REAL PROPERTY QUESTION CORNER:

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THE ELUSIVE LEGAL MALPRACTICE STATUTE OF LIMITATIONS FOR ATTORNEY TITLE OPINIONS

(PARTS I AND II OF II PARTS)

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THE ELUSIVE LEGAL MALPRACTICE STATUTE OF LIMITATIONS FOR ATTORNEY TITLE OPINIONS (PART I OF II PARTS)

What advice would you give your client (either the attorney or the attorney's client) in the following circumstances:

1. Client asserts that her attorney damaged her by an act of legal malpractice pursuant to a contract between the Client and her Attorney.

2. The Client complains of such malpractice publicly.

3. The Client sues her former attorney 10 years after first complaining of his wrongful actions.

4. The Attorney asserts that the passage of the two-year statute of limitations barred the pending action, under 12 O.S.A. 1981 § 95 Third.

5. 12 O.S.A. 1981 § 95 Third, provides:

> "Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> ***

3. Within two (2) years: An action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud - the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud;"

6. The Client asserts she can extend this statute of limitation due to the concealment of such malpractice by the Attorney.

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According to Funnell v. Jones, 1985 OK 73, 737 P.2d 105 (opinion by Doolin):

1. The Trial Court granted summary judgment for the Attorney on a claim by a Client for legal malpractice due the passage of two years, and that decision was affirmed on appeal.

2. "In Oklahoma, an action for malpractice, whether medical or legal, though based on a contract of employment, is an action in tort and is governed by

the two-year statute of limitations at 12 O.S.A. 1981 § 95 Third. (Seanor v. Browne, 154 Okl. 222, 7 P.2d 627 (1932)). This limitation period begins to run from the date the negligent act occurred or from the date the plaintiff should have known of the act complained of. (McCarroll v. Doctors General Hospital, 664 P.2d 382 (Okl. 1983)).”¶6

3. “In summary then, …, we find the two-year statute of limitations is applicable…; the original petitions allege no act of malpractice occurring within the two-year period immediately preceding its filing, and the allegation that the statute of limitation was tolled by concealment fails because of Appellant, Roberta Ann Funnell's knowledge of the acts she complains of as negligent. The trial court committed no error in granting summary judgment as to these causes.”¶11
4. **Conclusion:** This decision seems to establish and/or confirm that a legal malpractice lawsuit-- based on a contract between the attorney and client –is subject to the two-year statute of limitations for tort.

   [NOTE: Next month, in Part II, the discussion continues as to which statute of limitation applies to a legal malpractice claim based on a contract between the client and an attorney. The up-coming discussion deals with an attorney who provides a title opinion for a bank loan.

Remember that the court in Funnell finds: that a legal malpractice action "though based on a contract of employment, is an action in tort".]

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THE ELUSIVE LEGAL MALPRACTICE STATUTE OF LIMITATIONS FOR ATTORNEY TITLE OPINIONS

(PART II OF II PARTS)

What advice would you give your client (either the attorney or the attorney's client) in the following circumstances:

[Hint: Remember the rule of Funnell: a legal malpractice lawsuit-- based on a contract between the attorney and client –is subject to the two-year statute of limitations for tort.]

1. An Attorney is engaged to prepare a title opinion for a lender which is considering making a loan to an individual. The Attorney uses an 9-year old abstract of title supplemented with his own personal review of the land records in the County Clerk's office.
2. The opinion is expressly directed to a lender Client and shows a single prior mortgage in a modest amount. The new one-year loan is made, and the debtor defaults.
3. The Attorney sends a letter to the lender Client shortly before the passage of two years after the date of his first title opinion, advising the lender Client

that he has just discovered another intervening mortgage which results in the lender Client holding a third mortgage and, consequently, being unable to recover anything on its mortgage.

4. The lender Client brings an action against the Attorney in tort for malpractice and for breach of a contract between the parties or, alternatively, on a contract between the Attorney and another (the debtor) whereby the lender Client claimed third-party beneficiary status. ¶0
5. The oral contract was alleged to pertain to rendering a title opinion on a piece of real property and in addition, like an abstractor, searching the land records in the County Clerk's Office. ¶0
6. The Attorney filed a motion to dismiss relying on the bar of the two year limitation period for torts found at 12 O.S. 1981 § 95 (Third). The Attorney was relying on the holding in Funnel.
7. In response to the motion the lender Client expressly waived its tort claim and elected to proceed in contract. ¶0
8. [It is unclear why the lender Client waived its two-year tort claim, when it arguably could have extended the initial two-year period by relying on the "discovery" rule to toll the statute until such discovery occurred. The author of this article, Kraettli Q. Epperson, was engaged by the lender Client to testify in the later trial – in Federal court—on the standards to be followed in

conducting a “stand-up” title examination from the County Clerk’s land records]

9. The lender Client then argued the contract claim was not barred having been brought within the three year limitation period found at 12 O.S. 1981 § 95 (Second) for oral contracts. ¶0

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According to Great Plains Federal Sav. And Loan Ass’n v. Dabney, 1993 OK 4, 846 P.2d 1088 (opinion by Lavender):

1. The trial court granted a motion to dismiss advanced by the Attorney seeking to avoid the claim by the lender Client for legal malpractice, due the passage of two years. ¶0

2. The trial court sustained the motion to dismiss the lender Client’s claim, apparently concluding the action has to be brought in tort. ¶0

3. That decision was affirmed by the Court of Civil Appeals.

4. The Oklahoma Supreme Court accepted the case on Cert, and states: ¶5 “We have held when an abstracting company breaches an oral agreement to diligently search real estate records, provide an abstract of title and a

certificate thereof, the cause of action is one founded on the breach of an oral contract and is governed by the three year limitation period. Close v. Coates, 187 Okla. 315, 102 P.2d 613 (1940); Freeman v. Wilson, 105 Okla. 87, 231 P. 869 (1924); Garland v. Zebold, 98 Okla. 6, 223 P. 682 (1924). The cause of action accrues on the delivery date of the certificate of title. Close v. Coates, supra. We can hold no differently merely because a lawyer or law firm are alleged to have entered into a similar type of oral contract. Accordingly, the earliest point the three year limitation period would begin to run would be August 14, 1984, the date of the initial title opinion."

5. And it further states at ¶6 "Appellees [Attorney] argue the instant case should be controlled by Funnell v. Jones, 737 P.2d 105 (Okla. 1985), cert. denied, 484 U.S. 853, 108 S.Ct. 158, 98 L.Ed.2d 113 (1987), a case where we applied the two year tort limitation period to a legal malpractice case. Appellees' [Attorney's] reliance on Funnell is misplaced. The opinion in Funnell gives no indication a separate contract theory was alleged there or that the plaintiffs there attempted to rely on the three year limitation period for oral contracts. Thus, our statement in Funnell to the effect an action for malpractice, whether legal or medical, though based on a contract of employment, is an action in tort, must be taken in the context it was made, to wit: determining whether the two year limitation for torts was tolled based

on allegations of fraudulent concealment on the part of defendant attorneys and that no acts alleged against defendants occurred within the two years immediately preceding filing of the lawsuit. Id. at 107-108. We did not decide in Funnell a proceeding against a lawyer or law firm is limited *only* to a proceeding based in tort no matter what the allegations of a petition brought against the lawyer or law firm. We have never so held and, in fact, to so rule would be tantamount to treating lawyers differently than we have treated other professions, something we refuse to do."

6. And finally the Supreme Court stated at ¶7 "We have held a party may bring a claim based in both tort and contract against a professional and that such action may arise from the same set of facts. Flint Ridge Development Company, Inc. v. Benham-Blair and Affiliates, Inc., 775 P.2d 797, 799-801 (Okla. 1989) (architectural, engineering and construction supervision services). In essence, the holding of Flint Ridge is, if the alleged contract of employment merely incorporates by reference or by implication a general standard of skill or care which a defendant would be bound independent of the contract a tort case is presented governed by the tort limitation period. Id. at 799-801. However, where the parties have spelled out the performance promised by defendant and defendant commits to the performance without reference to and irrespective of any general standard, a contract theory

would be viable, regardless of any negligence on the part of a professional defendant. Id. As pertinent here, the specific promise alleged or reasonably inferred from the petition and documents attached thereto was to search the records of the County Clerk for an approximate nine (9) year period and report those records on file affecting the title for loan purposes. Simply, *if* this was the promised obligation a contractual theory of liability is appropriate which is governed by the three year limitation period applicable to oral contracts."

7. The Supreme Court supports its Reversal of the trial court and Vacating of the Court of Civil Appeals decision by explaining at ¶8 "Consistent with this view is a case relied on by both parties to support their respective positions, Seanor v. Browne, 154 Okla. 222, 7 P.2d 627 (1932). Seanor holds although the gravamen of an action against a physician is in tort, where a special oral contract is also alleged whereby defendant agreed to cure the injury of plaintiff the action also sounds in contract and use of the three year limitation period is appropriate to the contract portion. Id., 7 P.2d at 627-628, Second Syllabus. Here, although the gravamen of the petition is in tort we are of the opinion the petition, with attached documents, and the reasonable inferences to be drawn therefrom, are sufficient to plead a special oral contract to diligently and correctly search and report as to the records in

the Grady County Clerk's Office from October 1, 1975 to the date of the first title opinion/letter of August 14, 1984." [It is interesting to note that the Seanor case involves a doctor who orally agreed to and then negligently tried to use X-rays to "cure" a lady's fractured leg, causing severe burns and permanent damage to the skin and the bone itself]

8. **Conclusion:** Legal malpractice can be based on either tort or contract theory, and the statute of limitation which will be applied will depend on the theories surviving at the time of trial.