POST MORTEM OF AN ESTATE PLANNING MALPRACTICE CASE

By || Gregory S. Weiss and Diana L. Martin

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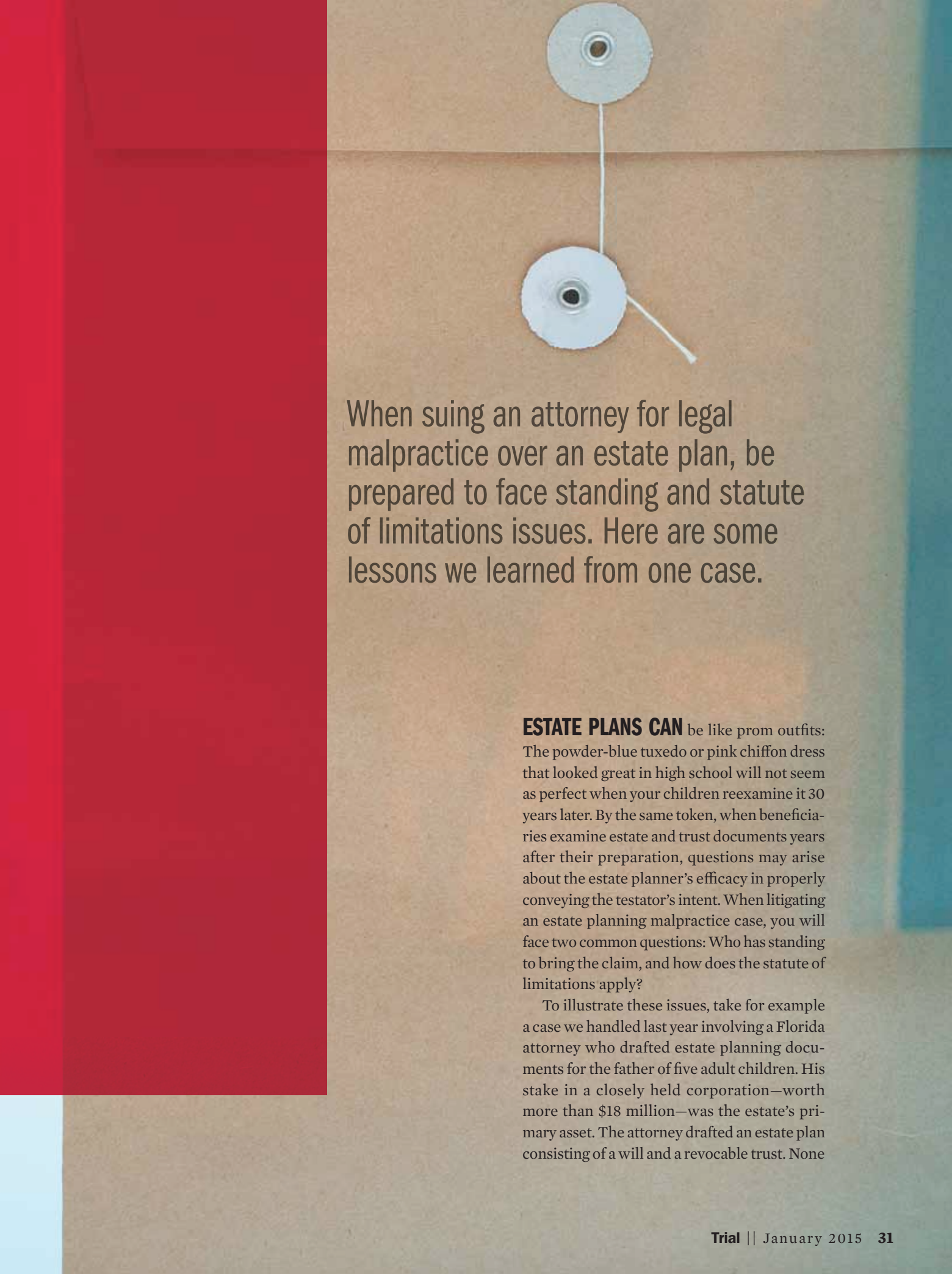

When suing an attorney for legal malpractice over an estate plan, be prepared to face standing and statute of limitations issues. Here are some lessons we learned from one case.

ESTATE PLANS CAN be like prom outfits: The powder-blue tuxedo or pink chiffon dress that looked great in high school will not seem as perfect when your children reexamine it 30 years later. By the same token, when beneficiaries examine estate and trust documents years after their preparation, questions may arise about the estate planner's efficacy in properly conveying the testator's intent. When litigating an estate planning malpractice case, you will face two common questions: Who has standing to bring the claim, and how does the statute of limitations apply?

To illustrate these issues, take for example a case we handled last year involving a Florida attorney who drafted estate planning documents for the father of five adult children. His stake in a closely held corporation—worth more than $18 million—was the estate's primary asset. The attorney drafted an estate plan consisting of a will and a revocable trust. None

of the beneficiaries had a legal relationship with the drafting attorney.

Under the plan, one child would receive 40 percent of the corporation's stock. The beneficiaries did not contest the apportionment, but they disputed who was responsible for the tax obligations related to the 40 percent stake—the proceeds of the specific bequest or the estate's residue, which would otherwise flow to the other four siblings.

The documents provided that the decedent waived "all rights of apportionment . . . for any payments made," and separately stated that the "trustee shall make such elections and allocation under the tax laws as the trustee deems advisable, *without regard to the relative interests of the beneficiaries* and without liability to any person." In a memo to the CPA filing the estate's taxes, the drafting attorney used the same language. During depositions in the probate litigation, the drafting attorney testified that it was the decedent's intent that his beneficiary take the 40 percent interest subject to taxes.

We alleged the documents confused the legal concepts of apportioning estate taxes under Florida law[1] and the Internal Revenue Code provisions that permit certain elections to be filed for different types of tax treatment, which affect the allocation of federal taxes to the estate's beneficiaries.[2] The documents also included a provision waiving apportionment of taxes. Despite the decedent's intent, the probate court determined that the documents required the other four children to bear the tax burden for their sibling's corporate stock gift by paying the taxes through the estate's residue. We alleged this error directly and proximately resulted in more than $1 million in damages to each of the four siblings.[3]

Two primary questions arose: Did the four children have standing to bring a legal malpractice claim against the drafting attorney, and when did the cause of action accrue for statute of limitations purposes? Fortunately, Florida law answered those questions favorably for our clients' position, but those answers would have been different under the law of many other states. In Maryland or Texas, for example, an estate's beneficiaries cannot bring a legal malpractice claim, because they are not in privity with the estate planning attorney.[4]

Standing to Sue

Florida law requires three elements for a legal malpractice cause of action: the attorney undertook representation; the attorney neglected a reasonable duty; and the neglect proximately caused the client's loss.[5] For the first element, courts normally require privity of contract between the plaintiff and defendant attorney to sustain a professional negligence claim.[6] However, "Florida recognizes a limited exception to this privity requirement in the area of will drafting which applies to those third parties able to demonstrate the apparent intent of the client in engaging the services of the lawyer was to benefit that third party."[7] In other words, "when an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries."[8] All but nine states follow Florida's exception to the privity requirement. Alabama, Arkansas, Maine, Maryland, Nebraska, New York, Ohio, Texas, and Virginia each require privity, regardless of the decedent's demonstrable intent.[9]

If your jurisdiction follows the Florida rule, first look at the documents to see if your clients are named beneficiaries in the trust, as ours were. Then you can demonstrate the decedent's apparent intent based on the face of the subject document. We argued that the decedent's intent was for the recipient to take the corporate stock subject to taxes. Further, the drafting attorney's term that the trustees maintained absolute discretion to make elections and allocations effectuated the decedent's intent, despite this term's conflict with the drafting attorney's inclusion of the later provision waiving apportionment.

We also argued our case was analogous

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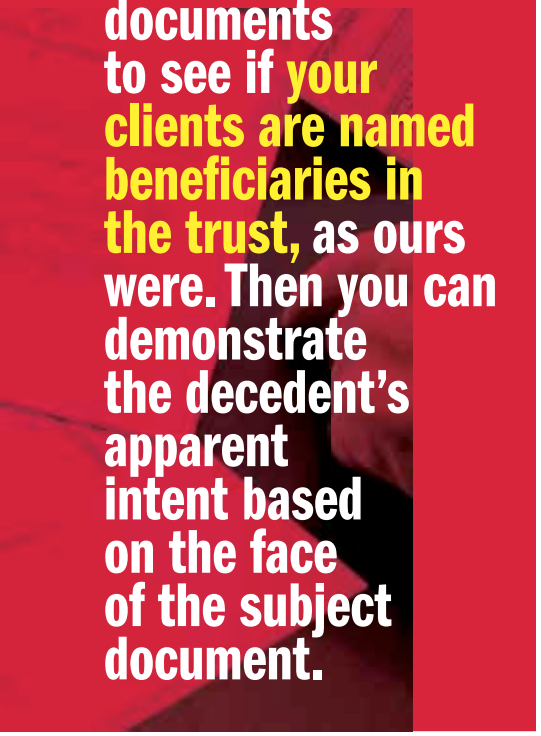

to one where the unmarried testatrix hired an attorney to prepare a will leaving her entire estate to her daughter.[10] Later, the testatrix married and told her attorney that she wanted a new will to ensure that her daughter would remain her estate's sole beneficiary. The attorney negligently advised her that she did not have to change her will to effectuate her intent, but when the will was probated, the court determined the widower qualified as a pretermitted spouse and awarded him a portion of the estate. The daughter filed a legal malpractice lawsuit against the attorney, and the trial court ruled she lacked standing. The appellate court reversed, holding the reduction in the daughter's share of the estate served as a sufficient harm to satisfy the standing requirement.[11]

But Florida law goes further and provides a route to relief for anyone not named a beneficiary. Although standing in legal malpractice actions is limited to those who can show the testator's apparent intent to provide a bequest to him or her, this does not prevent recovery for malpractice "when an attorney's negligence results in [the] *absence* of any validly executed will."[12] Thus, an intended beneficiary who can proffer "evidence of testamentary intent [not] *in conflict* with the express terms of a validly executed will" may recover against a negligent attorney.[13] So in limited circumstances, courts may allow extrinsic evidence to show intent, as long as such evidence does not conflict with the document's express terms.[14]

The availability of this remedy to unnamed beneficiaries is not limited to Florida. Illinois has allowed unnamed beneficiaries to sue an estate planning attorney for legal malpractice by permitting reliance on evidence extrinsic to the will to demonstrate the testator's intent.[15] So have Oregon and the District of Columbia.[16]

Statute of Limitations

Florida law provides a two-year statute of limitations for professional malpractice,[17] but check to see your jurisdiction's applicable law. California and Ohio have a one-year statute of limitations for legal malpractice,[18] while it's three years in Mississippi and New York.[19] A legal malpractice cause of action accrues "when the client incurs damages at the conclusion of the related or underlying judicial proceeding,"[20] and the statute begins to run when "the client can 'determine if there was any actionable error by the attorney,' " which happens at the conclusion of appellate review, or the time at which an appeal would be filed.[21] In some instances, collateral actions might toll the statute, but this requires the malpractice plaintiff to take contrary positions in two related actions.[22]

At issue in our case was whether the malpractice action accrued when the probate court ordered our clients to pay the taxes for their sibling's gift—and the statute would have expired on their claims—or whether the action accrued when the final judgment was entered, ending the probate action. Fortunately for our clients, the Florida Supreme Court has enunciated a bright-line rule: In cases that proceed to final judgment, the statute of limitations begins to run when that final judgment is entered.[23] Requiring a party to commence a legal malpractice action before this point could result in the filing of lawsuits where, ultimately, the plaintiff has not suffered any damages, because the malpractice was eventually rectified or rendered harmless by later court rulings.

This is not the rule in every state, however. Many states continue to follow the occurrence rule, under which the statute of limitations begins to run when the negligence occurred or when the plaintiff could have first filed suit because all the necessary elements had occurred.[24] Courts in some of those states, including Arkansas, Connecticut, Georgia, Illinois, Kentucky, Louisiana, New York, and Pennsylvania, have applied the occurrence rule to actions against attorneys for negligent acts or omissions. Some courts follow the "discovery rule," which runs from the time the malpractice was, or reasonably should have been, discovered,[25] and others adhere to the "damage rule," which runs from the time the plaintiff "suffers appreciable harm or actual damage as a consequence of his lawyer's conduct."[26] Still others follow the "termination of employment" rule,

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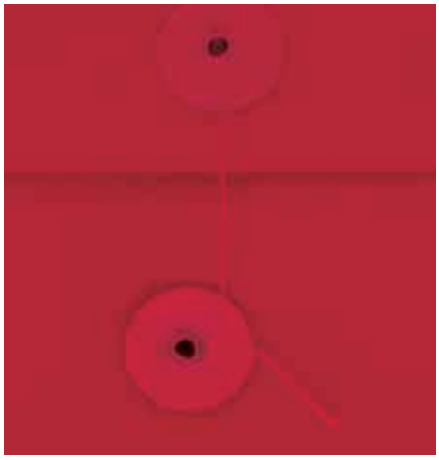
under which the statute of limitations does not begin to run until the attorney-client relationship has ended.[27]

Whether the beneficiary has a cause of action for legal malpractice against the drafting attorney depends on the case's particular circumstances, as well as the laws of the particular jurisdiction. So don't forget to check the relevant case law in your jurisdiction to see what rule typically applies. Because a cause of action for legal malpractice can accrue as early as the date the negligence was committed, it is of utmost importance to determine the applicable statute of limitations as soon as it appears the estate plan documents may have been drafted negligently—even if probate litigation is ongoing and it is unclear what the final result or damages may be.

Knowing what standing and statute of limitations rules your jurisdiction follows is crucial to your estate planning legal malpractice case. While the issues were in our favor in our example, you should be prepared for hurdles you may face. T

Gregory S. Weiss *is a shareholder with Mrachek, Fitzgerald, Rose, Kanopka, Thomas & Weiss in West Palm Beach, Fla. He can be reached at GWeiss@mrachek-law.com.* **Diana L. Martin** *is an associate with Cohen Milstein Sellers & Toll in Palm Beach Gardens, Fla. She can be reached at dmartin@cohenmilstein.com.*



Notes

1. Fla. Stat. Ann. §733.817 (West 2014).
2. *See e.g.* 26 U.S.C. §643(g) (2012) (allowing trustees to elect to allocate the payment of estimated taxes to trust beneficiaries).
3. This case was settled for a confidential amount before trial.
4. *See Noble v. Bruce*, 709 A.2d 1264, 1274–75 (Md. 1998); *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 783 (Tex. 2006).
5. *Larson & Larson, P.A. v. TSE Indus., Inc.*, 22 So. 3d 36, 39 (Fla. 2009).
6. *See e.g. Elkind v. Bennett*, 958 So. 2d 1088, 1090 (Fla. 4th Dist. App. 2007).
7. *Hare v. Miller, Canfield, Paddock & Stone*, 743 So. 2d 551, 553 (Fla. 4th Dist. App. 1999) (citing *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1380 (Fla. 1993)).
8. *Arnold v. Carmichael*, 524 So. 2d 464, 466 (Fla. 1st Dist. App. 1988) (internal citation omitted); *see also Hodge v. Cichon*, 78 So. 3d 719, 722 (Fla. 5th Dist. App. 2012) *review denied*, 99 So. 3d 942 (Fla. 2012) (beneficiaries were not barred from pursuing a malpractice action where the "purpose of the estate plan was to benefit all named and intended beneficiaries; the larger the net estate, the better for all who might partake").
9. *See e.g. Robinson v. Benton*, 842 So. 2d 631, 637 (Ala. 2002) ("[W]e decline to change the rule of law in this state that bars an action for legal malpractice against a lawyer by a plaintiff for whom the lawyer has not undertaken a duty, either by contract or gratuitously."); *Pettus v. McDonald*, 36 S.W.3d 745, 751 (Ark. 2001); *Nevin v. Union Trust Co.*, 726 A.2d 694, 701 (Me. 1999); *Swanson v. Ptak*, 682 N.W.2d 225, 231 (Neb. 2004); *Est. of Schneider v. Finmann*, 933 N.E.2d 718, 721 (N.Y. 2010) (Despite the court holding that an estate's personal representative may bring a malpractice claim, "strict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances."); *Belt*, 192 S.W.3d at 788–89.
10. *See McAbee v. Edwards*, 340 So. 2d 1167, 1168 (Fla. 4th Dist. App. 1976).
11. *Id.* at 1168, 1170.
12. *Arnold*, 524 So. 2d at 467 (emphasis added) (internal citation omitted).
13. *Id.*; *see also Gallo v. Brady*, 925 So. 2d 363, 364 (Fla. 4th Dist. App. 2006) (per curiam).
14. *See Arnold*, 524 So. 2d at 466, 467.
15. *Ogle v. Fuiten*, 466 N.E.2d 224, 227 (Ill. 1984).
16. *See Hale v. Groce*, 744 P.2d 1289 (Or. 1987) (the plaintiff stated a cause of action based on allegations that the testator instructed the estate planning attorney to prepare estate documents in which a specified sum to the plaintiff was to be included, but failed to do so); *see also Hamilton v. Needham*, 519 A.2d 172, 174–75 (D.C. 1986).
17. Fla. Stat. Ann. §95.11(4)(a) (West 2014).
18. Cal. Civ. Proc. Code Ann. §340.6(a) (West 2014); Ohio Rev. Code Ann. §2305.11(A) (West 2014).
19. Miss. Code Ann. §15-1-49(1) (West 2014); N.Y. C.P.L.R. §214(6) (McKinney 2014).
20. *Glucksman v. Persol N. Am., Inc.*, 813 So. 2d 122, 124 (Fla. 4th Dist. App. 2002) (internal citations omitted).
21. *Larson & Larson*, 22 So. 2d at 44 (because no appeal occurred, the cause of action accrued when the 30-day appeals window closed, and when a party appeals, the action does not accrue).
22. *Id.* (a pending sanctions matter did not toll the statute while a collateral action regarding a tax deficiency tolled an accounting malpractice claim, because litigating the two concurrently would require the taxpayer to argue that the tax return sent to the IRS was correct and argue it was negligently incorrect to the state courts).
23. *Silvestrone v. Edell*, 721 So. 2d 1173, 1175–76 (Fla. 1998); *see also Fremont Indem. Co. v. Carey, Dwyer, Eckhart, Mason & Spring, P.A.*, 796 So. 2d 504, 506–07 (Fla. 2001) (the statute of limitations began to run when litigation concluded pursuant to a settlement agreement, 12 years after defense counsel's purportedly negligent conduct—rejecting a favorable settlement offer).
24. *See e.g. Rice v. Ragsdale*, 292 S.W.3d 856, 860–61 (Ark. App. 2009) (common exception to this rule is when the attorney actively conceals the wrongdoing); *Streater v. Kelly*, 2002 WL 31460697 at **2–3 (Conn. Super. 2002) (citing *Gaylord Hosp. v. Massaro*, 499 A.2d 1162, 1163 (Conn. App. 1985)); *see also* George L. Blum, *Annotation, When Statute of Limitations Begins to Run on Action Against Attorney for Malpractice Based Upon Negligence—View That Statute Begins to Run From Time of Occurrence of Negligent Act or Omission*, 11 A.L.R. 6th 1, §4 (2006).
25. *See e.g. Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 120–21 (Tex. 2001).
26. *Pancake House, Inc. v. Redmond ex rel. Redmond*, 716 P.2d 575, 579 (Kan. 1986); *see also Jeanes v. Bank of Am., N.A.*, 295 P.3d 1045, 1051 (Kan. 2013).
27. *See Rice*, 292 S.W.3d at 861.