Study J-111 March 26, 2001

Memorandum 2001-30

Statute of Limitations for Legal Malpractice: Burden of Proving Time of Discovery

In its study of the statute of limitations for legal malpractice (Code Civ. Proc. § 340.6), the Commission is in the process of preparing a tentative recommendation. The Commission is exploring a number of different issues, including:

(1) Whether to toll the malpractice limitations period while related litigation is pending (the "simultaneous litigation problem").

(2) Whether to make revisions as to the burden of proving when the plaintiff discovered or should have discovered the facts constituting the malpractice. See *Samuels v. Mix*, 22 Cal. 4th 1, 989 P.2d 701, 91 Cal. Rptr. 2d 273 (1999).

(3) Whether to change the types of cases to which the statute applies. See *Knoell v. Petrovich*, 76 Cal. App. 4th 164, 90 Cal. Rptr. 2d 162 (1999) (Section 340.6 inapplicable to defamation claim by non-client); *Crouse v. Brobeck, Phleger & Harrison*, 67 Cal. App. 4th 1509, 80 Cal. Rptr. 2d 94 (1998) (Section 340.6 inapplicable to equitable indemnity claim).

(4) Whether to craft special rules for estate planning malpractice.

This memorandum focuses on the second issue: Who should bear the burden of proving when the plaintiff discovered or should have discovered the facts constituting legal malpractice?

(Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.)

BACKGROUND

Samuels v. Mix, 22 Cal. 4th 1, 989 P.2d 701, 91 Cal. Rptr. 2d 273 (1999), is the key decision on the burden of proving the time of discovery of legal malpractice. Some background information is in order before discussing that decision.

Occurrence Rule

Before Section 340.6 was enacted in 1977, actions for legal malpractice were generally governed by the two-year statute of limitations in Section 339. That provision was construed such that the limitations period began to run at the time of the negligent act (the "occurrence rule"). See, e.g., *DeGarmo v. Luther T. Mayo, Inc.*, 4 Cal. App. 2d 604, 606, 41 P.2d 366 (1935). There was also authority that the limitations period did not begin to run until injury from the malpractice occurred. See *Heyer v. Flaig*, 70 Cal. 2d 223, 231, 233-34 (1969). But it was generally accepted that ignorance of the malpractice (even excusable ignorance) did not delay the running of the limitations period. See, e.g., *Griffith v. Zavlaris*, 215 Cal. App. 2d 826, 830-31, 30 Cal. Rptr. 517 (1963). That rule was criticized as unduly harsh. See, e.g., *id.*

Discovery Rule

As early as 1936, the California Supreme Court took a different approach in the area of medical malpractice. It established what became known as the "discovery rule," under which the statute of limitations does not run against an injured person "during the time said person was in ignorance of the cause of his disability and could not with reasonable care and diligence ascertain such cause." *Huysman v. Kirsch*, 6 Cal. 2d 302, 57 P.2d 908 (1936). That rule was later applied to other types of malpractice (e.g., accounting malpractice) and adopted in other jurisdictions.

In *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971), the California Supreme Court extended the discovery rule to legal malpractice: "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." *Id.* at 194.

The court explained that a lawyer has special expertise and thus a client may not "recognize the negligence of the professional when he sees it." *Id.* at 188. Further, a client often will lack any opportunity to detect the attorney's negligence, because much an attorney's work is "performed out of the client's view." *Id.* Finally, a lawyer is the client's fiduciary. "The duty of a fiduciary embraces the obligation to render a full and fair disclosure" to the client. *Id.* at 188-89. "Postponement of accrual of the cause of action until the client discovers, or should discover, the material facts in issue vindicates the fiduciary duty of full

disclosure; it prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation to do so." *Id.* at 189.

In extending the discovery rule to legal malpractice, the court recognized that its ruling would "impose an increased burden upon the legal profession." *Id.* 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.* But "when an attorney raises the statute of limitations to occlude a client's action before that client has had a reasonable opportunity to bring suit, the resulting ban of the action not only starkly works an injustice upon the client but partially impugns the very integrity of the legal profession." *Id.*

The court suggested that an outer limit on liability for legal malpractice might be appropriate:

> We realize the possible desirability of the imposition of some outer limit upon the delayed accrual of actions for legal malpractice. Section 340.5, which governs actions for medical malpractice, states a limit of one year from discovery but provides a four-year absolute limit absent a showing of concealment of material facts by the defendant. *A similar, but possibly longer, absolute limit may be desirable in actions for legal malpractice* ….

Id at 192-93 (emphasis added).

Section 340.6

In 1977, the Legislature enacted Section 340.6 in response to *Neel*. As the court suggested, the statute was modeled on the provision for medical malpractice (Section 340.5). See Assembly Judiciary Committee analysis (May 12, 1977) of AB 298 (Brown), at 3; Fact Sheet (March 25, 1977) on AB 298 (Brown); *Review of Selected 1977 California Legislation*, 9 Pac. L.J. 281, 676 (1978).

As originally enacted and still in force, the statute 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.
>
> (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 statute does not specify which party bears the burden of proving when the plaintiff discovered, or through the use of reasonable diligence should have discovered, the facts constituting the malpractice.

Burden of Proof

The Evidence Code distinguishes between "the burden of *proving a fact* and the burden of *going forward* with the evidence." Evid. Code § 110 Comment. The "burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." Evid. Code § 115. For example, in a criminal case the prosecution must prove each element of the crime beyond a reasonable doubt. The burden of proof never shifts during trial.

The "burden of producing evidence" means the "obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." Evid. Code § 110. "At the outset of the case, this burden will coincide with the burden of proof." Evid. Code § 550 Comment. But the burden of producing evidence may shift during trial. For example, where the party with the initial burden of producing evidence establishes a fact giving rise to a presumption in favor of that party on the issue, the burden of producing evidence shifts to the other party. *Id.*

Samuels v. Mix focuses on who bears the burden of proof for purposes of applying the one-year limitations period of Section 340.6. Must the plaintiff prove when the client discovered, or should have discovered, the facts constituting legal malpractice, or must the defendant bear this burden?

SAMUELS V. MIX: FACTS AND PROCEDURAL HISTORY

In *Samuels v. Mix*, the plaintiff suffered from a disease that she attributed to ingestion of a drug called L-tryptophan. She retained an attorney to represent her in a personal injury lawsuit against the drug manufacturer. The attorney advised her to accept a settlement offer of $400,000, which she did. Thereafter, however, her medical condition worsened. In October 1991, she met briefly with a second attorney about the possibility of reopening her case against the drug manufacturer. Just over one year later, in October 1992, she brought suit against the first attorney, alleging that he had negligently advised her to settle her personal injury claim for an inadequate amount.

The attorney-defendant asserted that the plaintiff's claim was time-barred, because she filed it more than one year from when she discovered, or through reasonable diligence should have discovered, the facts constituting the alleged malpractice. At trial, the judge instructed the jury that the plaintiff had the burden of proving that the lawsuit was timely filed. The jury specially found that she had "failed to commence her suit within one year from the date she discovered, or through the use of reasonable diligence should have discovered, the facts constituting [the attorney-defendant's] wrongful act or omission." *Samuels v. Mix*, 22 Cal. 4th at 6.

The plaintiff appealed and the court of appeal reversed, holding that the burden of proof instruction was erroneous. The defendant filed a petition for review by the California Supreme Court, which was granted.

SAMUELS V. MIX: MAJORITY OPINION

The Supreme Court affirmed the judgment of the court of appeal. It held that for purposes of applying the one-year limitations period of Section 340.6, *the defendant* bears the burden of proving when the plaintiff discovered, or through the use of reasonable diligence should have discovered, the facts constituting the alleged legal malpractice. 22 Cal. 4th at 5.

The court based its decision on five separate grounds: three legislative intent analyses and two policy assessments. Each ground is discussed below, beginning with the three analyses focusing on the statutory language and legislative history.

Plain Language

The court's first and foremost argument was based on the plain language of Section 340.6 and Evidence Code Section 500. The court pointed out that Section 340.6 establishes an affirmative defense of the statute of limitations. *Id.* at 7. Under Evidence Code Section 500, the defendant normally bears the burden of proof on an affirmative defense: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Here, the court construed the one-year limitations defense of Section 340.6 to require proof of the time of discovery of the facts constituting malpractice. "In plain language, section 340.6(a) makes essential to that defense the fact that any attorney malpractice action against which it is invoked was not '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 ...." *Id.* The court thus concluded that the attorney-defendant bears the burden of proving the time of discovery, because Section 340.6 must be construed "in accordance with its plain language ... and the normal allocation of the burden of proof established by the Legislature ...." *Id.* at 7-8.

Common Law Discovery Rule

In *Laird v. Blacker*, 2 Cal. 4th 606, 611, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992), the court commented that "when the Legislature adopted section 340.6 in 1977, it implicitly ... codified the discovery rule of *Neel* ...." Relying on that remark, the defendant in *Samuels v. Mix* contended that "in enacting section 340.6, the Legislature intended that burdens of proof thereunder be allocated just as they have been allocated under the common law discovery rule ...." 22 Cal. 4th at 9. The defendant thus maintained that the plaintiff bears the burden of proving the time of discovery under Section 340.6, because "in applying the common law discovery rule, California courts generally have burdened plaintiffs with justifying any undue delay in filing their complaints." *Id.* at 10; see, e.g., *April Enterprises, Inc. v. KTTV*, 147 Cal. App. 3d 805, 832-33, 195 Cal. Rptr. 421 (1983).

The Supreme Court disagreed. It rejected "the sweeping notion that all common law appendages to the discovery rule are automatically pertinent under section 340.6." *Samuels v. Mix*, 22 Cal. 4th at 12. Rather, "the Legislature clearly intended more than merely to codify the common law discovery rule, because section 340.6(a), even absent discovery, absolutely cuts off actions after a

specified period ('four years from the date of the wrongful act or omission')." *Id.* Further, the discovery rule "runs in favor of the plaintiff by enlarging his or her time without a set limit," but the one-year alternate limitations provision of Section 340.6 "runs in favor of the defendant by cutting off the plaintiff's time definitively." *Id.* at 10. Because the one-year alternate period under Section 340.6 is a statute of limitations, the court concluded that "a defendant must prove the facts necessary to enjoy its benefit." *Id.*

The court cautioned that a contrary result (incorporating the discovery rule's exception to the normal burden of proof) could impinge on legislative prerogatives:

> While our judicially engrafting section 340.6(a) with the common law discovery rule's exception to the normal burden of proof might not directly invade the Legislature's exclusive province to specify limitations periods, it well might indirectly do so. This is because such a judicially recognized exception risks disturbing the policy balance among the various societal interests that the Legislature achieved when enacting the statute, including the interests in hearing meritorious malpractice suits, extinguishing stale claims, and avoiding consumer costs attendant on indefinite malpractice exposure.

Id. at 13.

Analogy to Fraud Claims

The defendant in *Samuels v. Mix* also sought to draw an analogy between Section 340.6 and the statute of limitations for fraud claims. "[A]s plaintiffs in some fraud actions are required, in order to avoid the three-year limitation on commencement of such actions found in Code of Civil Procedure section 338, subdivision (d), … to plead and prove their reasonably delayed discovery of the conduct they allege to constitute fraud, … and as section 340.6(a) is worded somewhat similarly to section 338(d), plaintiff here should face a similar requirement." 22 Cal. 4th at 14.

The Supreme Court determined, however, that there were "fundamental differences in provenance, structure and function between the discovery provisions of section 338(d) and section 340.6(a) …." *Id.* at 17. Thus, the court could not conclude that "the latter's plain language is somehow trumped by a judicial gloss relating to the former, so as to determine the burden of proof

question presented in this case." *Id.* Instead, the court was compelled to "construe section 340.6 on its own terms." *Id.*

Fairness

The court next considered a policy argument. The defendant contended that even if "the Legislature did not specifically intend section 340.6 to incorporate the common law discovery rule's entire related jurisprudence, [the court] should declare as a matter of fairness and judicial policy that proof burdens under the statute are the same as under the common law rule." *Id.* at 17. In advancing this argument, the defendant stressed that "fundamental fairness" is the "lodestar" in allocating the burden of proof. *Id.*; see, e.g., *Adams v. Murakami*, 54 Cal. 3d 105, 119-20, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991). As explained in the Law Revision Commission's Comment to Evidence Code Section 500,

> The general rule allocating the burden of proof applies "except as otherwise provided by law." The exception is included in recognition of the fact that the burden of proof is sometimes allocated in a manner that is at variance with the general rule. In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact. In determining the incidence of the burden of proof, "the truth is that there is not and cannot be any one general solvent for all cases. *It is merely a question of policy and fairness based on experience in the different situations.*" 9 Wigmore, Evidence 2486 at 275 (3d ed. 1940).

(Emphasis added.) (The full text of the Comment is reproduced at Exhibit pp. 1-2.)

The court rejected the notion that fairness considerations favored the defendant. "[I]nsofar as general considerations of fairness may be thought to bear, they suggest the defendant appropriately is burdened with proving all the elements of section 340.6(a)'s one-year-from-discovery defense." *Samuels v. Mix*, 22 Cal. 4th at 19. Because the common law discovery rule generally benefits plaintiffs, "it has been thought fair to burden them with proving its elements." *Id.* at 18. But that reasoning "supports plaintiff's position in this case, not defendant's." *Id.* The court explained:

> Section 340.6 sets up two alternative limitations periods, and defendants are just as fairly burdened with proving entitlement to the more beneficial one-year period as they are with proving entitlement to the less beneficial four-year period. When the applicability of the one-year period is at issue, *the defendant* is the one who seeks to shorten the limitations period that would otherwise apply. "The general rule has long been that '*He who takes the benefit must bear the burden*.'"

Id. (emphasis added; citations omitted).

Access to Evidence

The defendant further argued that "facts demonstrating a typical attorney malpractice plaintiff's knowledge of a typical defendant's malpractice *are likely to exist peculiarly within the plaintiff's access and control*." *Id.* at 19 (emphasis added). The defendant therefore urged the court to declare as a matter of policy "that the burden of proving such facts, when relevant under section 340.6, belongs to the plaintiff." *Id.*

The court rejected this proposed basis for deviating from Evidence Code Section 500's normal allocation of the burden of proof. The court asserted that it was not authorized to weigh the competing policies: "In light of Evidence Code section 500's mandate and the plain language of section 340.6(a), we need not strain to discern (because we are not free to impose) a universally 'desirable result in terms of public policy' … for all section 340.6(a) disputes." *Id.* at 20 (citation omitted). The court also questioned the premise that a legal malpractice plaintiff typically has better access than the defendant to evidence regarding the one-year limitations period under Section 340.6. "[T]he record in this case reveals no superior or enhanced access to evidence of plaintiff's part." *Id.* Further, "to the extent section 340.6(a)'s one-year-from-discovery limitations period may be triggered by a circumstance having no necessary relation to the plaintiff's actual state of mind — namely, that the plaintiff 'through the use of reasonable diligence should have discovered' the defendant's wrongful conduct — no reason appears for assuming that, in any given case, 'knowledge … concerning the particular fact' … or facts actually triggering the limitations period will lie within one party's grasp but not the other's." *Id.* (citation omitted). These remarks prompted a vigorous dissent by Justice Baxter.

Justice Baxter criticized both the majority's legislative intent analysis and its policy assessments.

Legislative Intent

With regard to legislative intent, Justice Baxter characterized the majority's "semantic analysis" of Section 340.6 as "overliteral and exaggerated." *Id.* at 24 (Baxter, J., dissenting). He further observed that the majority's holding "contravenes a long line of California decisions, including cases interpreting the identically structured limitations statute for medical malpractice (§ 340.5)." *Id.* at 23. "These authorities consistently hold that where a limitations period runs from the time of the plaintiff's discovery, *he* bears the burden of showing his suit was filed within the requisite time after discovery occurred." *Id.* (emphasis in original). According to Justice Baxter, the "history of section 340.6(a), its language, and its subsequent construction by this court demonstrate that the Legislature intended no radical *departure* from traditional delayed-discovery rules." *Id.* at 24 (emphasis in original). "Indeed, the Legislature's manifest aim was to adopt the common law delayed-discovery rule [the court] had already announced for legal malpractice, subject only to exceptions [the court] had invited the Legislature to impose" (i.e., the four-year outer limit suggested in *Neel*). *Id.*

Access to Evidence

Justice Baxter further explained that even if he "agreed that the structure of section 340.6(a) is materially distinct from other common law and statutory delayed-discovery rules, [he] would apply the 'escape clause' of Evidence Code section 500, and would thus retain, for attorney malpractice, the traditional burden of proving when the claim was discovered." *Id.* at 26. Relying on the Law Revision Commission's Comment to Evidence Code Section 500, he explained that courts consider a number of factors in deciding whether to depart from the general rule of burden allocation stated in the statute, including the knowledge of the parties concerning the particular fact and the availability of the evidence to the parties. *Id.* The established exception for the common law discovery rule is "amply supported by the principle that one should usually not have to defend himself by proving facts *peculiarly within his opponent's knowledge*." *Id.* at 23

(emphasis in original). According to Justice Baxter, that principle "applies with particular force where a claim of legal malpractice is asserted." *Id.*

In his view, the defendant in a legal malpractice case "faces unique and unfair difficulties if forced to prove the time of his opponent's actual or constructive discovery." *Id.* at 27. Justice Baxter explained:

> This is because discovery of one lawyer's malpractice will most often arise, as it did here, from the substance of the client's consultations with *another attorney*. Proof of the time of discovery will thus depend, as it did here, on the content of those interviews. But such attorney-client communications and confidential and privileged by law. (Evid. Code, § 954.) Unless the client waives the privilege, neither he nor the attorney he consulted can be compelled to disclose the substance of their discussions.
>
> If the *client* bears the burden of proving when the malpractice claim was discovered, as the trial court ruled here, he may feel obliged, as plaintiff Samuels did here, to present evidence about the timing and nature of his consultations with a second lawyer. But if, as the majority hold, that burden rests with the attorney sued, there is no necessity, and no incentive, for the client to waive the privilege to aid his adversary in establishing a limitations defense. No lawyer worth his salt would allow his client to do so. Thus, it is unclear at best how an attorney sued for malpractice will be able to sustain his burden of proving when the client's discussions with a second lawyer led to actual or constructive discovery of the malpractice claim.

Id. at 27-28 (emphasis added). In short, "the time of the plaintiff's actual or constructive discovery may, and often will, depend on what information he obtained, and when he obtained it, from *confidential and absolutely privileged* consultations with another attorney." *Id.* at 23 (emphasis in original). The defendant may therefore be left "without any opportunity" to show that the plaintiff's claim is untimely. *Id.* Justice Baxter refused to "vote to place an attorney sued for malpractice in such a legal and practical bind." *Id.*

SAMUELS V. MIX: REBUTTAL TO JUSTICE BAXTER

In a footnote, the *Samuels v. Mix* majority sought to rebut Justice Baxter's argument that the attorney-client privilege will impede legal malpractice defendants from establishing when the plaintiff discovered, or reasonably should have discovered, the facts constituting malpractice. 22 Cal. 4th at 20 n.5. The court made five points:

(1) "We decline to assume that a malpractice plaintiff will misrepresent, under oath, the date on which he discovered the facts underlying his action." *Id.*

(2) The attorney-client privilege does not protect the time, date, and names of the participants in a confidential communication. The defendant may thus establish when the plaintiff first conferred with another attorney regarding the gravamen of the legal malpractice claim, "in order to suggest a fact finder should discount the plaintiff's protestations of ignorance." *Id.*

(3) A plaintiff "who exposes any significant part of a communication in making his own case waives the privilege with respect to the communication's contents bearing on discovery, as well. (Evid. Code, § 912, subd. (a).) *Id.*

(4) Any communication "by the second lawyer with the defendant seeking, on behalf of the client, remedies for the alleged malpractice, would not be privileged and would, itself, constitute persuasive evidence regarding the time of discovery." *Id.*

(5) If the second lawyer provides an expert opinion in the malpractice case, he "may be cross-examined to the same extent as any other witness." *Id.*

The court further explained that "[a]ny residual proof difficulty facing attorney malpractice defendants under the one-year-from-discovery period of section 340.6(a) is a consequence of the existing legislative policy balance, since, as we have demonstrated, the defendants' burden to prove its elements follows from the statute's plain language and Evidence Code section 500." *Id.*

LEGAL COMMENTARY AND LAW OF OTHER JURISDICTIONS

The staff has searched for legal commentary or cases from other jurisdictions that shed light on the burden of proof issue addressed in *Samuels v. Mix*. We have not found anything particularly helpful. There are cases discussing who bears the burden of proving, for purposes of the statute of limitations for legal malpractice, when a client became aware of, or should have become aware of the attorney's misdeed. Those cases consistently place the burden on the client, not the attorney. But the statutes in those cases differ from California's. We were unable to find any such decision involving a provision structured like Section 340.6, much less one that discusses in detail why the burden of proving the time of discovery in that context should be allocated in a particular manner.

That is not too surprising, because states have taken a great variety of approaches to the limitations period for legal malpractice. 2 R. Mallen & J. Smith, Legal Malpractice *Statutes of Limitations* § 21.2, at 731-32 (4th ed. 1996). Only a minority of jurisdictions have adopted a statute of limitations that specifically refers to attorney malpractice. *Id.* § 21.8, at 762. In other states, the limitations period for legal malpractice is governed by a provision governing professional malpractice generally, or by limitations provisions for specific types of actions (e.g., the statute of limitations for a liability not founded on an instrument in writing). *Id.* §§ 21.3-21.7, at 733-50. The occurrence rule (under which the limitations period begins to run as soon as malpractice occurs) used to be widespread, but has been abandoned or modified in almost all jurisdictions. *Id.* § 21.10, at 776. In most states, including California, the limitations period is tolled until the malpractice results in injury (the "damage rule"). *Id.* § 21.11, at 776. California and some other jurisdictions also toll the limitations period while the allegedly errant attorney continues to represent the client (the "continuous representation rule"), *id.* § 21.12, at 815, 817-18, or fraudulently conceals the malpractice (the "fraudulent concealment rule"), *id.* § 21.13, at 829. In addition, many states have adopted some variant of the discovery rule. *Id.* § 21.14, at 836-39. California's hybrid approach (establishing a limitations period of one-year-from-discovery or four-years-from-occurrence, whichever is sooner) is used in a number of jurisdictions, with variations. See, e.g., La. Rev. Stat. Ann. § 9:5605 (legal malpractice action shall be brought "within one year from the date of the alleged act, omission, or neglect, or within one year from the date of that the alleged act, omission, or neglect is discovered or should have been discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect"); Mont. Code Ann. § 27-2-206 (legal malpractice action "must be commenced within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the act, error, or omission, whichever occurs last, but in no case may the action be commenced after 10 years from the date of the act, error, or omission).

With regard to tolling for fraudulent concealment, there is abundant authority that *the client* must show that the attorney fraudulently concealed the malpractice. See, e.g., *Lambert v. Stark*, 484 N.E.2d 630 (Ind. App. 1985); *Greene v. Morgan, Theelet, Cogley & Petersen*, 1998 S.D. 16, 575 N.W.2d 457 (1998); R. Mallen & J. Smith, *supra*, § 21.13, at 829. The attorney need only establish the affirmative

defense of the statute of limitations, then the burden is on the client to prove a basis for tolling. R. Mallen & J. Smith, *supra*, § 21.13, at 829 (attorney must establish each element of limitations defense, but client "must establish any doctrine relied upon to toll a statute of limitations").

But the concept of tolling for fraudulent concealment is distinct from the concept of delaying commencement of the limitations period until the plaintiff discovers, or reasonably should have discovered, the facts constituting malpractice. Discovery of legal malpractice may be delayed for reasons other than fraudulent concealment by counsel (e.g., where the attorney misses the statute of limitations due to a heavy caseload, both the attorney and the client may be oblivious to the error for a considerable time). Section 340.6 expressly incorporates both the concept of tolling for fraudulent concealment and the concept of delaying commencement of the limitations period until the plaintiff discovers, or reasonably should have discovered, the facts constituting malpractice. Case law on the former concept is not necessarily relevant to who bears the burden of proof regarding when the plaintiff discovered, or reasonably should have discovered, the facts constituting malpractice.

Similarly, there is extensive authority that where the discovery rule *extends* the period in which to sue, and suit is filed "after the apparent expiration [of] the statute of limitations, *the plaintiff* will be required to both plead and prove facts explaining the lack of discovery." R. Mallen & J. Smith, *supra*, § 21.15, at 846-47 (emphasis added); see, e.g., *K73 Corp. v. Stancati*, 174 Mich. App. 225, 435 N.W.2d 433 (1988) (where limitations period is *later of two* years from occurrence of legal malpractice or 6 months from time of discovery, client bears burden of proof as to time of discovery); *Leighton Avenue Office Plaza, Ltd. v. Campbell*, 584 So.2d 1340, 1344 (Ala. 1991) (where two-year limitations period is extended "if the cause of action is not discovered and could not reasonably have been discovered within such period," client must show lack of discovery). "A defendant who has established that the suit is barred cannot be expected to anticipate the plaintiff's defenses to that bar." *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988). "The party seeking to benefit from the discovery rule must … bear the burden of proving and securing favorable findings thereon." *Id.* "The party asserting the discovery rule should bear this burden, as it will generally have greater access to the facts necessary to establish that it falls within the rule." *Id.*

There is even authority clarifying that this allocation of the burden applied in California after the discovery rule was adopted in *Neel* but before the Legislature

enacted Section 340.6. "California courts impose a heavy burden upon plaintiffs who … bring their action after the apparent expiration of the statute of limitations." *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 633 n. 3 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir. 1981), *cert. denied*, 454 U.S. 1126 (1981). In a legal malpractice action, *the plaintiff* must plead and prove facts showing (1) lack of knowledge, (2) lack of means of obtaining knowledge (i.e., evidence that in the exercise of reasonable diligence the facts could not have been discovered earlier), and (3) how and when the client did actually discover the fraud or mistake. *Id.*

But we have been unable to find any decision or legal literature analyzing the burden of proof for a provision closely similar to Section 340.6: One where proving the time of discovery can be said (or at least arguably be said) to benefit *the attorney defendant*, rather than the plaintiff, by establishing the shorter of alternate limitations periods. The out-of-state authorities are thus of limited relevance in the matter at hand.

ANALYSIS

In determining how to proceed, what *is* critical for the Commission's purposes is to focus on the competing policy considerations. While the courts must seek to discern the legislative intent underlying the current version of Section 340.6, the Commission's role is to advise the Legislature on the best policy to implement in the future, consistent with constitutional constraints. Thus, the legislative intent analyses in *Samuels v. Mix* are comparatively unimportant here. The policy arguments relating to fairness and access to evidence are of greater concern.

Guiding Principles

As a threshold matter, the Commission should recognize that an affirmative defense based on the statute of limitations "should not be characterized … as either 'favored' or 'disfavored.'" *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397, 981 P.2d 79, 87 Cal. Rptr. 2d 453 (1999). The interests in repose and in disposition of the merits "are equally strong, the one being no less important or substantial than the other." *Id.* Thus, in determining a limitations issue, the playing field is level, favoring neither the plaintiff nor the defendant.

Further, basic considerations of fairness are of paramount importance in allocating a burden of proof. The Commission made that abundantly clear in its Comment to Evidence Code Section 500 (see p. 8 *supra* & Exhibit pp. 1-2), and the

courts have repeatedly echoed that sentiment. See, e.g., *Adams*, 54 Cal. 3d at 119; *Galanek v. Wismar*, 68 Cal. App. 4th 1417, 1425-28, 81 Cal. Rptr. 2d 236 (1999).

Party Who Benefits

With regard to fairness, there is some merit to the concept of requiring the party who benefits from a legal doctrine to bear the burden of proving its application. As Section 340.6 is presently worded, the one-year-from-discovery limitations period does appear to benefit the defendant, because it establishes alternate limitations periods (one-year-from-discovery and four-years-from-occurrence), and the one-year-from-discovery limitations period only applies *when it is the shorter* of the two.

Access to Evidence

The staff finds Justice Baxter's concerns regarding access to evidence troubling. Even the majority in *Samuels v. Mix* do not contend that an attorney-defendant has as much access as a malpractice plaintiff to evidence of when the plaintiff discovered, or should have discovered, the facts constituting the malpractice. Rather, they point out circumstances in which evidence bearing on discovery is accessible to the defendant, and state that any "residual proof difficulty facing attorney malpractice defendants under the one-year-from-discovery period of Section 340.6 is a consequence of the existing legislative policy balance …." 22 Cal. 4th at 20 n.5.

The question here is whether that "existing legislative policy balance" should be changed. As Justice Baxter points out, discovery of legal malpractice may hinge on consultations between a client and a second attorney. *Id.* at 27 (Baxter, J., dissenting). The timing of such conversations is not privileged, *id.* at 20 n.5, but the content of the conversations is. "There is no client-litigant exception to the attorney-client privilege." *Schlumberger, Ltd. v. Superior Court*, 115 Cal. App. 3d 386, 393, 171 Cal. Rptr. 413 (1981). Where a client sues an attorney for malpractice, conversations between the client *and that attorney* are not privileged. Evid. Code § 958. But this exception "is limited to communications between the client and the attorney charged with malpractice." *Schlumberger*, 115 Cal. App. 3d at 392. It "was not intended to abrogate the privilege as to communications between the client and the lawyer representing the client when suit is filed against a former lawyer for malpractice." *Id.*

Further, establishing the date when a client first contacted another attorney may not be sufficient to show when the client discovered, or through the use of reasonable diligence should have discovered, the facts constituting the malpractice. That date may not be considered determinative.

For example, in the recent dental malpractice case of *Kitzig v. Nordquist*, 81 Cal. App. 4th 1384, 97 Cal. Rptr. 2d 762 (2000), a dental patient experienced unusual symptoms after treatment, leading her to consult a second dentist, who informed her that everything was fine. Her problems continued afterwards, however, eventually leading her to sue for malpractice. The defendant contended that the suit was barred by the statute of limitations, because the limitations period was triggered when she consulted the second dentist. But the court disagreed, explaining that she was entitled to rely on the second dentist's advice. *Id.* at __, 97 Cal. Rptr. 2d at 769. "An injured party cannot, and should not, be expected to file a lawsuit against her current doctor when she subjectively and justifiably believes the lawsuit would be meritless." *Id.*; *cf. Gutierrez v. Mofid*, 39 Cal. 3d 892, 902, 705 P.2d 886, 218 Cal. Rptr. 313 (1985) (medical malpractice limitations period is "not delayed, suspended, or tolled when a plaintiff with actual or constructive knowledge of the facts underlying his malpractice claim is told by an attorney that he has no legal remedy").

Thus, at least in some cases, determining when a client knew or should have known the facts constituting legal malpractice may turn on what transpired in privileged conversations between the client and a second attorney. Consider, for example, a client who retains an attorney to defend a breach of contract claim. The attorney negotiates a settlement but, unbeknownst to the client, fails to obtain the opponent's signature on the settlement documents. The opponent later reasserts the breach of contract claim, and the client retains a new attorney to defend the suit because the first attorney retired. Only after the second attorney reviews the first attorney's file and informs the client of its contents does the client learn that the first attorney failed to obtain the necessary signature. Until then, the client had little reason to suspect the first attorney of malpractice. But that conversation may occur well after the client first meets with the second attorney, and the content of the conversation is absolutely privileged.

If the burden of proving the time of discovery were on the client, the client might elect to waive the privilege to establish the time of discovery. As Justice Baxter points out, however, if the burden of proof is on the attorney-defendant, "there is no necessity, and no incentive, for the client to waive the privilege to aid

his adversary in establishing a limitations defense." *Samuels v. Mix*, 22 Cal. 4th at 28 (Baxter, J., dissenting).

The attorney-defendant is thus put in an untenable position. It is the attorney-defendant's burden to establish the time of discovery, yet the critical evidence on that point is shielded by the attorney-client privilege. This strikes the staff as fundamentally unfair. See generally *McDermott, Will & Emery v. Superior Court*, __ Cal. App. 4th __, 99 Cal. Rptr. 2d 622 (2000); *Steiny & Co. v. Cal. Elec. Supply Co.*, __ Cal. App. 4th __, 93 Cal. Rptr. 2d 920, 925 (2000). This fairness consideration also seems weightier than the general principle that "He who takes the benefit must bear the burden." Civ. Code § 3521. "The burden of proving an element of a case is *more appropriately borne by the party with greater access to information*." *Thomas v. Lusk*, 27 Cal. App. 4th 1709, 1717, 34 Cal. Rptr. 2d 265 (1994) (emphasis added). As a general rule, fairness dictates that a party should not have to prove facts peculiarly within an opponent's access and control.

OPTIONS

Options to consider include the following:

(1) **Take no action in response to *Samuels v. Mix*.** This would do nothing to alleviate the concerns relating to access to evidence.

(2) **Codify *Samuels v. Mix*.** This would rigidify and reinforce the doctrine enunciated by the court. Like Option #1, it would do nothing to alleviate the concerns relating to access to evidence.

(3) **Create a client-litigant exception to the attorney-client privilege**, similar to the existing patient-litigant exception to the physician-patient privilege (Evid. Code § 999):

> 999. There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient in a proceeding to recover damages on account of the conduct of the patient if good cause for disclosure of the communication is shown.

See also Evid. Code § 1016 (patient-litigant exception to psychotherapist-patient privilege).

This would have much broader consequences than merely addressing the proof problems discussed above. Under current law, there is no client-litigant

exception to the attorney-client privilege, but the privilege is inapplicable to communications between a client and an attorney who is sued for malpractice. Evid. Code § 958. "This approach gives the attorney a meaningful opportunity to defend against the charge, but does not deter the client from confiding in other attorneys … about the dispute." *Brockway v. State Bar*, 53 Cal. 3d 64-65, 906 P.2d 308, 278 Cal. Rptr. 836 (1991). If the Commission is inclined to alter this balance, further research on the consequences of such an approach is in order.

(4) **Overturn *Samuels v. Mix.*** Another possibility would be to amend Section 340.6 to expressly require the plaintiff to prove when the client discovered or reasonably should have discovered the facts constituting malpractice. For example, the statute could be amended along the following lines:

> 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. The plaintiff has the burden of proving that the action was commenced within one year after the plaintiff discovered, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission. 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) ….
>
> **Comment.** Section 340.6 is amended to overturn *Samuels v. Mix*, 22 Cal. 4th 1, 989 P.2d 701, 91 Cal. Rptr. 2d 273 (1999).

This would be consistent with how the discovery rule has been interpreted in other contexts. It would also address the concerns regarding access to evidence, yet would not necessarily compel the plaintiff to waive the attorney-client privilege as to communications with a second attorney. The plaintiff could choose whether to waive the privilege to satisfy the burden of proof.

(5) **Recast delayed discovery as a tolling doctrine, instead of as a rule of accrual.** See generally Bauman, *The Statute of Limitations for Legal Malpractice in Texas*, 44 Baylor L. Rev. 425, 440 (1992) (discovery rule for legal malpractice in Texas "operates as a tolling of the statute of limitations, and is not an accrual

rule"). For example, Section 340.6 could be revised to provide a one year limitations period, which is subject to tolling for delayed discovery up to a maximum of four years (and also subject to the existing tolling provisions). Because the plaintiff normally bears the burden of proving a basis for tolling, see R. Mallen & J. Smith, *supra*, § 21.13, at 829, this approach would have the same effect as Option #4 (i.e., it would effectively overturn *Samuels v. Mix*).

RECOMMENDATION

The status quo on the burden of proof as to the time of discovery seems unfair and inequitable. The Commission should take action to remedy this situation. As between Option #3 (create a client-litigant exception to the attorney-client privilege), Option #4 (overturn *Samuels v. Mix*), and Option #5 (recast delayed discovery as a tolling doctrine, instead of as a rule of accrual), the staff leans towards Option #4, because it would address the burden of proof issue clearly and specifically.

Respectfully submitted,

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Exhibit

Evid. Code § 500. Party Who Has Burden of Proof

500. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

Comment. As used in Section 500, the burden of proof means the obligation of a party to produce a particular state of conviction in the mind of the trier of fact as to the existence or nonexistence of a fact. See Evidence Code §§ 115, 190. If this requisite degree of conviction is not achieved as to the existence of a particular fact, the trier of fact must assume that the fact does not exist. Morgan, Basic Problems of Evidence 19 (1957); 9 Wigmore, Evidence § 2485 (3d ed. 1940). Usually, the burden of proof requires a party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence — a degree of proof usually described as proof by a preponderance of the evidence. Evidence Code § 115; Witkin, California Evidence § 59 (1958). However, in some instances, the burden of proof requires a party to produce a substantially greater degree of belief in the mind of the trier of fact concerning the existence of the fact — a burden usually described by stating that the party must introduce clear and convincing proof (Witkin, California Evidence § 60 (1958)) or, with respect to the prosecution in a criminal case, proof beyond a reasonable doubt (Penal Code § 1096).

The defendant in a criminal case sometimes has the burden of proof in regard to a fact essential to negate his guilt. However, in such cases, he usually is not required to persuade that trier of fact as to the existence of such fact; he is merely required to raise a reasonable doubt in the mind of the trier of fact as to his guilt. Evidence Code § 501; *People v. Bushton*, 80 Cal. 160, 22 Pac. 127 (1889). If the defendant produces no evidence concerning the fact, there is no issue on the matter to be decided by the jury; hence, the jury may be instructed that the nonexistence of the fact must be assumed. See, *e.g.*, *People v. Harmon*, 89 Cal. App. 2d 55, 58, 200 P.2d 32, 34 (1948) (prosecution for narcotics possession; jury instructed "that the burden of proof is upon the defendant that he possessed a written prescription and that in the absence of such evidence it must be assumed that he had no such prescription"). See also *People v. Boo Doo Hong*, 122 Cal. 606, 607, 55 Pac. 402, 403 (1898).

Section 1981 of the Code of Civil Procedure (superseded by Evidence Code Section 500) provides that the party holding the affirmative of the issue must produce the evidence to prove it and that the burden of proof lies on the party who would be defeated if no evidence were given on either side. This section has been criticized as establishing a meaningless standard:

> The "affirmative of the issue" lacks any substantial objective meaning, and the allocation of the burden actually requires the application of several rules of practice and policy, not entirely consistent and not wholly reliable. [Witkin, California Evidence § 56 at 72-73 (1958).]
>
> That the burden is on the party having the affirmative [or] that a party is not required to prove a negative … is no more than a play on words, since practically any proposition may be stated in either affirmative or negative form. Thus a plaintiff's exercise of ordinary care equals absence of contributory negligence, in the minority of jurisdictions which place this element in plaintiff's case. In any event, the proposition seems simply not to be so. [Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan. L. Rev. 5, 11 (1959).]

"The basic rule, which covers most situations, is that whatever facts a party must affirmatively plead he also has the burden of proving." Witkin, California Evidence § 56 at 73 (1958). Section 500 follows this basic rule. However, Section 500 is broader, applying to issues not necessarily raised in the pleadings.

Under Section 500, the burden of proof as to a particular fact is normally on the party to whose case the fact is essential. "[W]hen a party seeks relief the burden is upon him to prove his case, and he cannot depend wholly upon the failure of the defendant to prove his defenses." *Cal. Employment Comm'n v. Malm*, 59 Cal. App. 2d 322, 323, 138 P.2d 744, 745 (1943). And, "as a general rule, the burden is on the defendant to prove new matter alleged as a defense … , even though it requires the proof of a negative." *Wilson v. California Cent. R.R.*, 94 Cal. 166, 172, 29 Pac. 861, 864 (1892).

Section 500 does not attempt to indicate what facts may be essential to a particular party's claim for relief or defense. The facts that must be shown to establish a cause of action or a defense are determined by the substantive law, not the law of evidence.

The general rule allocating the burden of proof applies "except as otherwise provided by law." The exception is included in recognition of the fact that the burden of proof is sometimes allocated in a manner that is at variance with the general rule. In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact. In determining the incidence of the burden of proof, "the truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." 9 Wigmore, Evidence 2486 at 275 (3d ed. 1940).

Under existing California law, certain matters have been called "presumptions" even though they do not fall within the definition contained in Code of Civil Procedure Section 1959 (superseded by Evidence Code Section 600). Both Section 1959 and Evidence Code Section 600 define a presumption to be an assumption or conclusion of fact that the law requires to be drawn from the proof or establishment of some other fact. Despite the statutory definition, subdivisions 1 and 4 of Code of Civil Procedure Section 1963 (superseded by Sections 520 and 521 of the Evidence Code) provide presumptions that a person is innocent of crime or wrong and that a person exercises ordinary care for his own concerns. Similarly, some cases refer to a presumption of sanity. It is apparent that these so-called presumptions do not arise from the establishment or proof of a fact in the action. In fact, they are not presumptions at all but are preliminary allocations of the burden of proof in regard to the particular issue. This preliminary allocation of the burden of proof may be satisfied in particular cases by proof of a fact giving rise to a presumption that does affect the burden of proof. For example, the initial burden of proving negligence may be satisfied in a particular case by proof that undamaged goods were delivered to a bailee and that such goods were lost or damaged while in the bailee's possession. Upon such proof, the bailee would have the burden of proof as to his lack of negligence. *George v. Bekins Van & Storage Co.*, 33 Cal. 2d 834, 205 P.2d 1037 (1949). *Cf.* Com. Code § 7403.

Because the assumptions referred to above do not meet the definition of a presumption contained in Section 600, they are not continued in this code as presumptions. Instead, they appear in the next article in several sections allocating the burden of proof on specific issues. See Article 2 (Sections 520-522).