Commissioner Primarily Responsible: Stanton

9/11/68

Memorandum 68-97

Subject: Suggested New Topic--Professional Malpractice

The staff suggests that the Commission consider requesting authority to make a study to determine whether the law relating to the statute of limitations for claims against professional persons arising out of their professional relationships should be revised. Exhibit I is a statement that could be included in our Annual Report if the Commission determines that it wishes to study this topic.

Also attached is a letter from the Editor of the U.C.L.A. Law Review referring to a Note which "thoroughly examines the application of the statutes of limitations in California legal malpractice actions, and clearly illustrates the necessity of an immediate legislative change in order to alleviate the resulting anomaly." Whether the lawyer members of the Senate and Assembly Judiciary Committees could be persuaded to liberalize malpractice liability for lawyers and restrict malpractice liability of doctors, accountants, and others--a likely result of a study of this topic--is questionable.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 68-[illegible] EXHIBIT I

A study to determine whether the law relating to the statute of limitations for claims against professional persons arising out of their professional relationships should be revised.

A medical malpractice action must be commenced within one year from the date the cause of action accrues. The cause of action does not accrue and the statute of limitations does not begin to run until the plaintiff discovers, or by reasonable diligence should have discovered, the negligently caused injury; nor does the statute commence to run until the physician-patient relationship terminates or the patient actually knows of the negligence.[1] Similar rules appear to apply to actions for malpractice against accountants and insurance brokers.[2] On the other hand, an action against an attorney for malpractice must be commenced within two years from the date the cause of action accrues, and the cause of action accrues at the time of the attorney's negligent act;[3] neither the "discovery"[4] nor the "relationship"[5] rules apply.

Underlying the malpractice action are the policies of deterrence of substandard conduct and of proper allocation of loss; statutes of limitations serve to maintain stability of human affairs and preclude suits based on long forgotten factual situations. The existing inconsistent rules do not appear adequately to satisfy any of these relevant policies, and a consistent statutory solution may be desirable.

Prepared by:

Jack Horton
Junior Counsel

1. See, e.g., Stafford v. Shultz, 42 Cal.2d 767, 270 P.2d 1 (1954); Garlock v. Cole, 199 Cal. App.2d 11, 18 Cal. Rptr. 393 (1962); Mock v. Santa Monica Hosp., 187 Cal. App.2d 57, 9 Cal. Rptr. 555 (1960).
2. See Moonie v. Lynch, Cal. App.2d , (1967)(accountants); Walker v. Pacific Indemnity Co., 183 Cal. App.2d 513, 6 Cal. Rptr. 924 (1960) (insurance brokers).
3. Eckert v. Schaal, 251 Cal. App.2d , 58 Cal. Rptr. 817 (1967).
4. Alter v. Michael, 64 Cal.2d 480, 50 Cal. Rptr. 553, 413 P.2d 153 (1966).
5. Eckert v. Schaal, supra note 3.

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U.C.L.A. LAW REVIEW
SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

May 8, 1968

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
School of Law
Stanford, California 94305

Dear Mr. DeMoully:

A short time ago the Review received a letter requesting that we inform the Commission of any legal problem areas that appear in need of legislative reform. Ideally, you sought a well-defined subject matter, and, preferably, one that had recently been commented upon in a legal publication.

15 UCLA L. Rev. 230

In the November issue of the UCLA Law Review, the recent case of Eckert v. Schaal, 251 Adv. Cal. App. 1, 58 Cal. Rptr. 817, hearing denied (1967), was noted. This note thoroughly examines the application of the statute of limitations in California legal malpractice actions, and clearly illustrates the necessity of an immediate legislative change in order to alleviate the resulting anomaly.

Currently, by virtue of judicial declaration, legal malpractice actions are governed by the two year period of limitation provided for by section 339(1) of the Code of Civil Procedure, which includes actions "not founded upon an instrument of writing." Consistently, the courts have held that where an attorney is guilty of neglect or breach of duty in the performance of professional services, the client's cause of action accrues and the statute of limitations commences to run when the negligence or breach of duty occurs, and not when it is discovered or when actual damage results or becomes fully ascertainable.

As applied, the present rule often denies rights to wronged clients before they are aware that they have such rights. The client is normally unaware of the attorney's negligence until loss or injury is actually threatened. If the client's reliance precedes the detriment caused by the attorney's negligence by two years or more, then the statute of limitations will bar any claim. The only way to avoid such an adverse result is to bring speculative litigation against the attorney, or to consult with several attorneys, seeking advice from each as to the propriety of the others' conduct.

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This rule has been adhered to notwithstanding the fact that medical malpractice, originally governed by the same rules of limitation, has subsequently been held to be governed by the one year period of limitation in section 340(3) of the Code of Civil procedure. At the same time the judiciary reduced the statutory period of limitation for medical malpractice, it applied the "discovery rule" to such actions. Although there appears to be no logical basis for the distinction, the California Supreme Court has maintained these divergent rules and has refused to apply the "discovery rule" to legal malpractice actions. See Alter v. Michael, 64 Cal. 2d 480 (1966).

In several instances, courts applying the present rule have alluded to its inherent unfairness and have noted that legislative action is required if it is to be changed. I believe that such change is needed and that this would be a worthwhile undertaking for the Commission. Should you be interested, the note referred to above can be found at 15 UCLA L. REV. 230 (1967).

It is a pleasure to have served you, and I hope that you will not hesitate to call upon the Review for assistance at any time in the future.

Sincerely yours,

Robert N. Harris Jr.

Robert N. Harris, Jr.
Editor-in-Chief

RNH/mn