

## CAN YOU ETHICALLY ASSERT A TIME-BARRED CLAIM?

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Most Minnesota lawyers know that several of the Rules of Professional Conduct prohibit the assertion of frivolous claims. See Rule 3.1<sup>Ftn 1</sup> and 3.3<sup>Ftn 2</sup> MRPC. Most lawyers also are aware of the potential civil penalties involved in the assertion of meritless or frivolous claims, including possible sanctions and attorneys fees under Rule 11 of the Minnesota Rules of Civil Procedure and Minn. Stat. sec. 549.211.<sup>Ftn 3</sup> However, there is confusion regarding whether a lawyer may ethically bring a claim which that lawyer knows is barred by the statute of limitations. Put another way, if the plaintiff's lawyer can make out a *prima facie* case for her client but knows that the defendant has the affirmative defense of statute of limitations which would dispose of the case, can she ethically assert the claim? The ABA and several jurisdictions have issued ethics opinions indicating that a lawyer may ethically assert such a claim – with some qualifications.<sup>Ftn 4</sup>

First, it is important to note that the question posed above does not include claims that lack legal or factual support in the first instance or those in which the plaintiff could not establish a *prima facie* case. Those claims would be regarded as frivolous even apart from the existence of an affirmative defense. The lawyer making the claims would run afoul of Rules 3.1 and 3.3 of the MRPC, as well as potential civil sanctions under Minn. R. Civ. P. Rule 11, the court's inherent authority to sanction, and Minn. Stat. sec. 549.211.<sup>Ftn 5</sup>

Second, it also is important to understand that a lawyer is always required to inform the client of the possible outcomes to the assertion of a time-barred claim and the possible affirmative defense that the defense could raise. The lawyer must abide by the client's decision whether to assert the claim or not under Rules 1.2 and 1.4 of the MRPC. Finally, a lawyer is never permitted to make false statements of fact or of law to the court or to opposing counsel under Rules 3.3(a)(1)<sup>Ftn 6</sup> and 4.1<sup>Ftn 7</sup> of the MRPC.

An analysis of the issue must include a basic understanding of how affirmative defenses work. Under the Minnesota Rules of Civil Procedure, if the defense does not assert an affirmative defense<sup>Ftn 8</sup> in its responsive pleading, usually in the answer, or later amend its pleadings to set forth the affirmative defense, the defense is deemed waived under Minn. R. Civ. P. Rule 12.02 <sup>Ftn 9</sup> and Minnesota caselaw.<sup>Ftn 10</sup>

With that understanding in hand, the analysis is guided by ABA Formal Opinion 94-387 which provides that a lawyer is not constrained by the rules of ethics from filing suit to enforce a time-barred claim "unless the rules of the jurisdiction preclude it."<sup>Ftn 11</sup> The question thus then becomes whether Minnesota rules (and statutes) preclude an attorney from bringing a claim which the lawyer knows to be time-barred. A review of Minnesota caselaw suggests that while attorneys have been professionally disciplined and civilly sanctioned for pursuing time-barred claims, the majority of those cases have involved factors in addition to the mere filing of the time-barred claim which supported the imposition of sanctions.

In one case, however, the court apparently did not need any additional factors to impose sanctions. In *Kassan v. Kassan*, 400 N.W.2d 346, 350 (Minn. Ct. App. 1987), pet. for rev. denied (Minn. April 23, 1987), the

court upheld an award of attorneys fees under Minn. Stat. sec. 549.21 for the assertion of a time-barred claim without mention of any aggravating factors. Yet the court noted that the claims asserted in *Kassan*, including fraud, misrepresentation, and inadequate disclosure in connection with the settlement of an estate, were clearly time-barred because the plaintiff failed to act on his suspicions of wrongdoing until 20 years after the fact. *Id.* It is possible that the extremely long passage of time in itself may have been deemed a sufficiently aggravating factor to permit the award of attorneys fees under the statute.

Aside from the *Kassan* decision, the closest the Minnesota appellate courts apparently have come to sanctioning an attorney for simply filing a claim barred by the statute of limitations was in *Cole v. Star Tribune*, 581 N.W.2d 364, 370 (Minn. Ct. App. 1998). In *Cole*, the court stated that because the lawsuit was filed two days after the two-year statute of limitations for the defamation claim ran "there was no reasonable basis in law or fact to believe that Cole could maintain a defamation action." Accordingly, the court upheld the award of sanctions. *Id.* Yet, despite this flat language, the *Cole* decision identifies several aggravating factors which also supported the sanctions, including the attorneys' meritless appeal from the trial court's sanctions and the trial attorneys' admission there was nothing defamatory in the document supposedly giving rise to the defamation claim in the first place. *Id.* at 370-71.

In summary, the ABA and other jurisdictions have indicated that an attorney ethically may file a time-barred lawsuit under the Minnesota Rules of Professional Conduct if certain conditions are met. The attorney must keep the client informed as to the possible affirmative defense that may be brought, must abide by the client's decision to pursue the matter or not, and must not make any misrepresentations in the representation. In addition, the attorney must voluntarily dismiss the action if the affirmative defense is raised and the attorney knows the defense to be valid. Attorneys should note that the fact that an attorney would not necessarily be subject to discipline as a result of this conduct does not, in itself, protect the attorney from possible court-ordered sanctions such as those awarded under Minn. R. Civ. P. Rule 11 and Minn. Stat. sec. 549.211. However, a review of Minnesota caselaw suggests that such sanctions generally have been ordered when other aggravating factors exist to support the imposition of sanctions.

<sup>1</sup> Rule 3.1 states that a lawyer may not bring or defend a proceeding or assert an issue "unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

<sup>2</sup> Rule 3.3 generally provides that a lawyer is prohibited from knowingly making false statements of fact to a tribunal, must disclose controlling legal authority, and may not knowingly offer false evidence.

<sup>3</sup> See, generally, David. H. Taylor, *Filing With Your Fingers Crossed: Should a Party Be Sanctioned for Filing a Claim to Which There is a Dispositive, Yet Waivable, Affirmative Defense?* 47 Syracuse L. Rev. 1037 (1997).

<sup>4</sup> See ABA Formal Opinion 94-387, dated Sept. 26, 1994 ("Disclosure to Opposing Party and Court that Statute of Limitations Has Run"); New York Opinion 475; dated Oct. 14, 1977; Pennsylvania Inquiry No. 96-80, dated June 24, 1996; Oregon Ethics Opinion 1991-21 (1991) ("Frivolous Litigation, Representing a Client Within the Law: Affirmative Defenses").

<sup>5</sup> For disciplinary cases, see, e.g., *In re Pinotti*, 585 N.W.2d 55 (Minn. 1998) (holding that repeated filing of unsubstantiated claims, confusing and improper motions, and appeals of court orders dismissing the same warranted 90-day suspension); *In re Selmer*, 568 N.W.2d 702, 704-05 (Minn. 1997) (one-year suspension warranted for assertion of false claims of racial discrimination in order to avoid payment of legitimate debts); *In re Schmidt*, 402 N.W.2d 544 (Minn. 1987) (filing a claim after the statute of limitations had run, false statements to the court, failure to communicate with client, and failure to voluntarily dismiss action when requested to do so warranted public reprimand and a six-month suspension). For cases regarding sanctions imposed under Minn. Stat. sec. 549.211 and Minn. R. Civ. P. Rule 11, see, e.g. *Kellar v. Von Holtum*, 605 N.W.2d 696 (Minn. 2000) (fees awarded "as a sanction of last resort" after party did not avail itself of opportunity to correct litigation); *Rumachik v. Rumachik*, 494 N.W.2d 68, 71 (Minn. Ct. App. 1992) (affirming sanction under Rule 11 but noting narrow construction of Rule 11), pet. for rev. denied (Minn. Feb. 25, 1993).

<sup>6</sup> Rule 3.3(a)(1), MRPC, provides that a lawyer "shall not knowingly make a false statement of fact to a tribunal."

<sup>7</sup> Rule 4.1, MRPC, provides that "in the course of representing a client a lawyer shall not knowingly make a false statement of fact or

law."

<sup>8</sup> Rule 8.03, Minn. R. Civ. P., states that "in pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense."

<sup>9</sup> Rule 12.02 provides, in pertinent part, that "every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required . . . ."

<sup>10</sup> See *Rehberger v. Project Plumbing Co., Inc.*, 295 Minn. 577, 205 N.W.2d. 126 (1973) (citing *Melbo v. Rinn*, 280 Minn. 72, 157 N.W.2d 842 (1968)); *Haack v. Coughlan*, 134 Minn. 78, 158 N.W. 908 (1916). See also, *Lowry Hill Props. Inc. v. Ashbach Constr. Co.*, 291 Minn. 429, 194 N.W.2d 767 (1972) (holding that statute of limitations is an affirmative defense to be pleaded in the answer); *Parsons v. Town of New Canada*, 209 Minn. 129, 295 N.W. 907 (1941).

<sup>11</sup> The opinion also states that the plaintiff's attorney has no ethical duty to inform an opposing party in negotiations that the statute of limitations has run on her client's claims. Indeed, to the contrary, the opinion notes that such a disclosure would violate Rules 1.3 and 1.6 if the information were revealed without the client's consent.