Study J-111 September 26, 2000

Memorandum 2000-61

Statute of Limitations for Legal Malpractice: Estate Planning Issues

At the June meeting, the Commission considered a draft of a tentative recommendation on the statute of limitations for legal malpractice (Code Civ. Proc. § 340.6). The draft would have revised the statute to expressly incorporate the doctrine of equitable tolling (i.e., tolling the limitations period on a malpractice claim during the pendency of an underlying case). The Commission directed the staff to make certain revisions in the draft. The Commission also considered a proposal provided by Marshal Oldman of the State Bar Estate Planning, Trust, and Probate Law Section (the "Estate Planning, Trust, and Probate Law Section"). (Exhibit pp. 1-5.) The Commission decided to defer action on that proposal until the State Bar group completed work on it. We have since learned that (1) the group approved the proposal, and (2) the group would like the Commission to review the proposal in the context of this study. Thus, this memorandum describes and analyzes the proposal of the Estate Planning, Trust, and Probate Law Section.

STATUS OF THE PROPOSAL

After approving the proposal, the Estate Planning, Trust and Probate Law Section sent it to the State Bar Board of Governors for review and possible inclusion in the Bar's 2001 legislative program. The Board of Governors has not yet acted on the proposal. Mr. Oldman reports that if the Commission is interested in the proposal, the Estate Planning, Trust and Probate Law Section would prefer to have it incorporated in a comprehensive reform of Section 340.6 prepared by the Commission, rather than pursuing it as a separate measure sponsored by the Bar. This may be true even if the Commission does not introduce legislation on this topic until 2002, which appears likely given the status of this study.

BACKGROUND

Historically, estate planning attorneys were rarely subject to malpractice claims. Under the doctrine of privity, a beneficiary under a will could not sue the drafter for negligence in preparing the will, because the beneficiary did not have a contractual relationship with the drafter. Moreover, the malpractice statute of limitations ran from occurrence of the malpractice (the "occurrence rule"), not discovery of the malpractice (the "discovery rule"), so most claims for estate planning malpractice were time-barred before the client died and the malpractice was discovered. M. Begleiter, *Attorney Malpractice in Estate Planning — You've Got to Know When to Hold Up, Know When to Fold Up*, 38 U. Kan. L. Rev. 193, 194-95, 208-10 (1990).

Both the privity defense and the occurrence rule have been overturned. In the seminal case of *Lucas v. Hamm*, 56 Cal. 2d 583, 589, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), the Court concluded that extension of an attorney's liability to beneficiaries injured by a negligently prepared will would "not place an undue burden on the profession." A decade later, the Court decided that the statute of limitations for legal malpractice "should be tolled until the client discovers, or should discover his cause of action." *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 179, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

The Legislature promptly codified this rule by enacting Section 340.6, which establishes alternate limitations periods: (1) one year from when the plaintiff discovers, or should have discovered, the attorney's wrongful act or omission, or (2) four years from the date of the wrongful act or omission, whichever occurs first. Both the one-year and four-year periods are subject to tolling in specified circumstances, including tolling during the time that the plaintiff has not sustained "actual injury":

> 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.
>
> (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.

In the estate planning context, tolling may continue for many years, because "actual injury" typically does not occur until the client dies and the estate is distributed. *See Heyer v. Flaig*, 70 Cal. 2d 223, 230-34, 449 P.2d 161, 74 Cal. Rptr. 225 (1969). Consequently, litigation for estate planning malpractice has dramatically increased since the privity requirement abolished and Section 340.6 was enacted. *See* M. Begleiter, *First Let's Sue All the Lawyers — What Will We Get: Damages for Estate Planning Malpractice*, 51 Hastings L.J. 325, 326-28 (2000); M. Begleiter, *Attorney Malpractice in Estate Planning — You've Got to Know When to Hold Up, Know When to Fold Up*, 38 U. Kan. L. Rev. at 193-212.

PROBLEM ADDRESSED BY THE PROPOSAL

The "actual injury" tolling provision effectively subjects an estate planning attorney "to an open statute of limitations that may involve counsel in litigation decades after the work leading to the malpractice was performed." (Exhibit p. 2.) "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." (*Id.*) "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." (*Id.* at 2.)

Thus, the Estate Planning, Trust, and Probate Law Section reports that insurance companies are unwilling to provide affordable malpractice tail coverage to estate planners "since the liability is difficult to calculate and can appear at any time until one year after counsel's death." ((Email from Marshal

Oldman to Barbara Gaal (September 20, 2000) (hereafter, "Oldman email").) This means that "attorneys cannot retire without the risk that they will be subject to suit in later years." (Exhibit p. 2.) Moreover, uninsured attorneys "may be unable to answer adequately in damages if a large judgment is rendered." (Oldman email.) In short, "the current system only encourages litigation, does not give counsel a reasonable chance to retire, and leaves everyone without the coverage that can be provided only by insurance." (*Id.*)

DESCRIPTION OF PROPOSAL

The Estate Planning, Trust, and Probate Law Section proposes to address these problems by permitting an estate planning attorney to send a notice to a client that would limit the period in which the attorney could be sued for malpractice. Specifically, the group proposes to add the following provision to the Code of Civil Procedure:

> 340.8. 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 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.

A conforming revision would be made in Section 340.6. (Exhibit pp. 3-4.)

KEY FEATURES

Key features of the proposed reform include (1) the notice requirement, (2) the four year deadline for filing suit after mailing the prescribed notice, (3) the ability to select which clients receive the notice, and (4) the restriction of the proposal to estate planning.

Requirement of Notice

The proposed notice of termination would alert clients to the four year period in which to sue. It would also inform a client that counsel is withdrawing from the case and urge the client "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 counsel's representation. This encouragement to seek the advice of new counsel could generate estate planning work that clients might not otherwise request.

However, "[t]he reason that seeking the advice of new counsel was inserted in the notice was to advise the client that documents should be reviewed periodically and that the prior estate planning counsel will no longer take responsibility." (Oldman email.) "Since these documents are transitory and can be amended and corrected prior to becoming irrevocable," the notice would help ensure that errors are discovered while an inexpensive solution still exists. (*Id.*) This would benefit both clients and attorneys, as well as the overburdened legal system.

Length of the Statutory Period

Under the proposal, the mailing of a notice of termination ends "actual injury" tolling under Section 340.6. Thus, the client to whom the notice is directed has a maximum of four years (the longer of the limitation periods in Section 340.6) from the date of mailing in which to sue for malpractice. This four year deadline applies even if the client (or a beneficiary of the client) does not discover

the malpractice or sustain any damage from the malpractice before the deadline elapses.

The deadline is thus akin to a statute of repose, rather than a statute of limitation. While a statute of limitations "normally sets the time within which proceedings must be commenced once a cause of action accrues, the statute of repose limits the time within which an action may be brought and is not related to accrual." *Giest v. Sequoia Ventures, Inc.*, 83 Cal. App. 4th 300, 99 Cal. Rptr. 2d 476, 479 (2000). A statute of repose reflects a determination that "there comes a time when the benefits gained by an absolute barrier to suit outweigh the costs to potential claimants who are denied judicial redress." M. Byrne, *Let Truth Be Their Devise:* Hargett v. Holland *and the Professional Malpractice Statute of Repose*, 73 N. C. L. Rev. 2209, 2221 (1995). Statutes of repose "have been challenged on constitutional grounds with mixed results," *id.*, but a recent Supreme Court decision supports use of such a provision in federal securities cases, *see Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

A classic example of a statute of repose is Code of Civil Procedure Section 337.15, which establishes an absolute ten year deadline for suits for latent construction defects. The proposed four year deadline for estate planning malpractice is substantially shorter, but the notice requirement mitigates this to some extent by alerting clients to the deadline and encouraging them to have their estate plans reviewed for errors. Most statutes of repose do not include a notice requirement, so the potential plaintiff may be unaware of the deadline and oblivious to errors that would be obvious even on cursory review. Mr. Oldman of the Estate Planning, Trust, and Probate Law Section believes that a ten year deadline would be inappropriate in the group's proposal, because it "would defeat some of the major goals of the proposal such as focusing the client on document review and providing affordable tail coverage for retiring estate planners." (Oldman email.)

Selection of Clients to Receive Notice

The proposal would permit an attorney to select which clients receive a notice of termination. An attorney would not have to terminate all estate planning clients at once.

This flexibility is intended to allow counsel "to send a notice to clients who are out of touch while maintaining other files where the client remains in contact." (Oldman email.) It could also be used in other circumstances, however,

such as terminating liability to a client who is having financial difficulties and is unlikely to be a good source of business, while maintaining estate planning relationships with solvent clients.

The ability to pick and choose among clients is not essential to the goal of permitting estate planning attorneys to retire from such work and cut off their potential liability. But it may further other goals of the proposal, such as encouraging clients to have estate planning mistakes corrected before the harm becomes irreparable. The Estate Planning, Trust, and Probate Law Section is confident that safeguards could be developed to protect clients if the flexibility to pick and choose creates problems. (Oldman email.)

Restriction of Proposal to Estate Planning

The proposal would apply only to malpractice in estate planning, not to malpractice in other areas of practice. Mr. Oldman explains that the "difference between estate planning and other areas of transactional drafting is that estate planning involves the creation of a large number of transitory documents that are subject to revocation and amendment." (*Id.*) The statute of limitations "is tolled since no damage has accrued until the document has become irrevocable." (*Id.*) Counsel are thus "subject to an open ended statute of limitations that is as uncertain as it is incalculable." (Exhibit pp. 2-3.) Because the client retains the ability to correct errors during his or her lifetime, "much litigation may be avoided years later" by encouraging the client to seek a review of his or her estate plan. (Oldman email.)

In contrast, most other documents drawn by counsel, such as leases or other contracts, "are irrevocable at the time of execution." (Exhibit p. 2.) The Estate Planning, Trust, and Probate Law Section interprets cases such as *Jordache v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998), and *Hensley v. Caietti*, 13 Cal. App. 4th 1135, 16 Cal. Rptr. 2d 837 (1993), to mean that damage from malpractice in preparing an irrevocable document occurs at the time the document is executed, even though the damage may not be discovered until much later. (Exhibit p. 2; see also Oldman email.) Under this interpretation, the statute of limitations is triggered upon execution of the irrevocable document, so counsel are not subject to lengthy tolling.

The staff does not consider the situation so clear-cut. Case law on actual injury tolling under Section 340.6 has been in flux. (See Memorandum 2000-14; Memorandum 2000-43.) It is hard to predict how courts will apply the actual

injury rule in circumstances such as malpractice in preparing a long-term lease with an option to renew, or malpractice in drafting a right of first refusal on a piece of real property.

Nonetheless, problems of delay are probably most acute in the estate planning context, where a will or revocable trust is often drafted long before the client dies and the documentation causes harm. The benefits of encouraging clients to have their documents reviewed would also be greater in that context, because malpractice in preparing other types of documents is not readily corrected. Moreover, even if estate planning does not warrant special treatment, it may still make sense to address the concerns raised by the Estate Planning, Trust, and Probate Law Section. For example, perhaps there should be an absolute limit on tolling for all types of legal malpractice, not just malpractice in estate planning.

ALTERNATIVES

Options available to the Commission include:

(1) Incorporating the proposal of the Estate Planning, Trust and Probate Law Section into the Commission's own proposal on the statute of limitations for legal malpractice.

(2) Modifying one or more key features of the estate planning proposal, and incorporating the modified proposal into the Commission's proposal on the statute of limitations for legal malpractice. Possible modifications include eliminating the notice requirement, adjusting the proposed four year deadline, restricting counsel's ability to select clients for termination of liability, and extending the proposal to other areas of practice.

(3) Permitting a court to establish a trust to cover potential damages from an incident of estate planning malpractice, instead of tolling the limitations period until actual injury occurs. See M. Begleiter, *First Let's Sue All the Lawyers — What Will We Get: Damages for Estate Planning Malpractice*, 51 Hastings L.J. 325, 361-63 (2000). Because estate planning errors may be correctable before a client's death, this approach would primarily if not exclusively apply where beneficiaries seek redress for malpractice that has been discovered but has not yet resulted in non-speculative damages. The staff can provide additional information on this approach if the Commission is interested in pursuing it.

(4) Doing nothing to address the concerns of the Estate Planning, Trust, and Probate Law Section.

RECOMMENDATION

Determining whether to proceed with the estate planners' proposal or with some other approach requires balancing of competing policies. Among the critical policy considerations are:

- The interest in affording clients and their beneficiaries an effective remedy for estate planning malpractice.
- The interest in litigating cases while memories are fresh, evidence is accessible, and witnesses are available.
- The interest in guaranteeing repose, affording a measure of certainty and stability in planning for the future.
- The interest in judicial economy, avoiding unnecessary litigation of malpractice claims and unnecessary legal work. To the extent that the proposal would prevent malpractice claims by prompting correction of documents before harm occurs, it would further this interest. To the extent that the proposal would force early assertion of malpractice claims that may ultimately prove unnecessary due to lack of damage, or cause unnecessary review of documents, it would undermine judicial economy.
- The interest in ensuring that affordable malpractice insurance is available, for the benefit of attorneys (who seek security against liability), clients (who may be forced to bear the cost of high insurance rates), and victims of malpractice (who may be unable to recover if a large judgment is entered against an uninsured attorney).

The Commission needs to determine how much weight to give to these or other relevant policy concerns, and how to achieve an appropriate balance. Due to its lack of self-interest, the Commission may have greater credibility on these issues, and hence more likelihood of success in addressing them, than the Estate Planning, Trust, and Probate Law Section. Choosing from the available options may be easier after hearing from that group and other interested parties at the Commission's meeting. Once the Commission has made the key policy decisions, the staff will consider the best means of implementing the Commission's approach.

If the Commission decides to proceed with the estate planning proposal, a number of technical issues deserve attention:

Trigger for Statutory Period

Proposed Section 340.8 states in part that the notice of termination would be "effective to commence the statute of limitations to run at such time that the notice has been deposited in the United States mail." The provision also states, however, that an attorney may end actual injury tolling under 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*." (Emphasis added.)

It is not clear to the staff how courts would interpret this language. Is the attorney supposed to send the client's file and other documents to the client together with the notice of termination? Or is the client supposed to contact the attorney upon receiving the notice, to make arrangements for transfer of the file and other documents? If the file and other documents are transferred after receiving the notice of termination, then does four year period run from date of mailing the file and other documents to the client? From date the client receives the file? From the date of mailing the notice of termination?

To avoid unnecessary litigation, **the proposal needs to be more clear on these points.** Assuming that the client is supposed to request the file from the attorney after receiving the notice, **there should also be some protection for the client if the attorney fails to provide access to the file** within a reasonable time after the client requests it.

Interrelationship of Deadlines

A notice of termination pursuant to proposed Section 340.8 would state in part that "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*." (Emphasis added.) Regardless of whether the four years runs from the mailing of the notice or the transfer of the client's documents, this language gives the impression that the deadline will elapse no sooner than four years from the mailing of the notice.

In fact, however, a notice of termination and tender of documents pursuant to proposed Section 340.8 would only terminate actual injury tolling under Section 340.6(a)(1). As currently drafted, the provision does not appear to: (1) override the one-year-from-discovery rule, or (2) lengthen the four year limitations period under Section 340.6 if that period has already commenced. Consequently, the client may have substantially less than four years from the mailing of the notice of termination in which to sue. **The proposed notice should be revised to make this clear**, so that clients are not misled into thinking they necessarily have a full four years from the mailing of the notice (or even longer) to decide whether to sue.

It is also necessary to clarify the impact of proposed Section 340.8 on the tolling rules of Section 340.6(a)(2)-(a)(4) (continuous representation, willful concealment, and legal or physical disability). Suppose, for instance, that a client is under a legal or physical disability at the time of receiving a notice of termination, or sometime thereafter. Does a malpractice claim have to be asserted within four years from the mailing of the notice, regardless of the legal or physical disability? To prevent needless litigation, this issue should be resolved upfront.

Due Diligence

Proposed Section 340.8(a) states in part that the notice of termination "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*." (Emphasis added.) This may be unduly harsh on the client, particularly where the notice is returned to the attorney as undeliverable and obtaining a new address for the client would not be difficult. **It might be more appropriate to require the attorney to use due diligence to locate the client and attempt to ensure that the notice actually reaches the client**. The Estate Planning, Trust, and Probate Law Section "would not object to that concept." (Oldman email.) Possibly, however, "the statute should also encourage clients to keep counsel informed of their whereabouts so that notices can be given efficiently." (*Id.*)

OTHER DEVELOPMENTS

In addition to the estate planning proposal, the State Bar is considering another proposal on the limitations period for legal malpractice, which was

drafted by the San Diego County Bar Association (the "San Diego proposal"). (Exhibit pp. 6-7.) This proposal would address the simultaneous litigation problem that the Commission has been examining. It would amend Section 340.6 to toll the limitations period "until the underlying case or administrative matter has been finally determined." In other words, tolling would continue until the underlying case is fully resolved on appeal.

This is similar to the approach that the Commission has been considering, but the Commission has not yet resolved whether tolling should continue (1) only until the trial court resolves the underlying case, or (2) until the underlying case is fully resolved through any appeal. Rather, the Commission has directed the staff to prepare alternative drafts and solicit input on which draft is preferable. Minutes (June 22-23, 2000), p. 10.

The San Diego proposal was approved by Conference of Delegates and is being sent to the Board of Governors for consideration. It is not yet clear what action the State Bar will take. Unless the Commission otherwise directs, the staff will track that proposal, but also continue working on this study.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Exhibit

PROPOSAL OF STATE BAR ESTATE PLANNING, TRUST, AND PROBATE LAW SECTION

To: State Bar

Re: Project No. 00-05

SECTION / COMMITTEE AND CONTACT

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

Author: Marshal A. Oldman
16133 Ventura Blvd., PHA
Encino, CA 91436
(818) 986-8080; (818) 789-0947 (fx)

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:

Marshal A. Oldman
16133 Ventura Boulevard, PHA
Encino, CA 91436
(818) 986-8080
(818) 789-0947 (fax)
Marold @ aol.com

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; and (5) the underlying case in which the wrongful act or omission occurred is on appeal and a final decision has not been rendered in the appeal. (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.

or administrative matter has been finally determined.

(Proposed new language is underlined; language to be deleted is stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

language approved by the Conference of Delegates

Existing Law: Code of Civil Procedure does not toll the statute of limitations on an action against an attorney for malpractice although damages may be uncertain because the underlying case is on appeal.

This Resolution: This resolution would toll the limitations period in attorney malpractice actions during any period that the underlying action was on appeal until the case is decided or rejected.

The Problem: Laird v. Blacker (1992) 2 Cal. 4th 606, cert. den. 506 U.S. 1021 held that the statute of limitations for a legal malpractice action is not tolled by an appeal of the underlying action. However, actual injury is never determined until any possible appeal is decided. Also, cooperation between any new counsel substituted in to do the appeal and the trial counsel at issue is unlikely without a tolling, which disadvantages the client on appeal. The courts of appeal clearly dislike this rule because it has been disagreed with, distinguished, or otherwise not followed in 12 published cases to date.

IMPACT STATEMENT: This proposed resolution does not affect any other law, statute, or rule.

AUTHOR AND/OR PERMANENT CONTACT: Robert H. Lynn, 2550 Fifth Ave., #330, San Diego, CA 92101, (619) 234-5488, rlynn@lsslawfirm.com

RESPONSIBLE FLOOR DELEGATE: Robert H. Lynn

RESOLUTION 02-09-00

DIGEST

Attorney Malpractice: Tolling of Statutue of Limitations on Appeal

Amends Code of Civil Procedure section 340.6 to toll the limitations period for a legal malpractice action while the underlying judgment is being appealed.

RESOLUTIONS COMMITTEE RECOMMENDATION:

APPROVE IN PRINCIPLE

Reasons:

This resolution amends Code of Civil Procedure section 340.6 to toll the limitations period for a legal malpractice action while the underlying judgment is being appealed. It should be approved because, if successful, appellate review of the adverse judgment resulting from the alleged malpractice may resolve the need for a malpractice action by reducing or eliminating the plaintiff's damages.

Generally, the victim of legal malpractice suffers damage through the entry of an adverse judgment. Under current law, the statutory limitation period usually begins to run when that judgment is entered. Although that damage will be mitigated in whole or in part if the judgment can be reversed on appeal, the law presently does not toll the limitations period to see whether the appeal will be successful. As a result, the injured client must promptly file a malpractice action even while the appeal is still pending, before the plaintiff can know either the full extent of his or her damages, or whether the alleged malpractice caused any permanent damages at all.

Currently, section 340.6 sets for four different circumstances under which the limitation period is tolled. If the pendency of an appeal of the underlying adverse judgment is added as a fifth circumstance, it will no longer be necessary for the client to litigate on two fronts simultaneously by prosecuting both an appeal of the underlying judgment and a potentially unnecessary action for legal malpractice. The amendment makes good practical sense.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that the Code of Civil Procedure Section 340.6 be amended to read as follows:

§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) 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