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Malpractice Rulings Extend NYC Lawyers' Ties To Old Clients

By **Pete Brush**

Law360, New York (September 11, 2014, 8:22 PM ET) -- New York City trial court and appellate rulings extending the clock on professional negligence claims against law firms that no longer directly represent those clients could boost malpractice risk and leave attorneys with tough choices over communicating on past matters, experts say.

Recently, New York City Judge Debra A. James refused to throw out a $12 million negligence suit against Olshan Frome Wolosky LLP over an allegedly useless agreement the firm drafted that plaintiff 180 Ludlow Development LLC claims cost it a chance to build a hotel.

Olshan is the latest firm to **get caught up** in what lawyers see as an expansion of the continuous representation doctrine governing after-the-fact legal communications or advice. Judge James had found that 180 Ludlow successfully argued it was continuously represented by Olshan well after the agreement was drafted.

"Plaintiff presents billing statements from the defendant showing that as late as September 2010, the defendant 'review[ed] and mark[ed] up draft brief[s]' that another law firm submitted on plaintiff's behalf," Judge James wrote, finding the clock didn't start ticking in 2007, when the agreement was drafted.

She cited as "binding appellate authority" a New York Appellate Division ruling in June in which the First Department left Cadwalader Wickersham & Taft LLP on the hook in a $17 million malpractice case that investment firm Red Zone LLC brought under similar circumstances.

Both law firms were no longer directly representing the malpractice plaintiffs, but had drafted agreements that became problematic in underlying litigation and — allegedly — continued to work with the plaintiffs' current legal team to an extent that kept the clock from ticking.

"It's an area that's moving," said attorney Jeffrey E. Glen of Anderson Kill PC, who represents 180 Ludlow. "Previous law, which is fairly old, was far more protective of the law firms."

Other legal experts agreed, pointing out how the Red Zone ruling contradicts a 1995 holding by the Second Department, another midlevel appeals court in New York.

In Tal-Spons Corp. v. Nurnberg, the Second Department held that a defendant-lawyer's "consultations with the plaintiffs and their new attorneys regarding pending litigation over the meaning of the contract drafted by him cannot be equated with ongoing

representation."

"It does seem that the Red Zone decision cracked the door on continuous representation, which historically was extremely difficult to allege," said Matalon Shweky Elman PLLC malpractice defense litigator Howard I. Elman. "Traditionally representing a client on a transaction, and then advising on litigation related to the transaction, would not have been considered to be continuous representation."

Either of the Olshan and Cadwalader cases could potentially end up before the state's court of last resort, the Court of Appeals in Albany, if it chooses to address the continuous representation question with an eye on the Red Zone precedent.

"Red Zone is a relatively short decision with no discussion of public policy considerations," Elman said. "It's hard to glean if the First Department truly intended to depart from well-established law."

In 2002 the Court of Appeals found in McCoy v. Feinman that continuous representation applies when there is a "mutual understanding with the professional that further services were needed in connection with the specific subject matter out of which the malpractice arose," but the ruling doesn't appear to address the question of whether such an understanding can apply to legacy clients.

"From a social policy point of view, it is better for clients, attorneys and the court to fix problems rather than resort to litigation," said attorney Andrew Lavoott Bluestone, a malpractice and civil litigation expert. "Attorneys who hang in the game and try to fix a situation give up the statute of limitations defense, but … often obviate the problem, avoid being sued, and sometimes get paid for the work."

Cadwalader has asked the Court of Appeals to look at the Red Zone ruling. And a decision on whether the appeal goes up to the next level could come in October.

The related case against the Olshan firm, meanwhile, remains in its early stages.

"We're still a long way away," said Glen. "We just beat a motion to dismiss."

The current lay of the land in New York City, where the First Department holds sway, means lawyers must take careful approaches when considering how they might communicate with clients — especially unhappy clients — after the work at hand is done, according to Brooklyn-based attorney Richard A. Klass, who represents malpractice plaintiffs and defendants.

Transactional lawyers, for example, might want to foreclose advice on litigation or appeals at the outset, according to Klass, and they also may want to make it clear that no more advice will be forthcoming at the completion of an engagement in order to shield themselves.

"They should beef up both their hello letters and their goodbye letters," Klass said.

--Editing by Sarah Golin and Edrienne Su.