Study J-111 November 1, 2004

Memorandum 2004-50

Statute of Limitations for Legal Malpractice (Draft of Tentative Recommendation on General Issues)

Attached is a draft of a tentative recommendation proposing revisions of the statute of limitations for legal malpractice (Code Civ. Proc. § 340.6). This draft does not address issues relating to estate planning malpractice, because that portion of the Commission's study is on hold, pending further investigation and consideration by the State Bar. In reviewing the attached draft, the Commission should consider whether to make revisions, and whether to approve the draft for circulation for comment.

ISSUES ADDRESSED

The attached draft addresses three points:

(1) **Actual injury and simultaneous litigation.** Under Section 340.6, the alternate one-year-from-discovery and four-years-from-occurrence limitations periods for legal malpractice are tolled until the plaintiff sustains actual injury. The definition of actual injury thus affects when the plaintiff must bring suit and whether the plaintiff must simultaneously litigate both the malpractice case and an underlying lawsuit that could affect the outcome of the malpractice case. The draft draws on the concept of equitable tolling to address the problems associated with the definition of actual injury and the need for simultaneous litigation. It incorporates changes suggested by the Commission in response to a previous draft. See Memorandum 2000-43 (available at www.clrc.ca.gov); Minutes (June 2000) (available at www.clrc.ca.gov). As previously directed, the draft does not take a position on whether (1) tolling should continue only until an initial decision is made in the underlying proceeding, or (2) until the appellate process is completed and the underlying proceeding is fully and finally resolved. Instead, the draft presents these alternative approaches and solicits input on which one is preferable.

(2) **Burden of proving time of discovery.** Section 340.6 does not specify who bears the burden of proof on the time of discovery of

the facts constituting the alleged malpractice. The California Supreme Court has interpreted the statute to place this burden on the attorney defendant. *Samuels v. Mix*, 22 Cal. 4th 1, 989 P.2d 701, 91 Cal. Rptr. 2d 273 (1999). The attached draft proposes to reallocate the burden to the plaintiff, because the pertinent facts are peculiarly within the plaintiff's knowledge and control. This would implement a tentative decision previously reached by the Commission. Minutes (March 29-30, 2001), pp. 11-12.

(3) **Action on written instrument effective on occurrence of future act or event.** Section 340.6 contains a specific provision pertaining to "an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future." As recommended by legal malpractice expert Ronald Mallen, the attached draft proposes to delete that provision as unnecessary and potentially confusing. The Commission has not previously considered this point. We have included it in the draft because it appears to be a minor improvement that is unlikely to be controversial.

The draft also mentions that the Commission has looked into the area of estate planning malpractice, but is not currently proposing any reform specific to that area.

BALANCED PACKAGE

As best the staff can determine based on current information, the attached draft is not one-sided, benefiting attorneys exclusively to the detriment of clients, or vice versa. It appears to be a reasonably balanced package:

- The proposed new provision based on the doctrine of equitable tolling would benefit a client by unambiguously tolling the limitations periods until an underlying proceeding is concluded, sparing the client from the burdens of simultaneously conducting a malpractice case and an underlying proceeding. To some extent, the reform would also benefit courts and attorneys, by providing a clear, predictable rule and eliminating unnecessary malpractice litigation.
- The proposed reallocation of the burden of proof on the time of discovery would benefit an attorney by placing that burden on the client, who typically has better access to the evidence bearing on whether that burden is satisfied.
- The proposed deletion of the special provision pertaining to "an action based upon an instrument in writing, the effective date of

> which depends upon some act or event of the future" would help everyone by deleting confusing and unnecessary language.

TYPES OF CASES COVERED BY SECTION 340.6

Among the issues we suggested exploring in this study is whether Section 340.6 should be revised with regard to the types of cases to which it applies. See Memorandum 2002-13, pp. 20-21 (available at www.clrc.ca.gov). This suggestion was prompted by an article in a legal newspaper criticizing the court's decision in *Knoell v. Petrovich*, 76 Cal. App. 4th 164, 90 Cal. Rptr. 2d 162 (1999). See Boyd, *Unclear Application: Court May Review Statute of Limitations for Claims Against Attorneys*, S.F. Daily J. 5 (March 7, 2000).

In *Knoell*, Joan Johnson sought to extinguish an easement across her property in favor of Michael Knoell. She believed that Knoell might have forged her signature on the easement deed. In connection with that dispute, her attorney, Susan Petrovich, sent a letter to the City Attorney stating that "Ms. Johnson takes the position that the easement was obtained by fraud and deception and has sent a recission letter to Mr. Knoell." Based on that comment and similar statements, Knoell sued Petrovich for defamation.

The trial court denied the claim on the grounds that it was barred by the litigation privilege (Civ. Code § 47) and the limitations periods of Code of Civil Procedure Sections 339 and 340. The court rejected Knoell's contention that the claim was timely because the applicable statute of limitations was Section 340.6.

That decision was upheld on appeal. In explaining its decision, the court of appeal stated:

> "Section 340.6 provides that the statute of limitations for legal malpractice commences when the *client discovers*, or should have discovered, the cause of action. The period is tolled during the times, inter alia, (i) *the client* 'has not sustained actual injury,' (ii) the negligent attorney continues to represent *the client*, (iii) the attorney willfully conceals facts constituting the negligence, or (iv) the plaintiff is under a disability that 'restricts the plaintiff's ability to commence legal action.'"

Id. at 169, *quoting Laird v. Blacker*, 2 Cal. 4th 606, 609, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992), *quoting* Section 340.6 (footnote omitted; emphasis in *Knoell*). The court of appeal then pointed out that Knoell had "cited no authority for the novel claim that a third party (i.e., a nonclient) may invoke Code of Civil Procedure section

340.6 to toll the statute of limitations when suing an attorney for defamation." *Knoell*, 76 Cal. App. 4th at 169. The court of appeal thus rejected the argument that Knoell could sue Johnson "for defamation, obtain a $120,000 judgment, and file a new action against Attorney Petrovich based on the same publication." *Id*.

Knoell could be construed to stand for the proposition that Section 340.6 only applies to an action by a client, not to an action by a nonclient. The legal news article criticized it on that basis:

> The holding of *Knoell*, while seemingly beneficial to Petrovich, is potentially damaging to attorney defendants in general.
>
> An attorney can be held liable to a non-client for negligence-based malpractice if the nonclient is found to be an intended beneficiary of the attorney's services. See, e.g., *Goodman v. Kennedy*, 18 Cal. 3d 335 (1976). Therefore, the rule articulated in *Knoell* distinguishing between clients and non-clients risks the creation of two different limitations periods for negligence causes of action asserted against an attorney: Section 340.6 for clients and Section 339(1) for nonclients.
>
> The revival of Section 339(1) as a limitations period for attorney malpractice would appear to substantially undermine the Legislature's goals in enacting Section 340.6 to supersede that provision. It would appear difficult to justify such a rule based upon the flimsy rationale, unsupported by any legislative intent, that when the Legislature used the term "plaintiff" in the statute it meant "client."

Boyd, *supra*, at 5.

But *Knoell* does not have to be interpreted as drawing a line between clients and nonclients. The court of appeal did not state that Section 340.6 is inapplicable to any action by a nonclient. Rather, it said that Knoell had "cited no authority for the novel claim that a third party (i.e., a nonclient) may invoke Code of Civil Procedure section 340.6 to toll the statute of limitations *when suing an attorney for defamation*." *Knoell*, 76 Cal. App. 4th at 169 (emphasis added). At issue was a claim by *an adversary of the client* against an attorney, not a claim by *an intended beneficiary of the attorney's services*. The staff believes that *Knoell* is properly understood as limiting Section 340.6 to a claim "against an attorney for a wrongful act or omission, ... arising in the performance of professional services," made by *a person to whom the attorney owed a professional duty*, or a successor in interest of such a person.

This construction would be consistent with the plain language of Section 340.6, which repeatedly refers to a "plaintiff," not to a "client." It would also be consistent with case law interpreting Section 340.6 to apply to a malpractice action by a decedent's children against the law firm that prepared the decedent's estate plan, *Sindell v. Gibson, Dunn & Crutcher*, 54 Cal. App. 4th 1457, 63 Cal. Rptr. 2d 594 (1997), and to a malpractice action by an estate against a law firm that represented the decedent in a personal injury case, *Gailing v. Rose, Klein & Marias*, 43 Cal. App. 4th 1570, 51 Cal. Rptr. 2d 381 (1996). Additionally, this construction would conform to the common understanding of the concept of legal malpractice, which does not encompass harm allegedly sustained by a person who was not intended to be benefited by the legal services rendered.

If so interpreted, then *Knoell* does not pose the specter of applying a different limitations periods to (1) a claim by a client for breach of a professional duty, and (2) a claim by a nonclient for breach of the same professional duty. Thus, although the language in the case might lead to some confusion, the result appears sound. **Unless and until problems arise, it does not seem necessary to try to clarify the types of cases to which Section 340.6 applies.**

TRANSACTIONAL MALPRACTICE

Another issue that the Commission touched on in previous discussions was whether Section 340.6 should be revised to establish special rules for transactional malpractice (i.e., malpractice that occurs in conducting a transaction, as opposed to malpractice that occurs in conducting litigation). At the time, the California Supreme Court was considering whether the causation standard should be different in a transactional malpractice case than in a litigation malpractice case. The Court has since ruled that the same standard applies in both contexts. *Viner v. Sweet*, 30 Cal. 4th 1232, 70 P.3d 1046, 135 Cal. Rptr. 2d 629 (2003). The staff is not aware of any concrete suggestions for revision of Section 340.6 to establish special rules for transactional malpractice. Consequently, the attached draft does not propose any reform specific to this area. Unless someone raises a particular suggestion, **we are not inclined to further pursue the idea of special rules for transactional malpractice.**

RETROACTIVITY

A further issue is whether the reforms proposed in the attached draft should be applied retroactively. This is discussed at page 24 of the attached draft. **The Commission should consider whether the proposed treatment of retroactivity is satisfactory.**

Respectfully submitted,

Barbara Gaal
Staff Counsel

#J-111

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft
TENTATIVE RECOMMENDATION

Statute of Limitations for Legal Malpractice

October 2004

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN _____.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

The statute of limitations for legal malpractice (Code Civ. Proc. § 340.6) establishes alternate limitations periods: (1) one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the malpractice, or (2) four years from the date of the malpractice, whichever occurs first. The limitations periods are tolled (i.e., the running of the periods is suspended) under a number of circumstances. In particular, the limitations periods do not begin to run until the plaintiff sustains actual injury. The statute also includes a special provision pertaining to "an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future."

The Law Revision Commission proposes the following reforms of the statute of limitations for legal malpractice:

- A new tolling provision would be added, which would apply when the attorney's malpractice liability depends on the outcome of an underlying proceeding, such as an arbitration that the attorney commenced after expiration of the applicable deadline. The new provision would toll the malpractice limitations periods until the underlying proceeding is resolved, provided that the plaintiff acts reasonably and in good faith, the plaintiff gives the attorney reasonable notice of the potential malpractice case, and the attorney is not unreasonably prejudiced in gathering evidence to defend that case. The Commission makes no tentative recommendation on whether tolling pursuant to the new provision should continue until the underlying proceeding is fully resolved, including completion of any appeal or other review process, or should end when the trial court or other initial tribunal renders its decision. The Commission specifically solicits comment on this point.

  The proposed new tolling provision seeks to spare the client from the financial, emotional, and logistical burdens of simultaneously pursuing both the malpractice case and the underlying proceeding. It would also promote judicial economy, conserve resources of both clients and attorneys, decrease litigation over the timing of actual injury, improve certainty in application, and reduce malpractice claims and premiums.

- The burden of proving the time of discovery of the facts constituting the malpractice would be allocated to the plaintiff because the pertinent facts are peculiarly within the plaintiff's knowledge and control. This would overturn *Samuels v. Mix*, 22 Cal. 4th 1, 989 P.2d 701, 91 Cal. Rptr. 2d 273 (1999).

- The special provision pertaining to "an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future" would be deleted as unnecessary and potentially confusing.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Contents

STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE

Enacted in 1977,[1] the statute of limitations for legal malpractice — Code of Civil Procedure Section 340.6[2] — has been the subject of extensive litigation.[3] The Law Revision Commission is studying this provision at the direction of the Legislature.[4] To reduce the number of disputes and improve the functioning of the provision, the Commission proposes to:

- Add a new tolling provision to the statute, which would apply when an attorney's liability for malpractice depends on the outcome of an underlying proceeding, such as a lawsuit that the attorney allegedly mishandled.
- Reallocate the burden of proving when the plaintiff discovered, or through the use of reasonable diligence should have discovered, the facts constituting the malpractice.
- Delete an unnecessary and potentially confusing sentence pertaining to "an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future.[5]

STATUTORY REQUIREMENTS

Section 340.6 establishes alternate one-year and four-year limitations periods for legal malpractice:[6]

> 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;

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

2. Unless otherwise specified, all further statutory references are to the Code of Civil Procedure.

3. At least __ published appellate decisions construe this provision.

4. 1999 Cal. Stat. res. ch. 81; see also Gov't Code § 8293, as amended by 2004 Cal. Stat. ch. 192, § 33 (effective Jan. 1, 2005); 2003 Cal. Stat. res. ch. 92.

5. Section 340.6(b).

6. This provision does not apply to actions for actual fraud. Quintilliani v. Mannerino, 62 Cal. App. 4th 54, 72 Cal. Rptr. 2d 359 (1998).

> (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 provision codifies the discovery doctrine, under which the limitations period does not begin to run until the client "discovers, or through the use of reasonable diligence should have discovered" the attorney's malpractice.[7] The client must commence the action within one year from the date of discovery. To preclude endless potential exposure, however, the statute also requires the client to bring the action within four years from the date of the wrongful act or omission.[8]

These alternate limitations periods (one-year-from-discovery and four-years-from-occurrence) are tolled[9] so long as the allegedly negligent attorney continues to represent the client "regarding the specific subject matter in which the alleged wrongful act or omission occurred."[10] Even after the client replaces the attorney, the limitations periods are tolled until the client sustains actual injury.[11]

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

8. In *Neel*, the Supreme Court recognized that application of the discovery doctrine in legal malpractice cases would "impose an increased burden on the legal profession." 6 Cal. 3d at 192. The Court observed that an attorney's mistake "may not work damage or achieve discovery for many years after the act, and the extension of liability into the future poses a disturbing prospect." *Id.* The Court acknowledged, however, that an outer limit on delayed accrual of legal malpractice actions might be desirable. *Id.* The Legislature established such an outer limit by codifying the four year alternate limitations period. Due to the tolling provisions in Section 340.6, however, that outer limit is not absolute.

9. The concept of tolling is distinct from the concept of delayed accrual. A rule of delayed accrual postpones the accrual of a cause of action until a specified event occurs (e.g., until discovery of the facts constituting malpractice). Once the cause of action accrues, the statute of limitations begins to run. A tolling provision may suspend (temporarily stop) the running of the statute of limitations after a cause of action has accrued. See Cuadra v. Millan, 17 Cal. 4th 855, 864-65 & n.11, 952 P.2d 704, 72 Cal. Rptr. 2d 687 (1998).

10. Section 340.6(a)(2); see, e.g., Crouse v. Brobeck, Phleger & Harrison, 67 Cal. App. 4th 1509, 80 Cal. Rptr. 2d 94 (1998); Gold v. Weissman, 114 Cal. App. 4th 1195, 8 Cal. Rptr. 3d 480 (2004); Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort, 91 Cal. App. 4th 875, 110 Cal. Rptr. 2d 877 (2001); Kulesa v. Castleberry, 47 Cal. App. 4th 103, 54 Cal. Rptr. 2d 669 (1996); Worthington v. Rusconi, 29 Cal. App. 4th 1488, 35 Cal. Rptr. 2d 169 (1994).

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

ACTUAL INJURY AND SIMULTANEOUS LITIGATION

The concepts of actual injury and simultaneous litigation are distinct but interrelated. Some background on these concepts is necessary before explaining the Commission's proposal to add a new tolling provision to the statute of limitations for legal malpractice.

Defining Actual Injury

The tolling provision for actual injury stems from the elementary principle of tort law that damages are an essential element of a cause of action for negligence. Until an attorney's negligence harms a client, the client cannot state a cause of action.[12] It would be unfair to start the running of the limitations period before the client is able to bring suit.

Much litigation has focused on what constitutes actual injury within the meaning of the statute.[13] It is clear that the mere fact of sustaining injury constitutes actual injury and is sufficient to end the tolling period.[14] It is not necessary that the injury exceed a threshold amount[15] or that the total amount of injury from the malpractice be calculable.[16] The critical inquiry is whether the plaintiff has been harmed by the malpractice and thus can claim damages.

Difficulties arise, however, in determining whether the fact of injury is sufficiently well-established to constitute actual injury. Consider, for instance, an

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12. "The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm — not yet realized — does not suffice to create a cause of action for malpractice." Budd v. Nixen, 6 Cal. 3d 195, 200, 491 P.2d 433, 98 Cal. Rptr. 849 (1971). "[U]ntil the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." *Id*.; *see also* Sindell v. Gibson, Dunn & Crutcher, 54 Cal. App. 4th 1457, 1466-67, 63 Cal. Rptr. 2d 594 (1997).

13. The California Supreme Court has addressed this point five times since 1992. See Coscia v. McKenna & Cuneo, 25 Cal. 4th 1194, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001); Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998); Adams v. Paul, 11 Cal. 4th 581, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995); ITT Small Business Finance Corp. v. Niles, 9 Cal. 4th 245, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994); Laird v. Blacker, 2 Cal. 4th 606, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992). Numerous court of appeal decisions focus on what constitutes actual injury. See, e.g., Village Nurseries, L.P. v. Greenbaum, 101 Cal. App. 4th 26, 123 Cal. Rptr. 2d 555 (2002); *Sindell*, 54 Cal. App. 4th 1457; Moss v. Stockdale, Peckham & Werner, 47 Cal. App. 4th 494, 54 Cal. Rptr. 2d 805 (1996); Marshall v. Gibson, Dunn & Crutcher, 37 Cal. App. 4th 1397, 44 Cal. Rptr. 2d 339 (1995).

14. "The first injury of any kind to the plaintiff, attributable to the defendant attorney's malfeasance or nonfeasance, should suffice." Radovich v. Locke-Paddon, 35 Cal. App. 4th 946, 971, 41 Cal. Rptr. 2d 573 (1995); see also *Jordache*, 18 Cal. 4th at 752 ("[T]he fact of damage, rather than the amount, is the critical factor."); *Adams*, 11 Cal. 4th at 589 (same); *Laird*, 2 Cal. 4th at 612 (same).

15. During the legislative process that led to the enactment of Section 340.6, it was proposed that the limitations periods be tolled until the client sustained "significant" injury. See AB 298 (Brown), as amended in Assembly May 9, 1977; *Radovich*, 35 Cal. App. 4th at 970-71. The term "actual "injury was later substituted for "significant" injury. See Section 340.6(a)(1); *Radovich*, 35 Cal. App. 4th at 971.

16. "[O]nce the plaintiff suffers actual harm, neither difficulty in proving damages nor uncertainty as to their amount tolls the limitations period." *Jordache*, 18 Cal. 4th at 752; *see also Laird*, 2 Cal. 4th at 612 ("the cause of action may arise before the client sustains all or even the greater part of damage.").

attorney's failure to timely file a claim on behalf of a client. It could be argued that actual injury occurs when the attorney misses the statute of limitations, diminishing the value of the client's claim. It could also be argued that actual injury does not occur until the client's adversary asserts the statute of limitations as a defense and the client incurs fees attempting to counter that defense. Alternatively, one could say that actual injury occurs even later — when the trial court enters judgment against the client based on the statute of limitations, or when the client loses on appeal and has no further right of review.

This type of issue can arise not only when an attorney commits malpractice in conducting litigation, but also when an attorney mishandles a business transaction in a manner that could lead to or adversely affect the outcome of pending or future litigation. For example, if an attorney negligently fails to obtain a borrower's signature on a security agreement for a promissory note, it is debatable whether actual injury occurs at that time, or not until the borrower fails to pay on the promissory note and the lender is unable to enforce the security agreement due to the lack of the borrower's signature. It is hard to identify the point at which it becomes sufficiently clear that the lender cannot enforce the security agreement and this circumstance has resulted in injury to the lender.

Necessity of Simultaneous Litigation

The definition of actual injury can affect whether a client must simultaneously litigate both a malpractice case and an underlying lawsuit or other proceeding.

- If Section 340.6 is interpreted to mean that actual injury does not occur until the underlying proceeding is decided and all appeals or other review processes are resolved, the alternate limitations periods are tolled through the appellate process and the malpractice case need not be commenced until after the underlying proceeding is fully and finally determined.
- If the statute is interpreted to mean that actual injury does not occur until the underlying proceeding is either settled or resolved by the trial court or other initial tribunal, simultaneous litigation will be necessary only if a party seeks to overturn the initial result and the review process cannot be completed before the statutory periods expire.
- If the statute is interpreted to mean that actual injury can occur before the underlying proceeding is resolved by the initial tribunal, it may be necessary to commence the malpractice case while the underlying proceeding is still pending in the initial tribunal.

Case Law on Actual Injury

The California Supreme Court has examined the definition of actual injury five times since 1992, dividing in all but one of those cases and reversing course as court personnel changed.[17]

17. The Court also addressed the issue of actual injury in the context of accounting malpractice. See International Engine Parts v. Fedderson & Co., 9 Cal. 4th 606, 608, 888 P.2d 1279, 38 Cal. Rptr. 2d 150

Termination of the Underlying Action in the Trial Court

The Court first considered the definition of actual injury in *Laird v. Blacker*,[18] in which an attorney served a complaint on behalf of a client but failed to prosecute the action, resulting in dismissal for lack of prosecution. The client sued the attorney for malpractice and the attorney asserted a limitations defense. The client contended that the malpractice case was timely, because actual injury did not occur until her appeal of the dismissal of the underlying action was resolved. The Supreme Court disagreed, however, concluding that "the limitations period of section 340.6 commences when a client *suffers an adverse judgment or order of dismissal in the underlying action* on which the malpractice action is based."[19] Justice Mosk dissented, maintaining that actual injury does not occur and the limitations period does not begin to run until the appeal is resolved.[20]

The Court's next case on the actual injury requirement was *ITT Small Business Finance Corp. v. Niles*,[21] which involved malpractice in the preparation of loan documentation. Again, the Court focused on termination of the underlying action, concluding that "in transactional legal malpractice cases, when the adequacy of the documentation is the subject of dispute, an action for attorney malpractice accrues *on entry of adverse judgment, settlement, or dismissal of the underlying action*.[22] Justice Mosk concurred, reiterating his view that tolling should continue throughout the appeal of the underlying action.[23] Justice Kennard dissented on the ground that actual injury may occur well before an underlying action is resolved by an adverse judgment or settlement.[24]

Fact-Specific Approach

The Court reversed course and was even more divided in *Adams v. Paul*,[25] in which an attorney failed to file a client's claim within the statute of limitations. Three justices determined that in light of the many variables where an attorney misses a limitations period, the determination of when actual injury occurs is generally a question of fact.[26] Thus, the case had to be remanded for determination of "the point at which the fact of damage became palpable and definite even if the amount remained uncertain, taking into consideration all relevant

(1995) (actual injury with regard to accountant's negligent preparation of tax return occurs when tax deficiency is assessed).

18. 2 Cal. 4th 606, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992).
19. *Id*. at 608 (emphasis in original).
20. *Id*. at 621-28 (Mosk, J., dissenting).
21. 9 Cal. 4th 245, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994).
22. *Id*. at 258 (emphasis added).
23. *Id*. at 258 (Mosk, J., concurring).
24. *Id*. at 260 (Kennard, J., dissenting).
25. 11 Cal. 4th 581, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995).
26. *Id*. at 585.

circumstances."[27] Justice Kennard concurred, emphasizing some points and stating certain qualifications.[28] Three justices dissented, adhering to the notion that actual injury does not occur until the underlying action is resolved, at least by the trial court.[29]

The Court's next decision construing the actual injury requirement was *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*.[30] in which a law firm failed to advise its client regarding insurance coverage. A five-member majority squarely endorsed four principles: "(1) determining actual injury is predominately a factual inquiry; (2) actual injury may occur without any prior adjudication, judgment, or settlement; (3) nominal damages, speculative harm, and the mere threat of future harm are not actual injury; and (4) the relevant consideration is the fact of damage, not the amount."[31] The Court thus rejected the approach of focusing on termination of the underlying action.[32] Instead, the Court emphasized the need for particularized assessment of the facts and circumstances of each case.[33] On the facts before it, the Court determined that the client sustained actual injury before settlement of the insurance coverage litigation, because it incurred extra expenses in that litigation due to the malpractice.[34] Chief Justice George and Justice Mosk each authored a vigorous dissent, reiterating their preference for a bright line approach to actual injury.

Most recently, the Court revisited the definition of actual injury in *Coscia v. McKenna & Cuneo*,[35] which involved alleged malpractice in a criminal case. The Court had previously determined that when a criminal defendant sues defense counsel for malpractice, actual innocence of the criminal charges is a necessary element of the malpractice claim.[36] In *Coscia*, the Court concluded that postconviction exoneration is a prerequisite to establishing actual innocence.[37]

In reaching that conclusion, the Court considered the impact of requiring postconviction exoneration on the running of the statute of limitations on the malpractice claim. Consistent with its approach in *Jordache*, the Court "decline[d]

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27. *Id*. at 593.

28. *Id*. at 601-04 (Kennard, J., concurring).

29. *Id*. at 604-09 (Lucas, C.J., dissenting).

30. 18 Cal. 4th 739, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998).

31. *Id*. at 743. Justice Kennard joined the majority opinion but also wrote a short concurrence.

32. *Id*. at 764. The Court expressly overruled *ITT*, commenting that the "broad, categorical rule" advanced in that decision "cannot be reconciled with the particularized factual inquiry required to determine actual injury under section 340.6 …." *Id*. at 763. The Court also interpreted *Laird* to mean merely that actual harm occurs *no later than* termination of the underlying action at the trial level. *See id.* at 762.

33. *Id.* at 764.

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

35. 25 Cal. 4th 1194, 25 P.2d 670, 108 Cal. Rptr. 2d 471 (2001).

36. Wiley v. County of San Diego, 19 Cal. 4th 532, 966 P.2d 983, 79 Cal. Rptr. 2d 672 (1998).

37. 25 Cal. 4th at 1201.

to adopt the legal fiction that an innocent person convicted of a crime suffer[s] no actual injury until he or she [is] exonerated through postconviction relief."[38] Thus, the statute of limitations for a criminal malpractice claim may expire before the client obtains postconviction exoneration.[39] To preserve the claim, the client must timely file the malpractice case, even though the client cannot yet show postconviction exoneration.[40] The court should then stay the malpractice case while the client "timely and diligently pursues postconviction remedies."[41]

Advantages of Existing Law

The Court's current, fact-specific approach to actual injury has both advantages and disadvantages. In adopting the approach in *Jordache*, the Court relied heavily on an analysis of the legislative history.[42] Although the Court also discussed some policy considerations, it declined to balance the competing interests, explaining that the Legislature had weighed the interests in formulating Section 340.6 and the Court's role was simply to follow the Legislature's intent.[43] While that mindset may be appropriate in interpreting the statute, a broader perspective, directly focusing on the relevant policy concerns, is warranted in determining whether to revise the provision.

The current approach has several advantages:

Preservation of Evidence

Statutes of limitation are intended to ensure that claims are litigated when evidence is accessible, memories are fresh, and witnesses are available.[44] If assertion of a malpractice claim is delayed while an underlying action is pending, evidence may deteriorate. Documents or other tangible evidence may be lost or destroyed, memories may fade, and witnesses may die or disappear, making it difficult to litigate the case. Under the Court's fact-driven approach, in contrast, actual injury may occur and tolling of the limitations period may cease before resolution of an underlying action. The approach thus promotes early assertion of

38. *Id*. at 1210.

39. *Id.*

40. *Id.*

41. *Id*. at 1210-11.

42. 18 Cal. 4th at 748-51.

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

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

malpractice claims and resolution of those claims while evidence is readily at hand.

Repose

Another important purpose of statutes of limitation is to guarantee repose, to allow a measure of certainty in conducting one's affairs.[45] If a claim is not promptly asserted, the potential defendant may be oblivious to the threat of liability and plan accordingly. Surprising that person with a claim for alleged misconduct in the distant past not only contravenes basic notions of fairness, but also undermines stability and predictability in legal affairs. As compared to an approach that tolls the limitations period until an underlying claim is resolved, the Court's current approach to actual injury in legal malpractice cases better serves the interest in guaranteeing repose, because the limitations period on at least some claims begins to run earlier.[46]

Flexibility

Legal malpractice cases involve a wide variety of fact situations, making it difficult to fashion a categorical rule that adequately accounts for all of the differing circumstances.[47] By calling for case-by-case assessment of actual injury in such cases, the Court's current approach permits flexibility to equitably determine application of the limitations period in each case.[48]

Recovery of Damages

A further significant point relates to the recovery of damages. In her *ITT* dissent, Justice Kennard observed that "it defies common sense to hold … that a client has not sustained 'actual injury' even though the client has paid thousands, perhaps hundreds of thousands, of dollars because the attorney's malpractice has compelled the client to prosecute or defend third party litigation."[49] She expanded on this comment in an accountant malpractice case, providing the following example:

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

45. See, e.g., *Jordache*, 18 Cal. 4th at 756; Valley Circle Estates v. VTN Consolidated, Inc., 33 Cal. 3d 604, 615, 659 P.2d 1160, 189 Cal. Rptr. 871 (1983); Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 787, 598 P.2d 45, 157 Cal. Rptr. 392 (1979); Ochoa & Wistrich, *supra* note 44, at 15.

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

47. *Jordache*, 18 Cal. 4th at 764; *Adams*, 11 Cal. 4th at 588-89; *Foxborough* , 26 Cal. App. 4th at 225-26.

48. *Jordache*, 18 Cal. 4th at 764.

49. 9 Cal. 4th at 259 (Kennard, J., dissenting); see also International Engine Parts, Inc. v. Fedderson & Co., 9 Cal. 4th 606, 626, 888 P.2d 1279, 38 Cal. Rptr. 2d 150 (1995) (Kennard, J., dissenting).

> including legal fees, accountant fees, and the time expended by the client's own employees. In addition, the audit may disclose the permanent loss of tax benefits that should have been but, because of the accountant's negligence, were not claimed in the client's return. Thus, I cannot agree that the issue of actual harm is "contingent on the outcome of the audit."[50]

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

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

Disadvantages of Existing Law

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

Judicial Economy and Litigation Expenses

The current approach may result in simultaneous litigation of a malpractice action and an underlying case. Often, however, resolution of an underlying case may render a malpractice action unnecessary.[51] For example,

> in statute of limitations cases, actual and appreciable harm may *never* occur, and the plaintiff's rights may never be invaded despite the attorney's "wrong," if no one ever spots the issue as a potential defense. It is unproductive to require a plaintiff to file a precautionary legal malpractice suit in anticipation of losing on an issue that may never arise, or, if it does arise, may be resolved against the defendants in the underlying suit.[52]

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50. *International Engine Parts*, 9 Cal. 4th at 626-27.

51. Ochoa & Wistrich, *supra* note 44, at 22-23; see *ITT*, 9 Cal. 4th at 257 (had client prevailed in adversary proceeding, malpractice action would have been unnecessary).

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

Forcing a client to file a malpractice claim without awaiting the outcome of underlying litigation may thus waste judicial resources.[53] By clogging court dockets, it also impedes access to justice.[54] Perhaps most significantly, it may unnecessarily subject clients, attorneys, and witnesses to the financial and emotional stress of litigation.

Staying the malpractice case pending resolution of the underlying action may alleviate these concerns to some extent.[55] This is not a complete solution, however, because obtaining a stay consumes judicial resources. It may also be costly to the litigants and the court may be reluctant to grant a stay due to pressure to control its docket.[56]

Inconsistent Positions

Another downside of the current approach is that it may force a client to simultaneously take inconsistent positions. Suppose, for instance, that it is questionable whether an attorney timely filed an action on behalf of a client. Under the Court's current approach to actual injury, the client may have to (1) show timeliness in the underlying action, while at the same time (2) proving untimeliness in a malpractice claim.[57] The result may be inconsistent verdicts or application of collateral estoppel in a manner harmful to the client.[58] In addition, respect for the legal system is "hardly enhanced by an incongruent procedural structure which causes an injured party simultaneously to allege before different tribunals propositions which are mutually inconsistent."[59]

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

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

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

56. Ochoa & Wistrich, *supra* note 44, at 65-66; see also Murphy v. Campbell, 41 Tex. Sup. Ct. J. 193, 964 S.W.2d 265, 275 (1997) (Spector, J., dissenting) (option of stay is overly burdensome on clients); *id*. at 276 (Abbott, J., dissenting) ("While the Court states that taxpayers can file a malpractice action and then abate the action until the tax suit is resolved, such a hurry-up-and-wait approach is contrary to our efforts to expedite the litigation process.").

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

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

58. Sirott v. Latts, 6 Cal. App. 4th 923, 934, 8 Cal. Rptr. 2d 206 (1992) (Johnson, J., dissenting); Ochoa & Wistrich, *supra* note 44, at 20-21.

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

Waiver of Lawyer-Client or Work Product Privilege

Simultaneous litigation of an underlying action and a malpractice claim could also result in a waiver of the lawyer-client or work product privilege.[60] To establish malpractice, the client may need to disclose the attorney's work product or confidential communications with the attorney. But such disclosure may waive the work product or lawyer-client privilege, giving the opposing party in the underlying action access to information that would otherwise be privileged. This may prejudice the client's case.[61] A carefully drafted protective order may mitigate the problem,[62] but obtaining a protective order is neither inexpensive nor certain, so a danger of prejudice remains.

Burden of Simultaneously Pursuing Multiple Actions

By requiring simultaneous litigation, at least in some cases, the Court's current approach to actual injury imposes a significant burden on clients.[63] Prosecuting a lawsuit is both expensive and emotionally draining. For some clients, the burden of simultaneously prosecuting both a malpractice case and an underlying suit may be prohibitive.[64]

Number of Malpractice Claims and Cost of Malpractice Coverage

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

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

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case. *Adams*, 11 Cal. 4th at 592-93; Carvell v. Bottoms, 900 S.W.2d 23, 30 (Tenn. 1995). But the potential availability of a stay does not fully resolve the problem. See note 57 *supra* and accompanying text.

60. Ochoa & Wistrich, *supra* note 44, at 21.

61. *Id.*

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

63. *Jordache*, 18 Cal. 4th at 769 (Mosk, J., dissenting); see also *Sirott*, 6 Cal. App. 4th at 934 (Johnson, J., dissenting) (hair trigger approach is bad for clients because it requires them to proceed with two lawsuits at a time).

64. Ochoa & Wistrich, *supra* note 44, at 21-22. As a court explained in a similar context:

> It is harsh to require an insured — often a private homeowner — to defend the underlying action, at the homeowner's own expense, and *simultaneously* to prosecute — again at the homeowner's own expense — a separate action against the title company for failure to defend. "[T]he unexpected burden of defending an action may itself make it impractical to immediately bear the additional cost and hardship of prosecuting a collateral action against an insurer."

Lambert v. Commonwealth Land Title Ins. Co., 53 Cal. 3d 1072, 1078, 811 P.2d 737, 282 Cal. Rptr. 445 (1991) (emphasis in original, citation omitted).

example, the former client may conclude that a wealthy law firm is a less sympathetic defendant than a less affluent third party.[65]

Certainty in Application

Perhaps most importantly, by focusing on the facts and circumstances of each case, the Court's current approach to actual injury fails to provide clear, consistent, guidance as to the running of the limitations period.[66] Ideally, a statute of limitations should state a clear, easy-to-follow rule, not one that requires guesswork and forces the client and attorney to incur substantial sums debating about whether the malpractice suit was timely, rather than addressing the merits of the malpractice claim.[67] A bright line approach, focusing on termination of the underlying action (at least at the trial level) may not yield the perfect result in all situations. But occasional inequity may be less of a harm than uncertainty in all cases and likely inconsistency in application.[68]

A Proposed New Approach

One means of addressing the problems inherent in the Court's fact-specific approach to actual injury would be to statutorily redefine actual injury. For example, Section 340.6 could be amended to make clear that when an attorney's liability for legal malpractice depends on the outcome of an underlying lawsuit or other proceeding, actual injury does not occur until that proceeding is resolved by the trial court or other initial tribunal.

In some cases, however, such an approach may put the court in an awkward position. Although there are sound policy justifications for not requiring the client to sue for malpractice until the underlying proceeding is resolved, as a matter of semantics it is difficult to explain that actual injury has not yet occurred when a client has already spent large sums or even been incarcerated as an apparent consequence of an attorney's actions. These semantic difficulties might also impede recovery for losses incurred before the underlying proceeding is resolved.[69]

Instead of redefining actual injury, the Law Revision Commission proposes to directly address the problems created by simultaneously litigating a malpractice case and an underlying proceeding. This would be achieved by adding a new tolling provision to Section 340.6, drawn from the doctrine of equitable tolling,

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65. *Jordache*, 18 Cal. 4th at 767 (George, C.J., dissenting); see also *Sirott*, 6 Cal. App. 4th at 934 (Johnson, J., dissenting) (hair trigger lawsuits are bad for lawyers "because there probably will be many more malpractice suits filed").

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

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

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

69. See "Recovery of Damages" and the discussion of *Coscia* in "Fact-Specific Approach" *supra*.

which the courts have developed in other contexts involving issues of simultaneous litigation.[70]

Under this doctrine, the statute of limitations on a potential claim is tolled during the pendency of a related claim, so long as three requirements are met: (1) timely notice to the potential defendant, (2) lack of prejudice to the potential defendant in gathering evidence to defend against the potential claim, and (3) good faith and reasonable conduct on the part of the potential plaintiff.[71] By conditioning tolling on timely notice and lack of prejudice to the potential defendant, the doctrine ensures that the potential defendant (not just the plaintiff) has an adequate opportunity to gather and preserve evidence while it is fresh.[72] It also permits the potential defendant to take the possible claim into account in developing business and personal plans.

The doctrine thus is sensitive to the interests in preventing deterioration of evidence[73] and affording repose.[74] Yet it also provides a bright-line rule keyed to termination of the underlying action, rather than an ill-defined, earlier point in the litigation. As such, it is less flexible than current law,[75] but it promotes consistency and ease of application.[76] It also conserves judicial resources and spares the parties

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70. See, e .g., Lambert v. Commonwealth Land Title Ins. Co., 53 Cal. 3d 1072, 1078, 811 P.2d 737, 282 Cal. Rptr. 445 (1991) (claim against title insurer accrues when insurer refuses to defend title, but limitations period is tolled until underlying title action is resolved); Prudential-LMI Commercial Ins. v. Superior Court, 51 Cal. 3d 674, 687-93, 798 P.2d 1230, 274 Cal. Rptr. 387 (1990) (period to sue on casualty policy begins at time of loss but is tolled from timely notice of loss until insurer denies claim); Addison v. State, 21 Cal. 3d 313, 317, 578 P.2d 941, 146 Cal. Rptr. 224 (1978) (deadline for state court suit against public agency was tolled during pendency of related federal suit); Elkins v. Derby, 12 Cal. 3d 410, 417, 525 P.2d 81, 115 Cal. Rptr. 641 (1974) (limitations period for personal injury case was tolled while plaintiff pursued workers' compensation remedy in good faith); Bollinger v. National Fire Ins. Co., 25 Cal. 2d 399, 411, 154 P.2d 399 (1944) (period to sue on fire insurance policy was tolled during pendency of timely prior case).

The courts have not applied the doctrine of equitable tolling in the context of legal malpractice, because Section 340.6 states that "in no event" shall the time for commencing a legal malpractice claim be more than four years except under the circumstances enumerated in the statute. Gordon v. Law Offices of Aguirre & Meyer, 70 Cal. App. 4th 972, 974, 83 Cal. Rptr. 2d 119 (1999) ("[W]e hold that section 340.6 is not subject to equitable tolling; rather, the Legislature intended the statute's explicit tolling provisions to be exclusive."); see also People ex rel. Dep't of Corporations v. SpeeDee Oil Change Systems, Inc., 95 Cal. App. 4th 709, 725, 116 Cal. Rptr. 2d 497 (2002); Leasequip, Inc. v. Dapeer, 103 Cal. App. 4th 394, 406, 126 Cal. Rptr. 2d 782 (2002).

71. See, e.g., *Addison*, 21 Cal. 3d at 319; McMahon v. Albany Unified School Dist., 104 Cal. App. 4th 1275, 1292-93, 129 Cal. Rptr. 2d 184 (2003), *review denied* (March 19, 2003), *cert. denied*, __ U.S. __, 124 S.Ct. 155 (2003); Waterman Convalescent Hosp., Inc. v. State Dep't of Health Services, 101 Cal. App. 4th 1433, 1441, 125 Cal. Rptr. 2d 168 (2002); Mitchell v. Frank R. Howard Memorial Hosp., 6 Cal. App. 4th 1396, 1406-08, 8 Cal. Rptr. 2d 521 (1992); Ochoa & Wistrich, *supra* note 44, at 51-53.

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

73. See "Preservation of Evidence" *supra*.

74. See "Repose" *supra*.

75. See "Flexibility" *supra*.

76. See "Certainty in Application" *supra*.

the expense and stress of unnecessary litigation,[77] protects clients from having to take inconsistent positions or waive a privilege to their detriment,[78] eliminates the burden of simultaneously pursuing multiple actions,[79] and reduces the number of malpractice claims, which should lower the cost of malpractice insurance.[80]

The Law Revision Commission therefore proposes that Section 340.6 be revised to add a new tolling provision, which would apply when an attorney's liability for malpractice depends on the outcome of a pending or potential civil or criminal action, administrative adjudication, arbitration, tax audit, or other proceeding affecting the client's rights or obligations.[81] The new provision would toll the malpractice limitations periods until the underlying proceeding is resolved, provided that the plaintiff acts reasonably and in good faith, the plaintiff gives the attorney reasonable notice of the potential malpractice case, and the attorney is not unreasonably prejudiced in gathering evidence to defend that case.[82]

The Commission makes no tentative recommendation on whether tolling pursuant to the new provision should continue until the underlying proceeding is fully resolved, including completion of any appeal or other review process, or should end when the trial court or other initial tribunal renders its decision. The Commission specifically solicits comment on which of the following approaches is preferable:

[*Alternative A*: Tolling under the proposed law would continue during the pendency of an appeal in the underlying proceeding or other review process. Until the underlying proceeding is fully and finally resolved, it remains uncertain whether malpractice litigation will be necessary. Requiring a client to file a malpractice case while such uncertainty exists would not promote judicial economy.[83] It might also entail the other problems associated with simultaneous litigation, such as unnecessary litigation expenses, inconsistent results, or forced waiver of the lawyer-client or work product privilege. The better approach is to allow a client to wait until the outcome of the underlying proceeding is certain before deciding whether to sue for malpractice.[84] This delay will not lead to serious difficulties of proof, because the proposed law would require the client to give the attorney reasonable notice of the possible malpractice claim, the attorney must not have been prejudiced in gathering evidence to defend that claim, and

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77. See "Judicial Economy and Litigation Expenses" *supra*.

78. See "Inconsistent Positions" and "Waiver of Lawyer-Client or Work Product Privilege" *supra*.

79. See "Burden of Simultaneously Pursuing Multiple Actions" *supra*.

80. See "Number of Malpractice Claims and Cost of Malpractice Coverage" *supra.*

81. For a detailed discussion of the advantages of equitable tolling in the context of legal malpractice, see Ochoa & Wistrich, *supra* note 44 (especially pp. 53-54, 59, 79).

82. See proposed Section 340.6(c)(5) *infra*.

83. *Laird*, 2 Cal. 4th at 626 (Mosk, J., dissenting) ("The status of the malpractice claim is uncertain until the appeal in the underlying case is resolved, because if it is ultimately decided in the client's favor the malpractice suit may well become moot for lack of damages.").

84. *Id*. at 621-28 (Mosk, J., dissenting).

legal malpractice is often memorialized in a pleading, transcript, or other written record.[85]]

[*Alternative B*: Tolling under the proposed law would not continue during the pendency of an appeal in the underlying proceeding or other review process.[86] It is true that the outcome of the underlying proceeding remains to some extent uncertain pending determination of an appeal.[87] The appeal process can be lengthy, however, so a malpractice claim may be very stale by the time the appeal is finally resolved.[88] Although each side can take steps to preserve evidence relating to the alleged malpractice pending resolution of the appeal, this may not fully safeguard against deterioration of the evidence. Because most decisions are affirmed,[89] this risk outweighs the benefits of awaiting the appellate outcome. In addition, if the circumstances warrant, the court or other tribunal can stay the malpractice case pending the outcome of the appeal or other effort to reverse the initial determination. Alternatively, the potential parties can enter into a tolling agreement, making it unnecessary to file the malpractice case until the appeal is resolved.[90]]

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85. *Id*. at 627 (Mosk, J., dissenting); see also Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 193 n.33, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

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

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

88. Ochoa & Wistrich, *supra* note 44, at 23; see also *Laird*, 2 Cal. 4th at 618 (tolling pending appeal would undermine legislative goal of resolving cases while evidence is fresh, witnesses are available, and memories have not faded).

89. *Laird*, 2 Cal. 4th at 617; Ochoa & Wistrich, *supra* note 44, at 24.

90. According to legal malpractice expert Ronald Mallen,

> most lawyers are willing to stipulate to toll a statute of limitations on the hope that the existence or extent of an injury will be minimized or eliminated by subsequent revelation. Lawyers usually prefer that alternative to being named in a lawsuit that must be defended at cost to themselves or their insurers.

Mallen, *Limitations and the Need for "Damages" in Legal Malpractice Actions*, 60 Def. Couns. J. 234, 248 (1993).

The proposed new tolling provision will not entirely eliminate disputes over the meaning of actual injury as used in Section 340.6. Such disputes will arise less frequently, because in most cases it will be clear that tolling continues until the underlying proceeding is resolved, making it unnecessary to decide the time of actual injury. In some cases, the new provision will not apply, such as when there is no underlying proceeding (pending or potential) or when a client fails to give an attorney reasonable notice of a malpractice claim. In those circumstances, it might still be important to determine the time of actual injury in deciding whether the statute has run.

In general, however, the necessity of simultaneous litigation will not depend on the time of actual injury. Thus, in most cases, courts will be able to award damages for legal malpractice unhampered by concerns relating to simultaneous litigation.[91]

BURDEN OF PROVING TIME OF DISCOVERY

Under Section 340.6, one of the alternate limitations periods is "one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission...." The statute does not specify which party bears the burden of proof on the time of discovery of the facts constituting the alleged malpractice.[92] Relying primarily on the statutory language and legislative history, the California Supreme Court has interpreted the statute to place that burden on the defendant attorney. As a matter of policy, the Law Revision Commission proposes to reallocate that burden to the client.

Existing Law on the Burden of Proving the Time of Discovery Under Section 340.6

Samuels v. Mix[93] is the key decision on the burden of proving the time of discovery of legal malpractice. The plaintiff in *Samuels* had retained an attorney to represent her in a personal injury lawsuit against a drug manufacturer. She accepted a settlement offer on the advice of her attorney. Thereafter, however, her medical condition worsened. She met briefly with a second attorney about the

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91. See "Recovery of Damages" *supra*.

92. The Evidence Code distinguishes between the burden of proof and the burden of producing evidence. The burden of proof means a party's obligation to convince the trier of fact as to the existence or nonexistence of the fact. Evid. Code § 115; see also Evid. Code § 500 Comment. 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 a party's obligation to introduce evidence sufficient to avoid a ruling against that party on the matter in question. Evid. Code § 110. At the start of a trial, this burden will coincide with the burden of proof. Evid. Code § 500 Comment. But the burden of producing evidence may shift during trial. For example, if 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.*

The focus of this discussion is on the burden of proof, not on the burden of producing evidence.

93. 22 Cal. 4th 1, 989 P.2d 701, 91 Cal. Rptr. 2d 273 (1999). The Commission is not aware of any other published California decision addressing this point.

possibility of reopening her case against the drug manufacturer. Just over one year after that meeting, she brought suit against the first attorney, alleging that he had negligently advised her to settle 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 the one-year period, and the trial court entered judgment accordingly.[94] The court of appeal reversed and the California Supreme Court granted review.

***Majority Opinion in* Samuels**

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 attorney 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.[95] The Court advanced a number of reasons for its decision, mostly focusing on the statutory language and legislative history, rather than on policy considerations.

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.[96] Under Evidence Code Section 500, the defendant normally bears the burden of proof on an affirmative defense.[97] 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 …."[98]

The Court next considered the defendant's contention that Section 340.6 merely codifies the common law discovery rule, under which the plaintiff bears the burden of proving the time of discovery of the facts giving rise to a cause of action.[99] The Court rejected that idea, pointing out that the statute differs from the

94. *Id.* at 6.

95. *Id.* at 5.

96. *Id.* at 7.

97. Section 500 states that "[e]xcept 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."

98. *Id.* at 7-8.

99. *Id.* at 9, 10; see, e.g., April Enterprises, Inc. v. KTTV, 147 Cal. App. 3d 805, 832-33, 195 Cal. Rptr. 421 (1983).

common law discovery rule in significant respects, such as its tolling provisions.[100]

Similarly, the Court rejected the defendant's attempt to draw an analogy between Section 340.6 and the statute of limitations for fraud claims, which requires the plaintiff to prove the time of discovery of the fraud.[101] Noting differences between the two provisions, the Court said that Section 340.6 has to be construed "on its own terms" and according to its plain language, rather than by reference to the statute of limitations for fraud claims.[102]

The Court then turned to a policy issue: Whether it is fair for a defendant attorney to have to prove when the client discovered, or should have discovered, the facts constituting malpractice. The Court pointed out that the one-year limitations period under Section 340.6 benefits the defendant as the shorter of the alternate limitations periods.[103] Because the rule benefits the defendant, the Court deemed it fair for the defendant to bear the burden of proving its requirements, including the time of discovery.[104]

Finally, the Court considered whether the burden of proof should be placed on the plaintiff because information regarding the time when the plaintiff discovered, or should have discovered, the facts constituting the malpractice is likely to be peculiarly within the plaintiff's access and control. The Court declined to weigh this policy consideration on its merits, because that is a legislative prerogative, not within the authority of the judiciary.[105] The Court considered itself bound by the plain language of Section 340.6 and Evidence Code Section 500.[106] The Court also said that there was no showing in the record that the plaintiff had superior access to evidence on the time of discovery, and there was no apparent reason that a plaintiff would be better able than a defendant to determine when the plaintiff *should have discovered* the facts constituting the malpractice.[107]

***Justice Baxter's Dissent in* Samuels**

Justice Baxter authored a vigorous dissent in *Samuels*. He criticized the majority's "semantic analysis" of Section 340.6 as "overliteral and exaggerated."[108] In his opinion, the legislative history and statutory language

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100. *Id*. at 12-13.

101. *Id*. at 14.

102. *Id*. at 17.

103. *Id*. at 18.

104. The Court viewed this as an example of the general rule that "He who takes the benefit must bear the burden." *Id*. at 18; see Civ. Code § 3521.

105. *Id*. at 20.

106. *Id.*

107. *Id.*

108. *Id*. at 24 (Baxter, J., dissenting).

demonstrate no intent to deviate from the traditional allocation of the burden of proof under the common law discovery rule.[109]

More importantly, he pointed out that although the defendant normally bears the burden of proof on an affirmative defense, Evidence Code Section 500 allows courts to deviate from that allocation in the interest of fairness and sound public policy.[110] Courts consider a number of factors in deciding to depart from the normal allocation, including the knowledge of the parties concerning the particular fact and the availability of the evidence to the parties.[111] In Justice Baxter's opinion, those factors call for reallocation of the normal burden of proof in the context of legal malpractice, because an attorney should not have to defend a malpractice claim by proving facts peculiarly within the opponent's knowledge.[112]

He explained that an attorney would face unique and unfair difficulties if forced to prove when a client discovered, or through the use of reasonable diligence should have discovered, the facts constituting the malpractice:

> 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 are 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.[113]

In short, Justice Baxter maintained that the time of discovery of legal malpractice often will depend on what information the plaintiff obtained at what time in confidential and absolutely privileged consultations with another attorney.[114] This

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109. *Id*. at 23-24 (Baxter, J., dissenting).

110. *Id*. at 26 (Baxter, J., dissenting).

111. Evid. Code § 500 Comment. Other relevant factors are "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." *Id*.

112. *Samuels*, 22 Cal. 4th at 23 (Baxter, J., dissenting).

113. *Id*. at 27-28 (Baxter, J., dissenting) (emphasis added).

114. *Id*. at 23 (Baxter, J., dissenting).

may leave the attorney without any meaningful opportunity to show that the plaintiff's claim is untimely.[115]

***Rebuttal to Justice Baxter's Dissent in* Samuels**

The *Samuels* majority made five points in attempting to rebut Justice Baxter's dissent:

- It should not be assumed that a malpractice plaintiff would misrepresent the time of discovery under oath.
- The lawyer-client privilege does not protect the time, date, and names of participants in a confidential communication. That information may be sufficient to establish the time of discovery.
- If a plaintiff exposes a significant part of a privileged communication, the privilege is waived.
- If an attorney is contacted by another attorney who seeks malpractice remedies on behalf of a client, that communication is not privileged. That information might help to establish the time of discovery.
- If an attorney provides an expert opinion in the malpractice case, the attorney may be cross-examined to the same extent as any other witness.[116]

The court further explained that any remaining difficulty in proving the time of discovery is a consequence of the existing legislative policy balance embodied in Section 340.6.[117]

Policy Analysis

The role of the courts is to interpret existing law by discerning the legislative intent underlying the current version of Section 340.6. In contrast, the role of the Legislature is to balance the competing policy considerations in the manner that best serves the public.

Thus, in deciding whether to revise the statute, the *Samuels* analyses of the statutory language and legislative intent are comparatively unimportant. The focus must be on the policy arguments relating to fairness and access to evidence.

Guiding Principles

As a general matter, an affirmative defense based on the statute of limitations is neither favored nor disfavored. [118] The competing interests in repose and in disposition on the merits are considered equally strong.[119] Thus, the field is presumptively level, favoring neither the client nor the attorney defendant.

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115. *Id.*
116. *Id*. at 20 n.5.
117. *Id.*
118. Norgart v. Upjohn Co., 21 Cal. 4th 383, 397, 981 P.2d 79, 87 Cal. Rptr. 2d 453 (1999).
119. *Id.*

Further, basic considerations of fairness are of paramount importance in allocating a burden of proof.[120] There is no one formula to apply in all cases.[121] It is a question of policy and fairness to be decided based on experience in the particular situation under consideration or in analogous situations.[122]

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 appears to benefit the defendant attorney, because the statute establishes alternate limitations periods and the one-year-from-discovery period only applies when it is the shorter of the two possibilities.

Access to Evidence

Justice Baxter's concerns regarding access to evidence appear to be well-taken. Even the *Samuels* majority did 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. The majority merely identified circumstances in which evidence bearing on the time of discovery is accessible to the defendant, and attributed any remaining proof difficulty to the existing legislative policy balance.[123]

The question is whether that existing legislative policy balance should be changed. As Justice Baxter pointed out, discovery of legal malpractice may hinge on consultations between a client and a second attorney.[124] The timing of such conversations is not privileged,[125] but the content of the conversations is. There is no client-litigant exception to the lawyer-client privilege.[126] When a client sues an attorney for malpractice, conversations between the client *and that attorney* are not privileged.[127] But that exception applies only to a communication between the client and the attorney accused of malpractice.[128] It does not abrogate the privilege

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120. Evid. Code § 500 Comment; see also Adams v. Murakami, 54 Cal. 3d 105, 119-20, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991); Galanek v. Wismar, 68 Cal. App. 4th 1417, 1425-28, 81 Cal. Rptr. 2d 236 (1999).

121. Evid. Code § 500 Comment, *quoting* 9 Wigmore, Evidence § 2486, at 275 (3d ed. 1940).

122. *Id.*

123. *Samuels*, 22 Cal. 4th at 20 n.5.

124. *Id*. at 27 (Baxter, J., dissenting).

125. *id*. at 20 n.5.

126. Schlumberger, Ltd. v. Superior Court, 115 Cal. App. 3d 386, 393, 171 Cal. Rptr. 413 (1981).

127. Evid. Code § 958.

128. *Schlumberger*, 115 Cal. App. 3d at 392.

as to a communication between the client and another lawyer, such as the attorney representing the client in the malpractice suit.[129]

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 determinative. The client might have been aware of, or on notice of, crucial facts well before then. Conversely, the client might not have learned of the malpractice until after the second attorney investigated the situation to some extent and conveyed key findings to the client.

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. 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, the client has no need or incentive to waive the lawyer-client privilege and thereby aid the attorney in establishing a limitations defense.[130]

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 may be shielded by the lawyer-client privilege. That is a fundamentally unfair predicament.[131] In assessing who should bear the burden of proof, this consideration overrides the general principle that the party who benefits from a legal doctrine should bear the burden of proving its application.[132]

Reallocation of the Burden of Proof

The Law Revision Commission proposes to amend Section 340.6 to provide that if an attorney defendant raises the one-year-from-discovery limitations period as an affirmative defense, the plaintiff bears the burden of proof on the time of discovery of the facts constituting the wrongful act or omission.[133] That would be consistent with how the common law discovery rule has been interpreted in other contexts. It would also address the concerns regarding access to evidence, ensuring that the party with greater access bears the burden of proof.[134] Further, the proposed rule would not compel the plaintiff to waive the lawyer-client privilege

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129. *Id.*

130. *Samuels*, 22 Cal. 4th at 28 (Baxter, J., dissenting).

131. See generally McDermott, Will & Emery v. Superior Court, 83 Cal. App. 4th 378, 99 Cal. Rptr. 2d 622 (2000); Steiny & Co. v. Cal. Elec. Supply Co., 79 Cal. App. 4th 285, 93 Cal. Rptr. 2d 920, 925 (2000).

132. Civ. Code § 3521.

133. See proposed Section 340.6(b) *infra*.

134. See Thomas v. Lusk, 27 Cal. App. 4th 1709, 1717, 34 Cal. Rptr. 2d 265 (1994) (burden of proving element of case is more appropriately borne by party with greater access to information).

as to communications with a second attorney. It would be left up to the plaintiff to decide whether to waive the privilege to satisfy the burden of proof.

ACTION ON WRITTEN INSTRUMENT EFFECTIVE ON OCCURRENCE OF FUTURE ACT OR EVENT

Section 340.6(b) states that "[i]n 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 effect of this provision is unclear. There do not seem to be any cases interpreting it.

The provision was included in the initial version of the bill that became Section 340.6.[135] That version did not include a provision tolling the limitations periods until the client sustains actual injury.[136] It is likely that Section 340.6(b) "was intended to toll the statute in common delayed damage situations, such as claims by beneficiaries of wills who are not damaged and whose causes of action do not arise until their testators die."[137]

But the provision does not effectuate that intent. A mistake in preparing a will results in an action "for" negligence, not an action "upon" the will.[138] Thus, the provision would not help the beneficiary of a will if the term "upon" were interpreted literally. Moreover, it would not add anything to existing contract law. As legal malpractice expert Ronald Mallen explains, "[o]bviously, where a cause of action is upon a writing which depends upon some future event for its effectiveness, a cause of action cannot accrue, and the limitations period does not start to run until the event occurs."[139] Section 340.6(b) would therefore be meaningless if the term "upon" were interpreted literally.

The provision would also be unnecessary if "upon" were interpreted to mean "relating to" or "concerning" a will. When malpractice occurs in preparing a document that is only effective on occurrence of a future event, the document cannot cause damages until that event occurs.[140] The provision tolling the limitations periods until actual injury occurs (Section 340.6(a)(1)) already protects the plaintiff in those circumstances. Section 340.6(b) would add nothing in that situation.

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135. See AB 298 (Brown), as introduced, Jan. 25, 1977.

136. *Id.*

137. Mallen, *An Examination of a Statute of Limitations for Lawyers*, 53 Cal. State Bar J. 166, 168 (1978).

138. *Id.*

139. *Id.*

140. *Id.*

Section 340.6(b) is thus a useless and potentially confusing vestige of the legislative drafting process.[141] The Law Revision Commission proposes that it be deleted.

ESTATE PLANNING MALPRACTICE

Numerous estate planning attorneys have expressed concerns regarding how Section 340.6 applies to estate planning malpractice. Those concerns stem from the provision tolling the limitations periods until actual injury occurs. In the context of estate planning, decades can elapse between the time an attorney drafts an estate plan and the time the client dies, triggering the estate plan and perhaps causing damages to a beneficiary. Because the limitations period for a legal malpractice claim is tolled during that time, an estate planning attorney can be sued for work performed many years in the past. This lengthy period of exposure might be related to the cost of malpractice premiums, which reportedly have increased dramatically in recent years.

The Law Revision Commission does not propose any reforms to address these concerns at this time. Any solution must be fair to clients and beneficiaries as well as attorneys.[142] The Commission has suggested that the State Bar examine the situation with that principle in mind, because the Bar can explore a wide variety of solutions, not just legislative action.[143] The Commission may propose legislation on this topic in the future.

RETROACTIVITY OF THE PROPOSED REFORMS

In revising a statute of limitations, it is important to consider how the reform will apply to a malpractice case that was filed before the operative date of the reform, or to a malpractice incident that occurred before the operative date but has not yet resulted in litigation. It is well-established that a party does not have a vested right in the time for commencement of a lawsuit.[144] Likewise, a party does not have a vested right in the running of the statute of limitations prior to its expiration.[145] If the Legislature shortens a limitations period, however, it must give parties a reasonable time to bring suit before the reform takes effect.[146]

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141. *Id.*; see also Mallen & Smith, *supra* note 67, at § 21.5, p. 741 & n. 32.

142. "[W]hen 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." Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 192, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

143. The role of the Law Revision Commission is to study topics assigned by the Legislature and recommend legislative reforms to the Legislature and the Governor. See Gov't Code §§ 8280-8298.

144. See, e.g., Carlson v. Blatt, 87 Cal. App. 4th 646, 650, 105 Cal. Rptr. 2d (2001).

145. See, e.g., *id.*

146. See, e.g., *id.*

None of the reforms proposed here would shorten a limitations period. The proposed new tolling provision would provide an additional means of extending the time in which to sue, avoiding the need for simultaneous litigation. The proposed reallocation of the burden of proving the time of discovery would benefit an attorney asserting the one-year limitations period as a defense, but would not change the length of that period. The deletion of unnecessary Section 340.6(b) would not have any substantive impact.

Nonetheless, the Law Revision Commission proposes that the operative date of the proposed reforms be delayed until one year after the new law becomes effective. That would give parties a reasonable time to take responsive action before the law changes. The Commission further proposes that the proposed reforms apply only in an action commenced on or after the operative date.

PROPOSED LEGISLATION

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

SEC. __. Section 340.6 of the Code of Civil Procedure is amended to read:

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

(b) If the attorney raises the one-year limitation as an affirmative defense, the plaintiff bears the burden of proof of the time of discovery of the facts constituting the wrongful act or omission.

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

(1) The plaintiff has not sustained actual ~~injury;~~ injury.

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

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

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

(5) The attorney's liability depends on the outcome of a pending or potential civil or criminal action, administrative adjudication, arbitration, tax audit, or other proceeding affecting the client's rights or obligations, and that proceeding has not been settled or fully resolved [by the trial court or other initial tribunal]. This paragraph only applies if the plaintiff acts reasonably and in good faith, the plaintiff gives the attorney reasonable notice of the potential action for a wrongful act or omission, and the attorney is not unreasonably prejudiced in gathering evidence to defend against the potential action for a wrongful act or omission.

~~(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.~~

Comment. New subdivision (b) is added to Section 340.6 to reallocate the burden of proof on the issue of discovery. It overturns *Samuels v. Mix*, 22 Cal. 4th 1, 989 P.2d 701, 91 Cal. Rptr. 2d 273 (1999), which held that the attorney defendant bears the burden of proving when the plaintiff discovered, or through the use of diligence should have discovered, the facts constituting the defendant's malpractice. For background on allocating the burden of proof to the plaintiff, see Section 500 (listing factors to be considered in allocating burden of proof); *Samuels*, 22 Cal. 4th

at 22-30 (Baxter, J., dissenting) (burden of proving time of discovery of legal malpractice should be on plaintiff because pertinent facts are peculiarly within plaintiff's knowledge and control).

Paragraph (5) is added to subdivision (c) (formerly the second sentence of subdivision (a)) to address the problem of simultaneous litigation. When an underlying proceeding bears on a malpractice incident, the tolling provided by this paragraph spares the client from having to simultaneously pursue both the underlying proceeding and a malpractice action. See generally ITT Small Business Finance Corp. v. Niles, 9 Cal. 4th 245, 257, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994) ("it would be a waste of judicial resources to require both the adversary proceeding and the attorney malpractice action to be litigated simultaneously"); Elkins v. Derby, 12 Cal. 3d 410, 412, 525 P.2d 81, 115 Cal. Rptr. 641 (1974) (awkward duplication of procedures is not necessary to serve fundamental purpose of statute of limitations, which is to insure timely notice to adverse party so that party can assemble defense while facts are fresh); Ochoa & Wistrich, *Limitation of Legal Malpractice Actions: Defining Actual Injury and the Problem of Simultaneous Litigation*, 24 Sw. U. L. Rev. 1, 3 (1994) (simultaneous litigation of malpractice suit and underlying action "can raise a host of legal and practical problems, including collateral estoppel, inconsistent outcomes, and waiver of attorney-client privilege").

[*Alternative A*: Tolling under the proposed law would continue during the pendency of an appeal in the underlying proceeding or other review process. For background on this approach, see Laird v. Blacker, 2 Cal. 4th 606, 621-28 (Mosk, J., dissenting).]

[*Alternative B*: Tolling does not continue during the pendency of an appeal, motion to overturn a settlement, or other review process. Laird v. Blacker, 2 Cal. 4th 606, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992). If the circumstances warrant, however, the court or other tribunal can stay the malpractice case pending the outcome of the appeal or other effort to reverse the initial determination. Alternatively, the potential parties can enter into a tolling agreement, making it unnecessary to file the malpractice case until the appeal is resolved.]

For guidance on the tolling requirements codified in this paragraph, see, e.g., Addison v. State of California, 21 Cal. 3d 313, 317-19, 321, 578 P.2d 941, 146 Cal. Rptr. 224 (1978); McMahon v. Albany Unified School Dist., 104 Cal. App. 4th 1275, 1292-93, 129 Cal. Rptr. 2d 184 (2003), *review denied* (March 19, 2003), *cert. denied*, __ U.S. __, 124 S.Ct. 155 (2003); Waterman Convalescent Hosp., Inc. v. State Dep't of Health Services, 101 Cal. App. 4th 1433, 1441, 125 Cal. Rptr. 2d 168 (2002); Mitchell v. Frank R. Howard Memorial Hosp., 6 Cal. App. 4th 1396, 1406-08, 8 Cal. Rptr. 2d 521 (1992); Ochoa & Wistrich, *supra*, at 51-53.

Former subdivision (b), concerning the limitations period where an instrument in writing is effective on occurrence of a future act or event, is deleted as unnecessary and potentially confusing. See R. Mallen & J. Smith, Legal Malpractice, *Statutes of Limitations* § 21.5, p. 741 & n. 32 (4th ed. 1996); Mallen, *An Examination of a Statute of Limitations for Lawyers*, 53 Cal. State Bar J. 166, 168 (1978).

The amendment of this section does not affect the limitations periods or tolling rules for other types of professional malpractice.

Section 340.6 is also amended to make nonsubstantive, stylistic revisions.

☞ **Note.** The Law Revision Commission solicits comment on whether tolling pursuant to proposed subdivision (c)(5) should continue until the underlying proceeding is fully resolved, including completion of any appeal or other review process (Alternative A), or should end when the trial court or other initial tribunal renders its decision (Alternative B).

Uncodified (added). Operative date

SEC. 2. (a) This act becomes operative on January 1, ____.

(b) This act applies only in an action or proceeding commenced on or after January 1, ____.

☞ **Note.** The Law Revision Commission proposes that the operative date of the proposed reforms be delayed until one year after the new law becomes effective, so as to give parties a

reasonable time to take responsive action before the law changes. The Commission further proposes that the proposed reforms apply only in an action commenced on or after the operative date. The Commission solicits comment on this approach.
