Study J-111 April 14, 2004

First Supplement to Memorandum 2004-21

Statute of Limitations for Legal Malpractice:
Additional Comments of HALT on Estate Planning Malpractice

Attached is a letter from HALT responding to Memorandum 2004-21. HALT makes three main points:

(1) Commission staff has overstated the difficulties of litigating a malpractice claim that is brought long after preparation of an estate plan. Exhibit pp. 1-2.

(2) Contrary to what Commission staff says, a shortened statute of limitations will "undoubtedly" cause a significant number of individuals to delay estate planning to preserve their beneficiaries' rights to sue for malpractice. Exhibit p. 2.

(3) Commission staff is wrong in concluding that the rising cost of malpractice insurance may have a negative impact on the availability of affordable estate planning services. Exhibit pp. 2-3. Rather "attorneys practicing in mid-size firms in metropolitan areas typically pay about $100 a month for a policy that covers $100,000 per claim, with an aggregate limit of $300,000." *Id*. at 2. "If anything is likely to deter Californians from hiring a lawyer for estate planning assistance, it is a measure which severely curtails their right to legal recourse — not the law as it currently stands, which may add a few dollars to their itemized bill each month." *Id*.

We will discuss these points further at the Commission meeting tomorrow.

Respectfully submitted,

Barbara Gaal
Staff Counsel

April 14, 2004

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94353-4739
Attn: Barbara Gaal, Staff Counsel

Re: Law Revision Commission study of statute of limitations for legal malpractice

To the Commission:

Thank you for your thorough analysis of HALT's comments regarding the estate planners' proposal to carve out a special exception to the statute of limitations for legal malpractice suits. We are pleased that the staff has recommended that the Commission refrain from adopting the Trusts and Estates Section's radical proposal. As the staff concluded in the recently released Memorandum 2004-12, we have no doubt that the estate planners' self-interested recommendation would "founder in the Legislature and harm the reputation of the legal profession and the Commission" [Memorandum 2004-12 at page 27].

In anticipation of the upcoming April 15, 2004 meeting held by the Commission, we wish to briefly respond to three issues raised in Memorandum 2004-12: (1) the alleged burden placed on attorneys and clients by the current statute of limitations; (2) the value a testator places on ensuring beneficiaries meaningful recourse in the event of an estate planning error; and (3) the current statute's effect on the affordability of estate planning services.

First, we believe that the staff's memorandum overestimates the current statute's burden on estate planners and clients. Estate planners argue that the current statute of limitations for malpractice should be curtailed due to the difficulty of litigating a stale claim. In our comments to the Commission, we pointed out that capable estate planners can easily prevent facts from becoming stale by simply keeping their records up to date. In response to our explanation, the CLRC's memorandum states:

> [I]t is not realistic to expect an attorney to fully document every interaction with a client and decision made in conjunction with an estate plan. The expense would be prohibitive. The documentation would also be inadequate to present the facts as perceived by witnesses other than the attorney, and would be insufficient to fully compensate for the lack of testimony from a client, attorney, or other important witness who died before adjudication of a malpractice claim. [Memorandum 2004-12 at page 17].

The simple task of updating records does not entail word-for-word transcriptions or daily client meetings. In many cases, a phone call every few years may be all that is needed to ensure that both estate planner and client are on the same page. To do less would violate California Professional Conduct Rule 3-110 which requires strict "diligence" and Rule 3-500 which mandates regular "communication." Litigating a case years later is not without its difficulties, but it is certainly not cost-prohibitive to prepare for or a circumstance that requires lawyers to exceed their ethical duties.

In addition, a shortened statute of limitations would not eradicate the obstacles associated with litigating a case after witnesses have passed away. This problem could occur in any malpractice case – in any type of case, for that matter. And in the unfortunate event that a critical witness is unavailable, it is the plaintiff who would bear the burden of challenging the defendant attorney's assertions. While this possibility is not ideal, it is certainly preferable to barring beneficiaries from bringing a lawsuit before they even have the opportunity to take notice of an estate planner's error.

We also believe that the staff's concern about lawsuits litigated after the estate planner's death is also overstated. As we pointed out in our comments, any claim against the attorney's estate must be brought within a year of the attorney's death. Cal. Code Civ. Proc. § 366.2. The possibility of an attorney's death prior to a malpractice claim is not eliminated by the estate planners' proposal.

The meaningful remedy afforded by the current law far outweighs any burden created by the length of liability exposure under California's long-standing statute of limitations for legal malpractice.

Second, Memorandum 2004-12 does not appear to fully recognize the broad ramifications of the estate planner's approach. In our comments, we indicated that a shortened statute of limitations may encourage individuals to delay estate planning to preserve their beneficiaries' right to sue. Without explanation, Memorandum 2004-12 states, "The staff is not convinced that this problem is likely to occur [Memorandum 2004-12 at page 22]."

Any person who takes the time and undergoes the expense to hire a lawyer to prepare his will or trust clearly places a high importance on his estate and on his specific asset allocation decisions. In selecting an estate planner, a client carefully selects an attorney based on her skill level and experience. Knowing that his testamentary wishes are worthless if not ensured, a diligent client also considers the measures he can take to combat possible mistakes made by the attorney. Under the Trusts and Estate Planning bar's proposal, many Californians would undoubtedly avoid hiring a lawyer or wait until the eleventh hour to seek assistance.

Finally, we disagree with the CRLC staff's characterization of the current statute's effect on the availability of affordable estate planning services. The staff

speculates that the cost of ongoing insurance coverage gets spread to the consumer. Without consideration of the actual costs, the staff concludes that this additional cost deprives many consumers of the option of hiring a lawyer.

In our comments to the Commission, we explained that if an estate is quite valuable and the attorney is well-qualified, the increased rate should make little difference to the client. If, on the other hand, an estate is small, self-help materials and other affordable non-lawyer alternatives might be a better way of managing the estate. Therefore, any concern about the availability of affordable estate planning services caused by current statute of limitations is unfounded. The CLRC staff disagrees, stating:

> HALT may be incorrect in dismissing the possibility that rising malpractice insurance costs will have a negative impact on the availability of affordable estate planning services for persons who require such help [Memorandum 2004-12 at page 23].

We would share this concern if insurance rates were unduly burdensome. But insurance agents have informed us that attorneys practicing in mid-size firms in metropolitan areas typically pay about $100 a month for a policy that covers $100,000 per claim, with an aggregate limit of $300,000. And attorneys with good records, as well as those practicing in smaller communities, pay substantially less each month. Insurance coverage gets passed on to the consumer at a few additional dollars a month – but this is hardly a high price to pay for a guarantee that the client and heirs will be protected.

If anything is likely to deter Californians from hiring a lawyer for estate planning assistance, it is a measure which severely curtails their right to legal recourse – not the law as it currently stands, which may add a few dollars to their itemized bill each month.

We hope that we have quieted the staff's concerns regarding HALT's comments to the Commission. Although we will be unable to attend the April 15, 2004 meeting in which you plan to discuss the estate planners' proposal, we hope that this letter is shared at the meeting. We look forward to receiving a transcript of the meeting or a summary of the discussion. Thank you for your consideration of this matter.

Sincerely,

HALT, Inc.
By:

Suzanne Mishkin
Associate Counsel