

First Supplement to Memorandum 2003-14

**Statute of Limitations for Legal Malpractice:
Additional Input on Estate Planning Issues**

The Commission received an additional letter relating to estate planning malpractice, which is from Bakersfield attorney Claude Kimball (see attached). Mr. Kimball has an LLM degree in Tax from New York University and regards himself as a reasonably capable practitioner in the estate planning area. He has nonetheless decided to discontinue practicing in that area, because of the exposure that he feels, "and will continue to feel, for instruments drafted many years ago." Exhibit p. 1.

Mr. Kimball explains that he has been unable to obtain tail coverage for work he did at his previous law firm, which dissolved eleven years ago. He is thus "exposed for a significant period" of his practice. Exhibit p. 2.

In his mind, "the risk-reward ratio has tipped so significantly to the risk side of the equation that it no longer makes sense" to continue practicing in the estate planning area. *Id.* "Legislation putting some kind of a time limit on malpractice claims for estate planning would certainly have extended" his time practicing in that area. *Id.* He urges the Commission to continue its efforts to strike a reasonable balance between protecting practitioners and "protecting the public from poor work." *Id.*

Respectfully submitted,

Barbara Gaal
Staff Counsel

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May 27, 2003

California Law Revision Commission
Attention: Barbara Gale
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Law Revision Commission
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JUN 2 2003

File: J-111

Re: Possible Legislation to Enact a Statute of Limitations with Respect to Estate Planning

Dear Ms. Gale:

It is my understanding that the California Law Revision Commission is considering supporting a proposal to limit the period of time in which estate planning attorneys will be liable for incorrectly drafted wills or trusts.

This letter urges you to please do so. I have been practicing law for a little over 35 years. A substantial portion of my practice has been devoted to estate planning. I have an LLM from NYU in Tax and feel that my expertise level on estate planning tax issues is good. However, I have decided to discontinue my estate planning practice because of the exposure that I feel, and will continue to feel, for instruments drafted many years ago. I do not believe California law is clear as to how proactive estate planning attorneys must be in alerting clients to changes in the law and advising these clients of the need for revisions to their existing estate planning documents.

The availability of adequate malpractice coverage for estate planners is shrinking. Eleven years ago when my previous law firm dissolved, our malpractice carrier was Lawyers Mutual. I moved to another firm at that time who also had Lawyers Mutual as its malpractice carrier.

**KLEIN, DeNATALE, GOLDNER,
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California Law Revision Commission

Attention: Barbara Gale

May 27, 2003

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However, Lawyers Mutual, even though they were covering me for the same exposures with the previous law firm, refused to provide me coverage for acts prior to my joining the new law firm. They obviously saw this as an opportunity to reduce underwriting exposure, and I was advised at the time that the decision was in part due to the fact that a substantial portion of my practice was devoted to estate planning.

Periodically since then, I have sought to get tail insurance for this period of time for which I no longer have coverage and have found no carrier willing to provide me that protection.

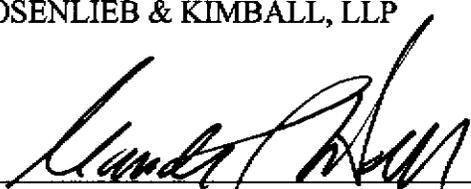
I am, therefore, exposed for a significant period of my practice. I would appear to remain exposed to potential malpractice claims for the rest of my life, a prospect that provides me a certain amount of unease. In order to limit my exposure in the only way that would appear to be available to me, I have reluctantly chosen to cease practicing in the estate planning area. At least for the future, I won't have to worry about little ticking time bombs floating up to my shoreline at sometime in the future and exploding in my face.

While I feel that I am a reasonably capable practitioner in the estate planning area, in my mind, the risk-reward ratio has tipped so significantly to the risk side of the equation that it no longer makes sense for me to continue practicing in that area. Legislation putting some kind of a time limit on malpractice claims for estate planning would certainly have extended my time practicing in the estate planning area. Some reasonable balance between protecting the public from poor work and protecting practitioners needs to be struck, and I would urge you to continue your efforts in this regard with the California legislature.

Thank you.

Very truly yours,

**KLEIN, DeNATALE, GOLDNER, COOPER,
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By: 

CLAUDE P. KIMBALL

CPK:vaj