals relied on a vintage supreme court case[44] in concluding that an action predicated upon a written instrument is based in contract, not in tort.[45]

The court of appeals' reasoning in *Whitehouse* was categorically rejected by the supreme court. Holding steadfastly to its reasoning in *Shideler*, the court held that it is necessary to "identify the substance of the cause of action by inquiring into the nature of the alleged harm."[46] Whitehouse had a right to file suit against the state of Indiana. As such, he possessed a chose in action and thus held a personal property interest. The claim made was that this personal property interest had been damaged as a result of a breach of duty assumed under a contract.

---

[40] *Id.*

[41] 443 N.E.2d 332 (Ind. Ct. App. 1982), *aff'd in part, rev'd in part,* 477 N.E.2d 270 (Ind. 1985).

[42] *Id.* at 337-38.

[43] *Id.* at 336-37.

[44] Foulks v. Falls, 91 Ind. 315 (1883).

[45] *Whitehouse*, 443 N.E.2d at 336-37.

[46] *Whitehouse*, 477 N.E.2d at 274.

However, the court reasoned that the existence of a written contract did not change the nature of the claim.[47] Whether Quinn's conduct was a breach of a common law duty so as to constitute a tort or a breach of a contractual duty so as to constitute a breach of a contract, the conduct *resulted* in an injury to Whitehouse's personal property. Thus, because the substance of the claim of the malpractice action was an injury to personal property, the court applied Indiana Code section 34-1-2-2(1), which governs injuries to personal property, including those caused by legal malpractice.

Thus, the statute of limitations applicable to any legal malpractice case in which a plaintiff alleges damage to a claim which he possessed before the breach of a duty once again appears to be clear. Regardless of the existence of a contractual, fiduciary, or other unique relationship between the plaintiff and an attorney, the cause of action must be brought within two years after the point when the cause of action accrued. The court painstakingly noted that there should not be a longer statute of limitations applicable to parties who have contracted, expressly or impliedly, with an attorney who committed malpractice. "This would create an artificial distinction between actions for personal injuries or personal property damage by non-contracting parties and those where some contractual relationship could be alleged."[48] Such an artificial distinction would not effectuate the policy set forth by the legislature in the statutes.

The supreme court's decision in *Whitehouse* should be the death knell to arguments alleging that injuries to personal property from acts of legal malpractice are covered by longer statutes or limitations. It again appears settled that stale claims of legal malpractice will be limited by two-year limitation periods under Indiana Code section 34-1-2-2(1).[49] However, the *Whitehouse* decision does not answer all the questions relating to the statute of limitations. Factual arguments and legal issues remain abundant regarding the issue of when a cause of action for malpractice accrues so as to commence the running of the statute.

To commence a legal malpractice action properly, the lawsuit must be filed within two years after the date upon which the cause of action accrued. Difficulty may arise in determining the date on which the statute begins to run. In the abstract, the statute begins to run at the point there is an actionable wrong. The wrongful conduct is actionable only

---

[47] *Id.*

[48] *Id.*

[49] Where an act of legal malpractice results in an injury to property other than personal property, a plaintiff should be able to assert effectively that the six-year limitations period of IND. CODE § 34-1-2-1 (1982) is applicable.

when an invasion of a personal right, recognized in the law, produces an injury.[50] "[I]t is not necessary that the extent of the damage be known or ascertainable but only that damage has occurred."[51]

However, as a general proposition, it is not necessary that a plaintiff know or should have known of his injury at the hands of his lawyer for the statute to commence running; rather, it is only necessary that the cause of action has accrued.[52] A cause of action accrues at the instant the conduct coalesces into an injury or harm. The court characterizes this coalescence as an irremediable harm.[53] At this instant, the wrong has manifested itself into a certain injury. Although the extent of damage may be speculative, the fact is established that the plaintiff has been injured and the cause of action will accrue.

While this interpretation could be viewed as yielding a harsh result, especially to a plaintiff who has experienced an injury which does not develop into a discoverable harm until the statute has lapsed, the policy of repose for the sake of peace is a paramount concern which has been recognized by the legislature. Hidden injuries, which may also pose a serious threat to the peace and the general welfare, may be protected against under the existing tolling principle. These tolling principles attempt to balance judicially valid claims with the interests expressed by our legislature in the statute of limitations.

Where there is a continuing fiduciary relationship, as in the attorney-client relationship, the attorney should be required to disclose all material information relating to the relationship. Failure to do so may well toll the statute of limitations until the relationship terminates. The supreme court has articulated this principle in the context of a physician-patient relationship.[54] The court of appeals in *Whitehouse* undertook a complete review of this principle. The court was unable to recognize any tolling under the facts presented because the plaintiff failed to allege sufficient facts to prove there was a continuation of the attorney-client relationship after the wrongful conduct had occurred.[55] These findings were incorporated by reference in the supreme court's opinion.[56]

---

[50]*Shideler*, 275 at 283-86, 417 N.E.2d at 289-91.

[51]*Id.* at 282, 417 N.E.2d at 289.

[52]*Id.* at 284, 417 N.E.2d at 290.

[53]*Id.*

[54]"[W]here the duty to inform exists by reason of a confidential relationship, when that relationship is terminated the duty to inform is also terminated; concealment then ceases to exist. After the relationship of physician and patient is terminated the patient has full opportunity for discovery and no longer is there a reliance by the patient nor a corresponding duty of the physician to advise or inform. The statute of limitations is no longer tolled by any fraudulent concealment and begins to run." Guy v. Schuldt, 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956); *accord* Conard v. Waugh, 474 N.E.2d 130, 135 (Ind. Ct. App. 1985).

[55]443 N.E.2d at 339, *aff'd on this ground*, 477 N.E.2d at 272.

[56]477 N.E.2d at 272.

The more difficult issue arises when there is no affirmative act by an attorney to mislead a former client, both where the attorney knew or should have known of his wrongful conduct. A plaintiff may assert that without training in law, a layperson is unable to ascertain whether malpractice has been committed, and thus, the statute should be tolled until the wronged party discovers the concealment. Such a broad discovery rule as this would, however, significantly alter the effect of having a statute of limitations. After the original attorney-client relationship has terminated, a potential plaintiff has a clear opportunity to seek independent counsel. A person's personal interest in seeking redress from an actionable harm, absent active fraud, is deemed to be valid in our system of justice only when commenced in a timely manner. If the courts were to recognize passive concealment as grounds for tolling the statute of limitations, all plaintiffs would argue their former attorney should have known of wrongful conduct and thus disclosed it. These general notions of fair play underlying the statute overwhelm the arguments supporting such a judicial opening of Pandora's box.

The supreme court has not completely foreclosed a discovery exception in the area of legal malpractice.[57] It would seem appropriate in instances in which an attorney has committed an act of misrepresentation for the attorney to be estopped from asserting the statute of limitations as a defense; the law should never foster an active fraud.[58]

Beyond the tolling of the statute of limitations where there is active fraud or a continuing fiduciary relationship, there was a noticed expansion of the tolling principles in *Barnes v. A.H. Robins Co., Inc.*[59] In its answer to a certified question from the Seventh Circuit Court of Appeals, the Indiana Supreme Court ruled a statute of limitations was tolled because "the misconduct is of a continuing nature and is concealed."[60] The court limited its findings "to the precise factual pattern related by the certified question which is an injury to a plaintiff caused by a disease which may have been contracted as a result of protracted exposure to a foreign substance."[61] The applicability of this exception to legal malpractice cases should be viewed as an extremely limited opening for plaintiffs to argue that the statute is tolled. Implicit in the factual circumstance in *Barnes* was the plaintiff's exposure to conduct which

---

[57]*See Shideler*, 275 Ind. at 286-87, 417 N.E.2d at 291.

[58]Active or affirmative misconduct on the part of a physician tolls the statute of limitations until the plaintiff discovers the wrongful conduct. Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956).

[59]476 N.E.2d 84 (Ind. 1985).

[60]*Id.* at 87.

[61]*Id.*

continued to create new and additional harm. The court found further that the conduct must be of a concealed nature.

Factually, a parallel situation may develop in certain claims for legal malpractice. For example, when a wrongful act by an attorney is relied upon by a known third party beneficiary in consummating a series of actions subsequent to the act of malpractice, the injury resulting to such a person might be characterized as being of a continuing nature. Had the wrongful conduct not been concealed from the third party, there would not have been a continuing reliance upon the original wrongful act. Without this reliance, there would not have been a continuing harm. Such a factual scenario would likely cause plaintiffs to argue that *Barnes* is authority for tolling the statute of limitations in a context of legal malpractice. However, this argument should be viewed as having relatively little chance of success because of the supreme court's strong language favoring a two-year statute (in both *Shideler* and *Whitehouse*).

III. Conclusion

Because of the nature of legal malpractice claims, injury usually occurs to a person's rights to an interest in personal property. It appears clear that a suit to enforce a claim alleging legal malpractice which resulted in injury to personal property must be brought within two years after the occurrence of the injury. However, there may be some latitude for argument regarding when the statute begins to run. Henceforth, plaintiffs will likely place more emphasis on developing factual arguments supporting the tolling of the statute or the use of a later date upon which to fix accrual of the cause of action. Such determinations may be used by our courts in an effort to balance any perceived inequities in a two-year statute of limitations. However, given the supreme court's strong language in *Shideler* and *Whitehouse*, this should occur infrequently.