



# Committee on Professional Ethics

Opinion #475 - 10/14/77 (76-77)

Topic: Limitations; institution of suit on cause against which period of limitations has run.

Digest: Lawyer may properly institute suit on cause against which period of limitations has run only where as a matter of law the limitation attaches to the remedy and not the right.

Code: Canon 7;  
EC 7-2, 7-3, 7-4, 7-8;  
DR 2-109(A)(1) and (2),  
7-101(A)(1), 7-102(A)(1)  
and (2)

## QUESTION

Under what circumstances may a lawyer properly institute suit on a cause of action against which the period of limitations has run?

## OPINION

It is not the function of this Committee to pass on matters of law. Nevertheless, a proper exposition of the ethical rule requires some understanding of the differences between causes of action which may be extinguished through the passage of time and those causes against which the passage of time merely gives rise to an affirmative defense that may be waived.

Where the time within which the action must be commenced is an integral part of the cause itself, the fact that suit has been instituted within the time prescribed must be established by the complaining party. The issue cannot be waived by his adversary. As explained by the Court of Appeals in Romano v. Romano, 19 N.Y.2d 444, 447 (1967):

"If time is integral with the cause of action, the plaintiff must establish [it] as part of his case . . . and this [holds] whether or not the defendant defaults. If the time stated is merely a Statute of Limitations, the plaintiff has no obligation in respect of the . . . period which must be established affirmatively by a defendant who contests the action."

The Court then went on to explain the general rule whereby those causes of action which are extinguished through the passage of time may be differentiated from those which are not:

"The general rule, which has rather wide acceptance,

may be simply stated: If a statute creates a cause of action and attaches a time limit to its commencement, the time is an ingredient of the cause. If the cause was cognizable at common law or by other statute law, a statutory time limit is commonly taken as one of limitations and must be asserted by way of defense." Id.

See also, 35 N.Y. Jur., Limitations and Laches, §§ 7, 8 and 13.

Lawsuits predicated upon causes of action which have been extinguished through the passage of time may not properly be instituted. Since the right no longer exists, the institution of an action purportedly based on the existence of that right would violate DR 7-102 (A)(2) which requires that a lawyer not "knowingly advance a claim . . . that is unwarranted under existing law" or which cannot "be supported by good faith argument for an extension, modification, or reversal of existing law." See, N.Y. State 472 (1977); cf., DR 7-102(A)(1) and (2) with DR 2-109(A)(1) and (2).

If, as a matter of law, the passage of time merely gives rise to an affirmative defense that may be waived, however, there would be no impropriety in causing suit to be instituted. This is the usual case and the period of limitations does not destroy the right but merely serves to bar the remedy. Indeed, because this is by far the more usual case, in announcing the ethical rule, the authorities have failed to distinguish cases where the period of limitations extinguishes the client's right and they have uniformly held it proper to advance a claim against which the period has run without further qualification. See, N.Y. City 518 (1939), ABA Inf. 694 (1963) and ABA Inf. 272 (1959); see also, ABA Inf. 1271 (1973) and ABA Inf. 767 (1964). The qualification is nonetheless important and goes to the heart of Canon 7 which enjoins lawyers to represent their clients zealously but "within the bounds of the law." See, N.Y. State 469 (1977).

The ethical rule can thus be easily stated. What problems occur in applying the rule derive from the uncertain state of the law, for it is not always clear whether the passage of time affects the right or merely the remedy. Cf., Romano v. Romano, supra, with Sharrow v. Inland Lines, 214 N.Y. 101 (1915), and Hughes v. Hinson's Garage, Inc., 9 A.D. 2d 1014 (4th Dept 1959). Where the law is unclear, the Code requires the lawyer to give his client every benefit of the doubt and to proceed on the assumption that the right is unaffected. See, EC 7-2, EC 7-3, and EC 7-4.

Throughout, the lawyer must be completely candid with his client concerning the nature of the defense and the circumstances under which it would serve to defeat his claim. See, EC 7-8. Should the client decide to proceed after having been fully informed, the lawyer may properly institute suit if the claim has not clearly been extinguished as a matter of law by the passage of time.

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