Study J-111 June 19, 2000

Memorandum 2000-43

Statute of Limitations for Legal Malpractice: Staff Draft

At the February meeting, the Commission commenced its study of whether the statute of limitations for legal malpractice actions "should be revised to recognize equitable tolling or other adjustment for the circumstances of simultaneous litigation, and related matters." 1999 Cal. Stat. res. ch. 81. After discussing materials relating to the problem of simultaneous litigation (including a law review article by Professor Tyler Ochoa and Judge Andrew Wistrich), the Commission directed the staff to prepare a draft revising Code of Civil Procedure Section 340.6 to expressly incorporate equitable tolling. The staff has since prepared a draft along those lines, which is attached for the Commission's review. Significant policy issues relating to the draft are discussed below.

ACTUAL INJURY

There is a tremendous amount of case law and legal literature on the concept of tolling the malpractice limitations period until the client has sustained actual injury. California courts have grappled with the matter in numerous published decisions, and courts in other jurisdictions have struggled with essentially the same issue. The staff has read much of this literature, focusing on the policy interests at stake, as well as the variety of contexts to be addressed in formulating effective policy in this area. The attached draft attempts to present a workable approach to actual injury as directed by the Commission. The area is complicated, however, and revisions may be necessary to adequately address it.

Availability of Tolling Agreements

At the February meeting, the Commission asked the staff to attempt to assess the likelihood that an attorney notified of a potential malpractice claim would refuse to enter into a tolling agreement. (Minutes, p. 7.) The staff has not found any empirical data on this point.

A leading treatise on legal malpractice says that "experience has shown that most lawyers are willing to agree to toll a statute of limitations upon the hope

that the existence or extent of an injury will be reduced or eliminated by a subsequent judicial action." R. Mallen & J. Smith, Legal Malpractice, § 21.11, p. 814 (4th ed. 1996 & Supp. 1999). But only two cases are cited as examples.

In the article that served as the background study for the Commission, Prof. Tyler Ochoa and Judge Andrew Wistrich discussed the argument that the client should attempt to obtain a tolling agreement:

> The theory is that an attorney will readily agree to such a waiver to avoid having a potentially unnecessary malpractice action commenced against him or her. While this alternative has much to recommend it, it is inferior to the equitable tolling doctrine for three reasons. First, having to seek a waiver distracts the client from the principal focus of salvaging the underlying litigation. Second, if the attorney believes the client has a weak case, he or she may make a strategic decision to decline the waiver, in the hope that the cost of litigating two actions simultaneously will force the client to settle the malpractice action on more favorable terms. Third, where the purpose of the statute of limitation has been served by timely notice to the defendant, the client ought to be able to make the choice between his alternative remedies without being pressured by the attorney who allegedly placed the client in a difficult position.

Ochoa & Wistrich, *Limitation of Legal Malpractice Actions: Defining Actual Injury and the Problem of Simultaneous Litigation*, 24 Sw. U. L. Rev. 1, 66-67 (1994) (footnotes omitted).

The staff tends to agree that tolling agreements are not a satisfactory solution to the problem of simultaneous litigation in the context of legal malpractice. While many attorneys may agree to tolling pending the outcome of an underlying action, others may refuse it in hopes that the client will not be able to maintain two actions at once and will decide not to pursue the malpractice claim. The client may also be hesitant to approach the attorney about a tolling agreement, assuming that the attorney would not agree to such a request. It seems unrealistic to assume that a client will be able to readily obtain a tolling agreement in all cases, and unfair to burden the client with the risk that a tolling agreement is not forthcoming.

Tolling During Appellate Process

An important issue in codifying the doctrine of equitable tolling is whether to toll the limitations period only until the trial court or other initial tribunal fully resolves the underlying action, or also during the pendency of an appeal or other

attempt to overturn the initial decision. This is discussed at page 13 of the attached draft. The Commission should review this discussion and determine whether it agrees with the staff's conclusion that tolling should terminate on resolution of the underlying action in the trial court or other initial tribunal.

Pure Transactional Situations

At the February meeting, the Commission directed the staff to consider tolling the limitations period during an ongoing deal, not just during ongoing litigation. (Minutes, p. 7.) The situation of pure transactional malpractice (where malpractice occurs in a transactional matter and no litigation ensues, other than the malpractice action) is discussed at pages 14-15 of the attached draft. Again, the Commission should review the discussion and determine whether it agrees with the staff's analysis. The staff is eager for suggestions on how to provide greater guidance in this area.

Estate Planning

Marshal Oldman of the State Bar Estate Planning Trust and Probate Law Section has provided the Commission with a proposal relating to application of the statute of limitations to alleged malpractice in estate planning (Exhibit pp. 1-5.) Under the proposal, an estate planning attorney would be able to start the running of a four year limitations period by giving a notice to the client that the attorney is no longer taking responsibility for the file and the client should have the file reviewed by new counsel. (*Id.* at 2, 4-5.)

The impetus for the proposal is that under current law the limitations period for malpractice in estate planning is tolled until damage occurs, which does not happen until the client dies. At that point,

> the beneficiaries are treated as third party beneficiaries of counsel's estate planning advice and are allowed to bring suit for damages caused by the malpractice. This effectively subjects the attorney to an open statute of limitations that may involve counsel in litigation decades after the work leading to the malpractice was performed. Moreover, the case may be initiated by dissatisfied persons who may have no actual knowledge of attorney-client communications or the client's goals and wishes.

(*Id.* at 1.) The proposal maintains that such delay in suing for estate planning malpractice is not good policy, "since insurance companies are unwilling to provide affordable malpractice tail coverage to estate planners, attorneys cannot

retire without the risk that they will be subject to suit in later years, and clients are not encouraged to correct mistakes that may be present in their estate plans until after death at which time corrections may become impossible." (*Id.* at 2.)

As yet, the staff has not thoroughly assessed this proposal. On initial consideration, however, we are reluctant to incorporate it into the Commission's own proposal. Other specialists may want to jump on the bandwagon, seeking similar exceptions for their areas of practice. Because it would involve notifying clients that they should seek the advice of new counsel, the proposal might also be viewed as a means of generating business for estate planners. Rather than getting involved in these issues, it seems preferable to let the estate planners pursue their own proposal and coordinate with them as necessary.

BURDEN OF PROOF AS TO DISCOVERY

The California Supreme Court recently considered which party bears the burden under Code of Civil Procedure Section 340.6 of proving when the client discovered, or through the use of reasonable diligence should have discovered, the facts constituting the alleged legal malpractice. The Court determined that the attorney bears the burden. *Samuels v. Mix*, 22 Cal. 4th 1, 989 P.2d 701, 91 Cal. Rptr. 2d 273, 275 (1999).

As directed by the Commission, the staff has researched this area, including legal commentary and decisions of other jurisdictions. (Minutes (Feb. 2000), p. 7.) The staff regrets, however, that we cannot do it justice in this memorandum and will have to cover it either in a supplement to be distributed at the upcoming meeting or in a later memorandum.

TYPES OF CLAIMS COVERED

A recent court of appeal decision held that Code of Civil Procedure Section 340.6 applies only to claims by a client and there is "no authority for the novel claim that a third party (i.e., a non-client) may invoke [the statute]." *Knoell v. Petrovich*, 76 Cal. App. 4th 164, 90 Cal. Rptr. 2d 162, 165 (1999). This decision has been criticized. Boyd, *Unclear Application: Court May Review Statute of Limitations for Claims Against Attorneys*, San Francisco Daily Journal, p. 5 (March 7, 2000). The staff has not yet researched this area, but intends to pursue this point unless the Commission directs otherwise.

TRANSITIONAL PROVISION

The attached draft does not include a transitional provision. The staff is still researching the extent to which limitations periods may be retroactively revised. We will include a transitional provision in the next draft.

OTHER TYPES OF MALPRACTICE

Justice Kennard has commented:

> All professionals are legally obligated to possess and employ the special knowledge and skills of their profession; a layperson who employs any professional is frequently not in a position to judge the quality of the professional's work and thus may not immediately detect malpractice, not only because the layperson lacks the professional's skill and knowledge, but also because the professional frequently works out of the client's view; and finally, all professionals are under a fiduciary duty to fully disclose to their clients facts materially affecting the client's interests. *Because of these similarities among the professions, the rules governing the running of the statute of limitations for the various professions should be alike unless there is a particular justification for different treatment.*

International Engine Parts, Inc. v. Feddersen & Co., 9 Cal. 4th 606, 631-32, 888 P.2d 1279, 38 Cal. Rptr. 2d 150 (1995) (Kennard, J., dissenting) (citations omitted, emphasis added). If the Commission proposes to incorporate the doctrine of equitable tolling in the statute of limitations for legal malpractice, an obvious issue is whether the doctrine should also apply to the limitations periods for other types of malpractice, such as medical malpractice or accounting malpractice. Delving into this area would greatly expand the scope of this study, so the staff recommends against it at this point, particularly because the Commission is only authorized to study the statute of limitations for legal malpractice. To prevent unintended implications for other types of malpractice, the Comment to the proposed revision of the statute would state: "Codification of the doctrine of equitable tolling in this section is not intended to in any way affect whether the doctrine applies to the limitations periods for other types of professional malpractice."

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

To: State Bar

Re: Project No. 00-05

SECTION / COMMITTEE AND CONTACT

Section: Estate Planning Trust and Probate Law Section
Date of Approval:

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Digest: Existing law at Section 340.6 of the Code of Civil Procedure provides a four year statute of limitations for legal malpractice actions against attorneys even though the client may not have discovered the malpractice. However, four exceptions to the statute of limitations may operate so as to extend the four year statute and allow later claims to be brought against an attorney. The exception that is affected by this proposal is number (1) which tolls the statute until damage has occurred. The section has been modified to allow an attorney give a notice to his client that his liability for any malpractice will end four years from the date of the notice.

Application: The proposal is designed to allow attorneys to retire or otherwise terminate their estate planning practice or attorney-client relationship and limit their liability by giving notice to their clients that counsel will no longer be responsible for the client's file. Since estate planning documents such as wills and revocable trusts are subject to change or correction, courts have ruled that no damage has been suffered by the client or his beneficiaries until the client has become deceased. At that point, the beneficiaries are treated as third party beneficiaries of counsel's estate planning advice and are allowed to bring suit for damages caused by the malpractice. This effectively subjects the attorney to an open statute of limitations that may involve counsel in litigation decades after the work leading to the malpractice was performed. Moreover, the case may be initiated after the client's death by dissatisfied persons who may have no actual knowledge of attorney-client communications or the client's goals and wishes.

These suits are difficult to defend since the attorney's actions are being judged by hindsight, standards of practice may have changed after the actions took place, and memories may have faded over the intervening decades. The Executive Committee does not believe this is good policy since insurance companies are unwilling to provide affordable malpractice tail coverage to estate planners, attorneys cannot retire without the risk that they will be subject to suit in later years, and clients are not encouraged to correct mistakes that may be present in their estate plans until after death at which time corrections may become impossible. The current system only fosters litigation for malpractice without providing an incentive to discover and correct estate planning mistakes that may otherwise lead to malpractice actions.

This problem is somewhat unique to the estate planning area of practice. Most documents drawn by counsel, such as contracts are irrevocable at the time of execution. The four year malpractice limitation at Section 340.6 of the Code of Civil Procedure has been interpreted to run from the date of execution of the document even though the damage may not be discovered for more than four years. This first appeared in Hensley vs Caietti, 13 CalApp4th 1135, 16 CalRptr2d 837 where a family law stipulation was entered into on the record and the date of damage from measured from that date as opposed to the date that the court enforced the settlement. The Supreme Court in Jordache vs. Brobeck, Phleger & Harrison (1998) 18 C4th 739, 76 CalRptr2d 749 found that the statute of limitations ran from the moment that the plaintiff suffered legally cognizable harm and not when the damage was no longer speculative. Because of the limitation that damage must occur before the four year statute starts to run, revocable estate planning instruments do not fall within the Hensley and Jordache opinions and counsel are subject to an open ended statute of limitations that is as uncertain as it is incalculable.

Illustration: An attorney will be able to start the running of a four statute of limitations by giving a notice to the client that the attorney is no longer taking responsibility for the file and that the client should have the file reviewed by new counsel. Whether or not the client seeks the advice of new counsel, the attorney's liability for any malpractice on the ground that no

damage has occurred will terminate four years after the mailing of the notice.

Documentation: The sponsor is not aware of any formal studies or documentation.

History: No similar proposals by the State Bar are known.

Pending Litigation: The proposal has not been drawn with any pending litigation in mind. However, the Executive Committee anticipates that litigation may be in process at this time. This proposal is not designed to affect any current litigation.

Likely Support: The sponsor expects that this proposal is likely to excite little interest except from lawyers that prosecute and defend the type of malpractice actions that arise in this context.

Fiscal Impact: No fiscal impact is expected from this proposal.

Germaneness: The proposed legislation is directly related to the practice of the members of the Estate Planning, Trust and Probate Law Section. The Section has the particular expertise pertaining to the management of the affairs of persons seeking estate planning advice.

Text:

Section 1: Amendment to Section 340.6 of the Code of Civil Procedure:

Section 340.6.

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) Subject to Section 340.8, the plaintiff has sustained no actual injury;

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitations; and

(4) The plaintiff is under a legal or physical disability that restricts the plaintiff's ability to commence the action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

Section 2:Section 340.8 of the Code of Civil Procedure is hereby added to the Code.

(a) An attorney may end the tolling of the statute of limitations as provided under subparagraph (1) of paragraph (a) of Section 340.6 by sending the notice set forth in this section and if available to the counsel giving the notice by tendering the client's file and original documents in the possession of the attorney to the client. The notice shall be sent to the client at the client's last known address by certified mail, return receipt requested. The notice shall be deemed as effective to commence the statute of limitations to run at such time that the notice has been deposited in the United States mail whether or not the notice reaches the client.

(b) The notice shall be in at least 10 point bold type and shall state the following:

NOTICE OF TERMINATION OF ATTORNEY CLIENT RELATIONSHIP FOR ESTATE PLANNING MATTERS AND TENDER OF FILE AND ORIGINAL DOCUMENTS

The undersigned as your attorney will no longer take responsibility for your estate planning file. By this notice, you are hereby notified that your attorney is hereby tendering to you your file and all documents in the undersigned's possession, available to the undersigned, if any. Since the undersigned as your attorney is no longer taking any further responsibility for your file, you are encouraged to seek the advice of new counsel and to review the estate plan for any corrections that may need to be made to fit your current family situation or any mistakes that may have occurred during the undersigned's representation of you as your attorney for this estate planning matter. Further, even if mistakes exist in your estate planning documents, the undersigned as your attorney will no longer be liable to you or to any person taking under or seeking to enforce your estate planning documents on the fourth anniversary of the mailing of this notice and tender of your estate planning documents.

Please contact the office of the undersigned at the following address and telephone number:

ADDRESS
TELEPHONE NUMBER

Contact:

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SUMMARY

The statute of limitations for legal malpractice (Code Civ. Proc. § 340.6) is tolled when the client has not sustained actual injury. What constitutes actual injury is not statutorily defined nor has it been clearly resolved by the courts, despite extensive litigation on this point.

The Law Revision Commission proposes to revise the statute to clarify the meaning of actual injury. The proposed law would incorporate the following principles:

- Actual injury occurs when the plaintiff sustains appreciable damages (other than fees for professional advice relating to or arising from malpractice, or related expenses) and causation of those damages is not speculative.
- Where the existence of appreciable damages or the determination of causation depends on the outcome of an underlying proceeding, the period is tolled until the proceeding is settled or fully resolved by the trial court or other initial tribunal, if the requirements of equitable tolling are met.
- Where a plaintiff incurs fees for professional advice relating to or arising from malpractice, actual injury does not occur until the plaintiff sustains damages unrelated to seeking professional advice, or it becomes clear that the plaintiff will not sustain such damages.
- A plaintiff may seek recovery of all appreciable damages proximately caused by a wrongful act or omission, including, fees for professional advice relating to or arising from the malpractice.

These reforms would promote judicial economy, conserve resources of both clients and attorneys, provide certainty in application, reduce malpractice claims and premiums, and protect clients from the burdens of simultaneous litigation, including the necessity of simultaneously advocating inconsistent positions.

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

STATUTE OF LIMITATIONS FOR ATTORNEY MALPRACTICE

The statute of limitations for attorney malpractice is tolled until the client sustains actual injury from the alleged malpractice.[1] Since its enactment in 1977,[2] the statute has been the subject of extensive litigation, much of which has centered on the actual injury requirement.[3] Nonetheless, the meaning of the requirement remains unclear. To provide certainty in application and improve the administration of justice in attorney malpractice cases, the Law Revision Commission recommends that the statute be amended to provide guidance on what constitutes actual injury.[4]

CODE OF CIVIL PROCEDURE SECTION 340.6

The statute of limitations for legal malpractice is Code of Civil Procedure Section 340.6,[5] which provides:

> 340.6. (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, or whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
>
> (1) The plaintiff has not sustained actual injury;
>
> (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
>
> (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
>
> (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

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1. Code Civ. Proc. § 340.6(a)(1).

2. 1977 Cal. Stat. ch. 863, § 1. Before this legislation became operative on January 1, 1978, there was no limitations provision specifically directed to legal malpractice. Instead, such actions were governed by the general provision for torts affecting intangible property (Code Civ. Proc. § 339). See, e.g., Budd v. Nixen, 6 Cal. 3d 195, 199, 491 P.2d 433, 98 Cal. Rptr. 849 (1971); Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 187, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

3. The California Supreme Court has addressed this point four times in the past decade. See Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998); Adams v. Paul, 11 Cal. 4th 581, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995); ITT Small Business Finance Corp. v. Niles, 9 Cal. 4th 245, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994); Laird v. Blacker, 2 Cal. 4th 606, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992). Numerous court of appeal decisions focus on what constitutes actual injury. See, e.g., Sindell v. Gibson, Dunn & Crutcher, 54 Cal. App. 4th 1457, 63 Cal. Rptr. 2d 594 (1997); Moss v. Stockdale, Peckham & Werner, 47 Cal. App. 4th 494, 54 Cal. Rptr. 2d 805 (1996); Marshall v. Gibson, Dunn & Crutcher, 37 Cal. App. 4th 1397, 44 Cal. Rptr. 2d 339 (1995).

4. The Legislature directed this study. 1999 Cal. Stat. res. ch. 81.

5. This provision does not apply to actions for actual fraud. Quintilliani v. Mannerino, 62 Cal. App. 4th 54, 72 Cal. Rptr. 2d 359 (1998). Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

> (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

The provision codifies the discovery doctrine, under which the limitations period does not begin to run until the client "discovers, or through the use of reasonable diligence should have discovered" the attorney's malpractice.[6] The client must commence the action within one year from the date of discovery. To preclude endless potential exposure, however, the statute also requires the client to bring the action within four years from the date of the wrongful act or omission.[7]

These alternate limitations periods (one-year-from-discovery and four-years-from-occurrence) are tolled so long as the allegedly negligent attorney continues to represent the client "regarding the specific subject matter in which the alleged wrongful act or omission occurred."[8] Even after the client replaces the attorney, the limitations periods are tolled until the client sustains actual injury.[9]

CASE LAW ON ACTUAL INJURY

The issue of actual injury can arise in three different contexts: (1) Where malpractice occurs in representing a client in litigation, (2) where malpractice occurs in a transactional matter but leads to or potentially influences the result of litigation, and (3) where malpractice occurs in a transactional matter and no litigation ensues ("pure transactional malpractice").[10] The first two contexts pose the problem of simultaneous litigation: Litigation of a malpractice action while an underlying action is still pending.

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6. The California Supreme Court first applied the discovery doctrine to a legal malpractice case in 1971. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 187, 491 P.2d 421, 98 Cal. Rptr. 837 (1971). Previously, the courts applied the occurrence rule, under which the limitations period began to run on occurrence of the malpractice, regardless of when or whether the client discovered the malpractice. This harsh approach was overruled because it is difficult for a client to detect legal malpractice and it is unfair for an attorney (as a fiduciary) to benefit from failing to disclose malpractice to a client. *Neel*, 6 Cal. 3d at 187-90.

7. In *Neel*, the Supreme Court recognized that application of the discovery doctrine in legal malpractice cases would "impose an increased burden on the legal profession." 6 Cal. 3d at 192. "An attorney's error may not work damage or achieve discovery for many years after the act, and the extension of liability into the future poses a disturbing prospect." *Id*. The Court acknowledged, however, that an outer limit on delayed accrual of legal malpractice actions might be desirable. *Id*. The Legislature established such an outer limit by codifying the four year alternate limitations period.

8. Section 340.6(a)(2); see, e.g., Crouse v. Brobeck, Phleger & Harrison, 67 Cal. App. 4th 1509, 80 Cal. Rptr. 2d 94 (1998); Kulesa v. Castleberry, 47 Cal. App. 4th 103, 54 Cal. Rptr. 2d 669 (1996); Worthington v. Rusconi, 29 Cal. App. 4th 1488, 35 Cal. Rptr. 2d 169 (1994).

9. Both the one-year and the four-year limitations periods are also tolled when the client is under a legal or physical disability that prevents the client from commencing legal action. Section 340.6(a)(4). Only the four-year period is tolled when the attorney willfully conceals the malpractice. Section 340.6(a)(3).

10. Tchorbadjian v. Western Home Ins. Co., 39 Cal. App. 4th 1211, 1218-19, 46 Cal. Rptr. 2d 370 (1995).

Whether simultaneous litigation is necessary depends on how the malpractice statute of limitations applies where a malpractice claim relates to an underlying action:

- If the statute is interpreted to mean that actual injury does not occur until the underlying action is resolved and all appeals exhausted, the limitations period is tolled through the appellate process and the malpractice action need not be commenced until the underlying action is over.
- If the statute is interpreted to mean that actual injury does not occur until the underlying action is either settled or resolved by the trial court or other initial tribunal, simultaneous litigation is necessary only where a party seeks to overturn the initial determination of the underlying action.
- If the statute is interpreted to mean that actual injury can occur before the underlying action is resolved by the initial tribunal, it may be necessary to commence the malpractice action while the underlying action is still pending in the initial tribunal.

The California Supreme Court has addressed this issue four times, dividing in each case and reversing course as court personnel changed.

Laird

In *Laird v. Blacker*,[11] an attorney served a complaint on behalf of a client but failed to prosecute the action, resulting in dismissal for lack of prosecution. The client sued the attorney for malpractice and the attorney asserted a limitations defense. The client contended that the malpractice action was timely, because actual injury did not occur until her appeal of the dismissal of the underlying action was resolved. The Supreme Court disagreed, however, concluding that "the limitations period of section 340.6 commences when a client *suffers an adverse judgment or order of dismissal in the underlying action* on which the malpractice action is based."[12] Justice Mosk dissented, maintaining that actual injury does not occur and the limitations period does not begin to run until the appeal is resolved.[13]

ITT

The Court's next case on the actual injury requirement was *ITT Small Business Finance Corp. v. Niles*,[14] which involved malpractice in the preparation of loan documentation. Again, the Court focused on termination of the underlying action, concluding that "in transactional legal malpractice cases, when the adequacy of the documentation is the subject of dispute, an action for attorney malpractice accrues

11. 2 Cal. 4th 606, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992).
12. 2 Cal. 4th at 608 (emphasis in original).
13. *Id*. at 621-28 (Mosk, J., dissenting).
14. 9 Cal. 4th 245, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994).

on entry of adverse judgment, settlement, or dismissal of the underlying action.[15] Justice Mosk concurred, reiterating his view that tolling should continue throughout the appeal of the underlying action.[16] Justice Kennard dissented on the ground that actual injury may occur well before an underlying action is resolved by an adverse judgment or settlement.[17]

Adams

The Court reversed course and was even more badly splintered in *Adams v. Paul*,[18] in which an attorney failed to file a client's claim within the statute of limitations. Three justices determined that in light of the many variables where an attorney misses a limitations period, the determination of when actual injury occurs is generally a question of fact.[19] Thus, the case had to be remanded for determination of "the point at which the fact of damage became palpable and definite even if the amount remained uncertain, taking into consideration all relevant circumstances."[20] Justice Kennard concurred, emphasizing some points and stating certain qualifications.[21] Three justices dissented, adhering to the notion that actual injury does not occur until the underlying action is resolved, at least by the trial court.[22]

Jordache

The Court's most recent decision construing the actual injury requirement is *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*.[23] in which a law firm failed to advise its client regarding insurance coverage. A five-member majority squarely endorsed four principles: "(1) determining actual injury is predominately a factual inquiry; (2) actual injury may occur without any prior adjudication, judgment, or settlement; (3) nominal damages, speculative harm, and the mere threat of future harm are not actual injury; and (4) the relevant consideration is the fact of damage, not the amount."[24] The Court thus rejected the approach of focusing on termination of the underlying action.[25] Instead, the Court emphasized

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15. 9 Cal. 4th at 258 (emphasis added).
16. *Id*. at 258 (Mosk, J., concurring).
17. *Id*. at 260 (Kennard, J., dissenting).
18. 11 Cal. 4th 581, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995).
19. *Id*. at 585.
20. *Id*. at 593.
21. *Id*. at 601-04 (Kennard, J., concurring).
22. *Id*. at 604-09 (Lucas, C.J., dissenting).
23. 18 Cal. 4th 739, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998).
24. *Id*. at 743. Justice Kennard joined the majority opinion but also wrote a short concurrence.
25. *Id.* at 764. The Court expressly overruled *ITT*, commenting that the "broad, categorical rule" advanced in that decision "cannot be reconciled with the particularized factual inquiry required to determine actual injury under section 340.6 …." *Id.* at 763. The Court also interpreted *Laird* to mean merely that actual harm occurs *no later than* termination of the underlying action at the trial level. *See id.* at 762.

the need for particularized assessment of the facts and circumstances of each case.[26] On the facts before it, the Court determined that the client sustained actual injury before settlement of the insurance coverage litigation, because it incurred extra expenses in that litigation due to the malpractice.[27] Chief Justice George and Justice Mosk each authored a vigorous dissent, reiterating their preference for a bright line approach to actual injury.

ADVANTAGES OF EXISTING LAW

The Court's current, fact-specific approach to actual injury has both advantages and disadvantages. In adopting the approach in *Jordache*, the Court relied heavily on an analysis of the legislative history.[28] Although the Court also discussed some policy considerations, it declined to balance the competing interests, explaining that the Legislature had weighed the interests in formulating Section 340.6 and the Court's role was simply to follow the Legislature's intent.[29] While that mindset may be appropriate in interpreting the statute, a broader perspective, directly focusing on the relevant policy concerns, is warranted in determining whether to revise the provision.

It is logical to begin by examining the advantages of the current approach:

Preservation of evidence

Statutes of limitation are intended to ensure that claims are litigated when evidence is accessible, memories are fresh, and witnesses are available.[30] If assertion of a malpractice claim is delayed while an underlying action is pending, evidence may deteriorate. Documents or other tangible evidence may be lost or destroyed, memories may fade, and witnesses may die or disappear, making it difficult to litigate the case. Under the Court's fact-driven approach, in contrast, actual injury may occur and tolling of the limitations period may cease before resolution of an underlying action. The approach thus promotes early assertion of malpractice claims and resolution of those claims while evidence is readily at hand.

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26. *Id.* at 764.

27. *Id.* at 743-44, 764-65.

28. *Id*. at 748-51.

29. *Id*. at 756 ("section 340.6 reflects the balance the Legislature struck between a plaintiff's interest in pursuing a meritorious claim and the public policy interests in prompt assertion of known claims. The courts may not shift that balance by devising expedients that extend or toll the limitations period."); *see also id.* at 757 ("Whatever the merits of these policies in other settings, the legislative scheme embodied in section 340.6 allocates their relative weight in legal malpractice actions.").

30. See, e.g., *Jordache*, 11 Cal. 4th at 756; Addison v. State, 21 Cal. 3d 313, 317, 578 P.2d 941, 146 Cal. Rptr. 224 (1978); Elkins v. Derby, 12 Cal. 3d 410, 417, 525 P.2d 81, 115 Cal. Rptr. 641 (1974); Ochoa & Wistrich, *Limitation of Legal Malpractice Actions: Defining Actual Injury and the Problem of Simultaneous Litigation*, 24 Sw. U. L. Rev. 1, 14-15 (1994).

Repose

Another important purpose of statutes of limitation is to guarantee repose, to allow a measure of certainty in conducting one's affairs.[31] If a claim is not promptly asserted, the potential defendant may be oblivious to the threat of liability and plan accordingly. Surprising that person with a claim for alleged misconduct in the distant past not only contravenes basic notions of fairness, but also undermines stability and predictability in legal affairs. As compared to an approach that tolls the limitations period until an underlying claim is resolved, the Court's current approach to actual injury in legal malpractice cases better serves the interest in guaranteeing repose, because the limitations period on at least some claims begins to run earlier.[32]

Flexibility

Legal malpractice cases involve a wide variety of fact situations, making it difficult to fashion a categorical rule that adequately accounts for all of the differing circumstances.[33] By calling for case-by-case assessment of actual injury in such cases, the Court's current approach permits flexibility to equitably determine application of the limitations period in each case.[34]

Recovery of damages

A further significant point relates to the recovery of damages. In her *ITT* dissent, Justice Kennard observed that "it defies common sense to hold … that a client has not sustained 'actual injury' even though the client has paid thousands, perhaps hundreds of thousands, of dollars because the attorney's malpractice has compelled the client to prosecute or defend third party litigation."[35] She expanded on this comment in an accountant malpractice case, providing the following example:

> [A]n accountant's negligent preparation of a business's tax returns may trigger a full-scale audit by the IRS. In the end, the IRS may assess no deficiency because the accountant made mistakes in the government's favor that offset mistakes in the client's favor. Does this mean that the client has suffered no injury? Not at all. In responding to the audit, the client may have incurred massive expenses, including legal fees, accountant fees, and the time expended by the client's own employees. In addition, the audit may disclose the permanent loss of tax benefits that should have

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31. See, e.g., *Jordache*, 11 Cal. 4th at 756; Valley Circle Estates v. VTN Consolidated, Inc., 33 Cal. 3d 604, 615, 659 P.2d 1160, 189 Cal. Rptr. 871 (1983); Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 787, 598 P.2d 45, 157 Cal. Rptr. 392 (1979); Ochoa & Wistrich, *supra* note 30, at 15.

32. See Foxborough v. Van Atta, 26 Cal. App. 4th 217, 227, 31 Cal. Rptr. 2d 525 (1994).

33. *Jordache*, 11 Cal. 4th at 764; *Adams*, 11 Cal. 4th 581, 588-89, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995); Foxborough v. Van Atta, 26 Cal. App. 4th 217, 225-26, 31 Cal. Rptr. 2d 525 (1994).

34. *Jordache*, 11 Cal. 4th at 764.

35. 9 Cal. 4th at 259 (Kennard, J., dissenting); see also International Engine Parts, Inc. v. Fedderson & Co., 9 Cal. 4th 606, 626, 888 P.2d 1279, 38 Cal. Rptr. 2d 150 (1995) (Kennard, J., dissenting).

> been but, because of the accountant's negligence, were not claimed in the client's return. Thus, I cannot agree that the issue of actual harm is "contingent on the outcome of the audit."[36]

Her concern seems to be that if actual injury within the meaning of Section 340.6 is not deemed to occur until an underlying action is resolved, a client may have no recourse for harm sustained before the underlying action is resolved.

In other words, she appears to presume that actual injury is equivalent to recoverable damages. That is a natural but not inevitable conclusion. Actual injury could also be construed to denote only the point at which the fact and causation of harm are sufficiently well-established to trigger the limitations period, regardless of when the harm occurred. But the Court's current approach, in which actual injury is not tied to resolution of an underlying action, unambiguously establishes that it is possible to recover for harm that is sustained before resolution of an underlying action.

DISADVANTAGES OF EXISTING LAW

Although the current, fact-specific approach to actual injury has advantages, it also has serious disadvantages:

Judicial economy and litigation expenses

The current approach may result in simultaneous litigation of a malpractice action and an underlying case. Often, however, resolution of an underlying case may render a malpractice action unnecessary.[37] For example,

> in statute of limitations cases, actual and appreciable harm may *never* occur, and the plaintiff's rights may never be invaded despite the attorney's "wrong," if no one ever spots the issue as a potential defense. It is unproductive to require a plaintiff to file a precautionary legal malpractice suit in anticipation of losing on an issue that may never arise, or, if it does arise, may be resolved against the defendants in the underlying suit.[38]

As Chief Justice George has explained, "a rule that measures the running of the statute of limitations from an early date — before the underlying litigation or controversy has been resolved — inevitably will require (or at least encourage) the early filing of legal malpractice actions that might otherwise not be brought …."[39]

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36. International Engine Parts, Inc. v. Fedderson & Co., 9 Cal. 4th 606, 626-27, 888 P.2d 1279, 38 Cal. Rptr. 2d 150 (1995) (Kennard, J., dissenting).

37. Ochoa & Wistrich, *supra* note 30, at 22-23; see *ITT*, 9 Cal. 4th at 257 (had client prevailed in adversary proceeding, malpractice action would have been unnecessary).

38. Pleasant v. Celli, 18 Cal. App. 4th 841, 22 Cal. Rptr. 2d 663 (1993) (emphasis in original). If the underlying suit is settled, rather than decided on the merits, the impact of the attorney's error may not be totally clear. *Jordache*, 18 Cal. 4th at 754-55. Many different factors can influence the decision to settle a suit. *Id*. Nonetheless, the amount of a settlement likely will shed some light on the impact of the malpractice. For instance, if a client receives a large settlement in a suit that the attorney filed late, the late filing probably did not adversely affect the client's recovery.

39. *Jordache*, 18 Cal. 4th at 767 (George, C.J., dissenting).

Forcing a client to file a malpractice claim without awaiting the outcome of underlying litigation may thus waste judicial resources.[40] By clogging court dockets, it also impedes access to justice.[41] Perhaps most significantly, it may unnecessarily subject clients, attorneys, and witnesses to the financial and emotional stress of litigation.

Staying the malpractice case pending resolution of the underlying action may alleviate these concerns to some extent.[42] This is not a complete solution, however, because obtaining a stay consumes judicial resources. It may also be costly to the litigants and the court may be reluctant to grant a stay due to pressure to control its docket.[43]

Inconsistent positions

Another downside of the current approach is that it may force a client to simultaneously take inconsistent positions. Suppose, for instance, that it is questionable whether an attorney timely filed an action on behalf of a client. Under the Court's current approach to actual injury, the client may have to (1) show timeliness in the underlying action, while at the same time (2) proving untimeliness in a malpractice claim.[44] The result may be inconsistent verdicts or application of collateral estoppel in a manner harmful to the client.[45] In addition, respect for the legal system is "hardly enhanced by an incongruent procedural structure which causes an injured party simultaneously to alleged before different tribunals propositions which are mutually inconsistent."[46]

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40. *See, e.g.*, *Jordache*, 18 Cal. 4th at 769 (Mosk, J., dissenting); *Adams*, 11 Cal. 4th at 605 (Lucas, C.J., dissenting); *Laird*. 2 Cal. 4th at 626 (Mosk, J., dissenting); Sirott v. Latts, 6 Cal. App. 4th 923, 934-35, 8 Cal. Rptr. 2d 206 (1992) (Johnson, J., dissenting).

41. See Robinson v. McGinn, 195 Cal. App. 3d 66, 77, 240 Cal. Rptr. 423 (1987).

42. See, e.g., *Jordache*, 18 Cal. 4th at 758.

43. Ochoa & Wistrich, *supra* note 30, at 65-66; see also Murphy v. Campbell, 41 Tex. Sup. Ct. J. 193, 964 S.W.2d 265, 275 (1997) (Spector, J., dissenting) (option of stay is overly burdensome on clients); *id*. at 276 (Abbott, J., dissenting) ("While the Court states that taxpayers can file a malpractice action and then abate the action until the tax suit is resolved, such a hurry-up-and-wait approach is contrary to our efforts to expedite the litigation process.").

44. Pleasant v. Celli, 18 Cal. App. 4th 841, 849-50, 22 Cal. Rptr. 2d 663 (1993); see also *Adams*, 11 Cal. 4th at 605 (Lucas, J., dissenting). A further problem is that the mere assertion of the malpractice claim may alert the defendant in the underlying action to the limitations defense.

For another example where a client would be forced to take inconsistent positions in a malpractice case and an underlying proceeding, see U.S. Nat'l Bank of Oregon v. Davies, 274 Or. 663, 548 P.2d 966 (1976) ("plaintiff's decedent would have been defending one suit or action, claiming he had acted in conformance with the law, while simultaneously maintaining an action against defendants, claiming he had not acted in conformance with the law because of faulty advice from defendants"); see also International Engine Parts, Inc. v. Fedderson & Co., 9 Cal. 4th 606, 620, 888 P.2d 1279, 38 Cal. Rptr. 2d 150 (1995) (tax audit and action for faulty tax advice); Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 156, 60 U.S.L.W. 2435 (1991) (parental rights termination suit and action for malpractice in adoption process).

45. Sirott v. Latts, 6 Cal. App. 4th 923, 934, 8 Cal. Rptr. 2d 206 (1992) (Johnson, J., dissenting); Ochoa & Wistrich, *supra* note 30, at 20-21.

46. Elkins v. Derby, 12 Cal. 3d 410, 420, 525 P.2d 81, 115 Cal. Rptr. 641 (1974). Again, this problem may be mitigated to some extent by staying the malpractice action pending resolution of the underlying

Waiver of attorney-client privilege

Simultaneous litigation of an underlying action and a malpractice claim could also result in a waiver of the attorney-client or work product privilege.[47] To establish malpractice, the client may need to disclose the attorney's work product or confidential communications with the attorney. But such disclosure may waive the work product or attorney-client privilege, giving the opposing party in the underlying action access to information that would otherwise be privileged. This may prejudice the client's case.[48] A carefully drafted protective order may mitigate the problem,[49] but obtaining a protective order is neither inexpensive nor certain, so a danger of prejudice remains.

Burden of simultaneously pursuing multiple actions

By requiring simultaneous litigation, at least in some cases, the Court's current approach to actual injury imposes a significant burden on clients.[50] Prosecuting a lawsuit is both expensive and emotionally draining. For some clients, the burden of simultaneously prosecuting both a malpractice case and an underlying suit may be prohibitive.[51]

Number of malpractice claims and cost of malpractice coverage

By requiring early assertion of malpractice claims, the Court's current approach is also burdensome on attorneys and may unnecessarily increase malpractice premiums. As Chief Justice George has explained:

> [A] rule that measures the running of the statute of limitations from an early date — before the underlying litigation or controversy has been resolved — inevitably will require (or at least encourage) the early filing of legal malpractice actions that might otherwise not be brought, and may lead former clients, as malpractice plaintiffs, to pursue their legal malpractice action more vigorously than their underlying action against the third party, for reasons other than the relative merits of the two actions and the relative culpability of the respective tortfeasors. For example, the former client may conclude that a wealthy law firm is a less sympathetic defendant than a less affluent third party.[52]

Certainty in application

Perhaps most importantly, by focusing on the facts and circumstances of each case, the Court's current approach to actual injury fails to provide clear, consistent,

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case. *Adams*, 11 Cal. 4th at 592-93; Carvell v. Bottoms, 900 S.W.2d 23, 30 (Tenn. 1995). But the potential availability of a stay does not fully resolve the problem. See note 43 *supra* and accompanying text.

47. Ochoa & Wistrich, *supra* note 30, at 21.

48. *Id*.

49. See *Jordache*, 18 Cal. 4th at 758.

50. *Jordache*, 18 Cal. 4th at 769 (Mosk, J., dissenting); see also Sirott v. Latts, 6 Cal. App. 4th 923, 934, 8 Cal. Rptr. 2d 206 (1992) (Johnson, J., dissenting) (hair trigger approach is bad for clients because it requires them to proceed with two lawsuits at a time).

51. Ochoa & Wistrich, *supra* note 30, at 21-22.

52. *Jordache*, 18 Cal. 4th at 767 (George, C.J., dissenting); see also Sirott v. Latts, 6 Cal. App. 4th 923, 934, 8 Cal. Rptr. 2d 206 (1992) (Johnson, J., dissenting) (hair trigger lawsuits are bad for lawyers "because there probably will be many more malpractice suits filed").

guidance as to the running of the limitations period.[53] Ideally, a statute of limitations should state a clear, easy-to-follow rule, not one that requires guesswork and forces the client and attorney to incur substantial sums debating about whether the malpractice suit was timely, rather than addressing the merits of the malpractice claim.[54] A bright line approach, focusing on termination of the underlying action (at least at the trial level) may not yield the perfect result in all situations. But occasional inequity may be less of a harm than uncertainty in all cases and likely inconsistency in application.[55]

EQUITABLE TOLLING

It is challenging to balance the competing interests in defining the point of actual injury in legal malpractice cases. It is helpful, however, to consider an approach that the courts have developed in other simultaneous litigation contexts: the doctrine of equitable tolling.

Under this doctrine, the statute of limitations on a potential claim is tolled during the pendancy of a related claim, so long as three requirements are met: (1) timely notice to the potential defendant, (2) lack of prejudice to the potential defendant in gathering evidence to defend against the potential claim, and (3) good faith and reasonable conduct on the part of the potential plaintiff.[56] By conditioning tolling on timely notice and lack of prejudice to the potential defendant, the doctrine ensures that the potential defendant (not just the plaintiff) has an adequate opportunity to gather and preserve evidence while it is fresh.[57] It also permits the potential defendant to take the possible claim into account in developing business and personal plans.

The doctrine thus is sensitive to the interests in preventing deterioration of evidence and affording repose. Yet it also provides a bright-line rule keyed to termination of the underlying action, rather than an ill-defined, earlier point in the litigation. As such, it conserves judicial resources, spares the parties the expense and stress of unnecessary litigation, reduces the number of malpractice claims, eliminates the burden of simultaneously pursuing multiple actions, and protects clients from having to take inconsistent positions or waive a privilege to their

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53. *Jordache*, 18 Cal. 4th at 767 (George, C.J., dissenting); *id.* at 769 (Mosk, J., dissenting).

54. Finlayson v. Sanbrook, 10 Cal. App. 4th 1436, 1442, 13 Cal. Rptr. 2d 406 (1992); Mallen & Smith, Legal Malpractice § 21.11, p. 784 (4th ed. 1996)

55. International Engine Parts, Inc. v. Fedderson & Co., 9 Cal. 4th 606, 621-22, 888 P.2d 1279, 38 Cal. Rptr. 2d 150 (1995).

56. Addison v. State, 21 Cal. 3d 313, 319, 578 P.2d 941, 146 Cal. Rptr. 224 (1978); [insert additional case cites]; Ochoa & Wistrich, *supra* note 30, at 51-53.

57. Ochoa & Wistrich, *supra* note 30, at 23; Bauman, *The Statute of Limitations for Legal Malpractice in Texas*, 44 Baylor L. Rev. 425, 452 (1992); see also *Jordache*, 18 Cal. 4th at 760; Worton v. Worton, 234 Cal. App. 3d 1638, 286 Cal. Rptr. 410 (1991).

detriment.[58] It may not be as flexible as the Court's current, case-by-case approach, but it would promote greater consistency and ease of application.[59]

The Law Revision Commission therefor recommends that Section 340.6 be revised to incorporate the doctrine of equitable tolling. If the existence of appreciable damages from alleged legal malpractice, or the determination of whether an attorney negligently caused harm sustained by a client, turns on the outcome of a civil or criminal action, administrative adjudication, arbitration, tax audit, or other official proceeding authorized by law, and the three requirements of equitable tolling are met, the limitations period should be tolled until the proceeding is settled or fully resolved by the trial court or other initial tribunal.

Tolling under the proposed law would not continue through an appeal of the underlying action or other review process. It is true that the outcome of the underlying action remains to some extent uncertain pending determination of an appeal.[60] The appeal process can be lengthy, however, so a malpractice claim may be very stale by the time the appeal is finally resolved.[61] Although each side can take steps to preserve evidence relating to the alleged malpractice pending resolution of the appeal, this may not fully safeguard against deterioration of the evidence. Because most decisions are affirmed,[62] this risk outweighs the benefits of awaiting the appellate outcome. A majority of the jurisdictions that have considered this point have reached the same conclusion (tolling should not continue during an appeal or other attempt to overturn the initial decision in the underlying case).[63]

The proposed law also addresses Justice Kennard's concern regarding recovery for harm sustained before resolution of the underlying action, such as attorney's

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58. See *id*. at 53-54, 59, 79; see also notes 37-52, *supra*, and accompanying text.

59. See notes 53-55, *supra*, and accompanying text.

60. International Engine Parts, Inc. v. Fedderson & Co., 9 Cal. 4th 606, 622-23, 888 P.2d 1279, 38 Cal. Rptr. 2d 150 (1995) (Mosk, J., concurring).

61. Ochoa & Wistrich, *supra* note 30, at 23; see also *Laird*, 2 Cal. 4th at 618 (tolling pending appeal would undermine legislative goal of resolving cases while evidence is fresh, witnesses are available, and memories have not faded).

62. *Laird*, 2 Cal. 4th at 617; Ochoa & Wistrich, *supra* note 30, at 24.

63. Dvorak, *Idaho's Statute of Limitations and Accrual of Legal Malpractice Causes of Action: Sorry, But Your Case Was Over Before It Began*, 31 Idaho L. Rev. 231, 255 (1994); see, e.g., *Laird*, 2 Cal. 4th at 609 (appeal); Pompilio v. Kosmo, Cho & Brown, 39 Cal. App. 4th 1324, 46 Cal. Rptr. 2d 409 (1995) (attempt to set aside settlement agreement); Safine v. Sinnott, 15 Cal. App. 4th 614,, 19 Cal. Rptr. 2d 601 (1993) (attempt to obtain corrected judgment in trial court); see also Beesley v. Van Doren, 873 P.2d 1280 (Alaska 1994); Brunacini v. Kavanagh, 117 N.M. 122, 869 P.2d 821 (N.M. 1994); but see International Engine Parts, Inc. v. Fedderson & Co., 9 Cal. 4th 606, 623, 888 P.2d 1279, 38 Cal. Rptr. 2d 150 (1995) (Mosk, J., concurring) (tolling should not be deemed to occur until taxpayer has exhausted administrative and judicial remedies); *Laird*, 2 Cal. 4th at 559-64 (Mosk, J., dissenting) (tolling should continue through appeal); Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 60 U.S.L.W. 2435 (Tex. 1991) (same); Semenza v. Nevada Medical Liability Ins. Co., 765 P.2d 184 (Nev. 1988) (same); Amfac Distribution Corp. v. Miller, 673 P.2d 792 (Ariz. 1983) (same). In Murphy v. Campbell, 41 Tex. Sup. Ct. J. 193, 964 S.W.2d 265 (1997), the Texas Supreme Court appears to have limited tolling during the appellate process to situations in which the allegedly negligent attorney continues to represent the client in the appeal).

fees for obtaining advice pertaining to the alleged malpractice.[64] It would make explicit that where a client incurs fees for professional advice relating to or arising from a wrongful act or omission, or related expenses,[65] actual injury does not occur until the client sustains other appreciable damages (unrelated to seeking professional advice) or it becomes clear that the client will not sustain other appreciable damages.[66] The proposed law would further state that a client may seek recovery of all appreciable damages proximately caused by a wrongful act or omission, including fees for professional advice relating to or arising from the wrongful act or omission. This is consistent with the basic principle that an injured party should be made whole.[67]

PURE TRANSACTIONAL MALPRACTICE

Finally, the proposed law would address the situation where malpractice occurs in a transactional matter and no litigation ensues (other than the malpractice action). Simultaneous litigation is not a problem in these situations of pure transactional malpractice, but it is still necessary to determine the point at which harm from the malpractice and the circumstances of the harm are sufficient to constitute actual injury within the meaning of Section 340.6.

The purpose of tolling the limitations period until actual injury occurs is to ensure that the client does not have to sue until the client "possesses a true cause of action …."[68] Appreciable harm to the client is not sufficient to establish a cause of action for legal malpractice. it is also necessary to show that the harm was caused by an attorney's malpractice.[69]

Thus, instead of focusing solely on the occurrence of harm (as the Court did in *Jordache*[70]*)*, the proposed law would link actual injury to establishment of

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64. See notes 35-36, *supra*, and accompanying text.

65. E.g., lost opportunity to profit from investment of funds spent on attorney's fees due to the alleged malpractice; lost employee time devoted to gathering evidence to counter the negative effects of the attorney's alleged mistake.

66. E.g., through a determination by the trial court or other initial tribunal in an underlying action.

67. See, e.g., Sindell v. Gibson, Dunn & Crutcher, 54 Cal. App. 4th 1457, 1470, 63 Cal. Rptr. 2d 594 (1997) (recoverable damages include attorney's fees for instituting or defending action as direct result of tort of another).

68. Robinson v. McGinn, 195 Cal. App. 3d 66, 77, 240 Cal. Rptr. 423 (1987); see also *Jordache*,. 18 Cal. 4th at 751 ("statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence.").

69. Baltins v. James, 36 Cal. App. 4th 1193, 1203, 42 Cal. Rptr. 2d 896 (1995) (there must be a nexus between the alleged malpractice and the injury); Tchorbadjian v. Western Home Ins. Co. 39 Cal. App. 4th 1211, 1223, 46 Cal. Rptr. 2d 370 (1995) ("Liability for malpractice requires a nexus between the attorney malpractice and the 'actual injury'."); see also *Jordache*, 18 Cal. 4th at 768-69 (Mosk, J., dissenting) (causal connection between lawyers' omission and plaintiff's damages was established only when plaintiff settled its lawsuit with insurers).

70. 18 Cal. 4th at 752 ("Actual injury refers only to the legally cognizable damage necessary to assert a cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury.").

causation. Specifically, under the proposed law, actual injury does not occur until the client sustains appreciable damages (other than fees for professional advice relating to or arising from the malpractice, or related expenses) *and* causation of those damages is not speculative. Where there is underlying litigation, causation would be considered established on resolution of that litigation in the initial tribunal.[71] The proposed law does not attempt to define a similar benchmark in the context of pure transactional malpractice (e.g., closure of an underlying deal). Because of the variety of transactional settings, the development of workable guidelines in this context would be left to the courts.

71. See "Equitable Tolling", *supra*.

STAFF DRAFT STATUTE

Code Civ. Proc. § 340.6 (amended). Limitations period for legal malpractice

SECTION 1. Code of Civil Procedure Section 340.6 is amended to read:

340.6. (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, or whichever occurs first.

(b) In no event shall the time for commencement of legal action exceed four years except that the period ~~shall be~~ is tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual ~~injury;~~ injury as provided in subdivisions (c) and (d).

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission ~~occurred~~; occurred.

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the ~~attorney, except that this subdivision shall toll only the four-year limitation; and~~ attorney. This paragraph only tolls the four-year limitation.

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

~~(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.~~

(c) Except as provided in subdivision (d), actual injury occurs when the plaintiff sustains appreciable damages and causation of those damages is not speculative. Where the existence of appreciable damages or the determination of causation depends on the outcome of a civil or criminal action, administrative adjudication, arbitration, tax audit, or other official proceeding authorized by law, the period is tolled until the proceeding is settled or fully resolved by the trial court or other initial tribunal, if all of the following conditions are satisfied:

(1) The plaintiff has given the attorney reasonable notice of the potential action for a wrongful act or omission.

(2) The attorney has not been prejudiced in gathering evidence to defend against the potential action.

(3) The plaintiff has acted reasonably and in good faith.

(d) Where a plaintiff incurs fees for professional advice relating to or arising from a wrongful act or omission, or related expenses, actual injury does not occur until the plaintiff sustains other appreciable damages, unrelated to seeking professional advice, or it becomes clear (through a determination by the trial court

or other initial tribunal, or, where there is no proceeding relating to the wrongful act or omission, through other means) that the plaintiff will not sustain other appreciable damages. A plaintiff may seek recovery of all appreciable damages proximately caused by a wrongful act or omission, including, without limitation, fees for professional advice relating to or arising from the wrongful act or omission.

Comment. Section 340.6 is amended to clarify the reference to actual injury.

Under subdivision (c), the one-year and four-year limitations periods are tolled until the client sustains appreciable, non-speculative damages, because the "mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm — not yet realized — does not suffice to create a cause of action for negligence." Budd v. Nixen, 6 Cal. 3d 195, 200, 491 P.2d 433, 98 Cal. Rptr. 849 (1971). In recognition that limitations periods should not begin to run until "the occurrence of the last element essential to the cause of action," Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 187, 491 P.2d 421, 98 Cal. Rptr. 837 (1971), tolling continues until both the fact of injury and causation of the injury are established.

Where an underlying proceeding bears on a malpractice incident, subdivision (c) codifies the doctrine of equitable tolling, sparing the client from simultaneously pursuing both the underlying proceeding and a malpractice action. See generally International Engine Parts v. Fedderson & Co., 9 Cal. 4th 606, 619, 888 P.2d 1279, 38 Cal. Rptr. 2d 150 (1995) (disposition of underlying case triggers statute of limitations in professional negligence suits); ITT Small Business Finance Corp. v. Niles, 9 Cal. 4th 245, 257, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994) ("it would be a waste of judicial resources to require both the adversary proceeding and the attorney malpractice action to be litigated simultaneously"). Elkins v. Derby, 12 Cal. 3d 410, 412, 525 P.2d 81, 115 Cal. Rptr. 641 (1974) (awkward duplication of procedures is not necessary to serve fundamental purpose of statute of limitations, which is to insure timely notice to adverse party so that party can assemble defense while facts are fresh). For guidance on the equitable tolling requirements codified in paragraphs (c)(1)-(c)(3), see Addison v. State of California, 21 Cal. 3d 313, 319, 578 P.2d 941, 146 Cal. Rptr. 224 (1978). Tolling does not continue during the pendency of an appeal, motion to overturn a settlement, or other review process, Laird v. Blacker, 2 Cal. 4th 606, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992), but the court can stay the malpractice case pending the outcome of the appeal or other effort to reverse the initial determination. Codification of the doctrine of equitable tolling in this section is not intended to in any way affect whether the doctrine applies to the limitations periods for other types of professional malpractice.

Subdivision (d) clarifies the limitations period where a client's damages consist of fees or expenses for professional advice relating to malpractice, as where a client consults a new attorney upon learning that a lawsuit on behalf of the client was not timely filed. It overturns Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 743-44, 746, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998), which holds that actual injury triggering the limitations period occurs upon incurring defense costs in an underlying action. Subdivision (d) also clarifies, however, that the plaintiff is entitled to recover all damages proximately caused by the attorney's negligence, not just damages incurred after actual injury is sustained. See generally *Jordache*, 18 Cal. 4th at 751 (attorney's fees incurred as direct result of another's tort are recoverable damages); see also *Fedderson*, 9 Cal. 4th 606, 626-27 (Kennard, J., concurring & dissenting) (malpractice may severely damage client even when underlying litigation terminates in client's favor).

Former subdivision (b), concerning the limitations period where an instrument in writing is effective on occurrence of a future act or event, is deleted as unnecessary and potentially confusing. See R. Mallen & J. Smith, Legal Malpractice, *Statutes of Limitations* § 21.5, p. 741 & n. 32 (4th ed. 1996).

Section 340.6 is also amended to make technical changes.

☞ **Staff Note.** Subdivision (b) of Section 340.6 now provides:

> In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

A leading treatise comments that this provision is "seemingly unnecessary and unclear", because the one-year and four-year periods of subdivision (a) have been construed to apply to claims on a contract. R. Mallen & J. Smith, Legal Malpractice, *Statutes of Limitations* § 21.5, p. 741& n. 32 (4th ed. 1996). Based on research conducted thus far, the staff tends to agree, but we are continuing to investigate this matter.
