Study J-111 April 28, 2005

Memorandum 2005-20

Statute of Limitations for Legal Malpractice (Comments on Tentative Recommendation)

The Commission has been studying the statute of limitations for legal malpractice (Code Civ. Proc. § 340.6), which has been the focus of numerous disputes. Last November the Commission approved a tentative recommendation proposing several reforms. The tentative recommendation was posted on the Commission's website and widely circulated for comment, with a comment deadline of March 31, 2005. Thus far, the Commission has received the following input:

The Commission also received an email message from John T. George raising an issue that is not addressed in the tentative recommendation (Exhibit p. 21). The staff has been informed that a couple of organizations still plan to submit comments on the tentative recommendation. These should be arriving soon. At its upcoming meeting, the Commission will need to consider the comments and determine how to proceed. This memorandum analyzes the comments submitted to date.

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

SECTION 340.6: STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE

Section 340.6 establishes alternate limitations periods for legal malpractice. The limitations period is either one year from the client's actual or constructive discovery of the malpractice, or four years from the date of the malpractice, whichever occurs first. The statute provides:

> 340.6. (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, or whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
>
> (1) The plaintiff has not sustained actual injury;
>
> (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
>
> (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
>
> (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.
>
> (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

The alternate limitations periods are tolled under a number of circumstances — i.e., the running of the limitations periods is interrupted when those circumstances exist.

In particular, the limitations periods are tolled while the allegedly negligent attorney continues to represent the client "regarding the specific subject matter in which the alleged wrongful act or omission occurred." The limitations periods are also tolled when the client is under a legal or physical disability that interferes with the client's ability to bring suit. The four-year but not the one-year limitations period is tolled when the attorney willfully conceals the malpractice. Perhaps most importantly, both limitations periods are tolled until the client sustains "actual injury" from the malpractice.

Much litigation has centered on what constitutes "actual injury" within the meaning of the statute. The California Supreme Court has repeatedly addressed the issue, taking different approaches at different times and dividing in almost every case. A critical question is when harm becomes sufficiently certain and sufficiently attributable to malpractice to constitute "actual injury." For example,

suppose an attorney makes a mistake in handling a lawsuit for a client, which might adversely affect the outcome of the lawsuit. Does "actual injury" occur as soon as the attorney makes the mistake, because the mistake affects the value of the claim by or against the client? Does "actual injury" only occur when the client first incurs fees or other expenses investigating or otherwise dealing with the mistake? Or does "actual injury" not occur until even later, such as when the underlying proceeding settles, when the trial court resolves the underlying proceeding, when the time to appeal expires, or when all appeals in the underlying proceeding are resolved? The Court's current approach to these issues calls for a particularized assessment of the facts of each case. Because the Court has not established a bright-line rule, it is difficult to predict how the statute will apply in each case.

The definition of "actual injury" may also dictate whether the client must commence a malpractice case before the underlying proceeding is resolved. As explained at pages 6-9 of the tentative recommendation, simultaneous litigation of a malpractice case and an underlying proceeding poses a number of serious problems, including potentially prohibitive burdens on the client, a danger of inconsistent positions or results, potential for undue harm from waiver of privileges in pursuing the malpractice case, and adverse impacts on judicial economy, litigation expenses, and malpractice insurance costs. Some time ago, Andrew Wistrich (United States Magistrate Judge for the Central District of California) and Tyler Ochoa (a law professor now at the University of Santa Clara School of Law) wrote an article about these matters, which prompted the Commission's study of this topic. Ochoa & Wistrich, *Limitation of Legal Malpractice Actions: Defining Actual Injury and the Problem of Simultaneous Litigation*, 24 Sw. U. L. Rev. 1 (1994).

SUMMARY OF THE TENTATIVE RECOMMENDATION

The tentative recommendation proposes three reforms.

First, the tentative recommendation proposes to address the problem of simultaneous litigation and reduce the emphasis on defining "actual injury" by adding a new tolling provision to Section 340.6. This proposed new provision is drawn from the judicial doctrine of equitable tolling, which courts developed in other contexts involving simultaneous litigation (courts have not applied this doctrine to legal malpractice because they have interpreted the language of

Section 340.6 to preclude as much). Under the proposed new provision, the alternate limitations periods for a legal malpractice claim would be tolled when the attorney's liability for malpractice "may depend on the outcome of a pending or reasonably foreseeable 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." This rule would only apply, however, if three requirements are satisfied: "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." The tentative recommendation does not take a position on whether tolling pursuant to the new provision should end when the trial court or other initial tribunal renders its decision in the underlying proceeding, or continue during the pendency of an appeal or other review process. The tentative recommendation presents both of these alternatives for consideration and comment.

The second reform proposed in the tentative recommendation pertains to the burden of proving when the malpractice plaintiff "discover[ed], or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission...." Code Civ. Proc. § 340.6(a). Under existing law, the defendant attorney bears the burden of proof on the time of the plaintiff's actual or constructive discovery, even though evidence on that point is likely to be more accessible to the plaintiff than to the attorney. The tentative recommendation proposes to reallocate that burden from the attorney to the plaintiff.

Third, the tentative recommendation proposes to delete Section 340.6(b), which states: "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 tentative recommendation explains that this provision appears to be a useless and confusing vestige of the legislative drafting process.

In combining these three reforms into a single proposal, it was important to examine whether the proposal would be one-sided, benefiting attorneys exclusively to the detriment of clients, or vice versa. As explained in a staff memorandum, the proposal appeared to be reasonably well-balanced:

- 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.

Memorandum 2004-50, pp. 2-3 (available from the Commission, www.clrc.ca.gov).

ACTUAL INJURY AND SIMULTANEOUS LITIGATION

Reaction to the proposed new tolling provision was mixed, but mostly negative.

Support

The proposed new tolling provision based on the doctrine of equitable tolling is similar to an idea advanced by Judge Wistrich and Professor Ochoa: that courts should "defin[e] 'actual injury' in a manner consistent with that doctrine, thereby tolling the commencement of the limitation period for the malpractice action until an adverse judgment or other appealable order is entered against the client at the trial court level in the underlying action, provided the other requirements of the doctrine are satisfied." Ochoa & Wistrich, *supra*, at 79. Unfortunately, however, neither Judge Wistrich nor Professor Ochoa commented on the tentative recommendation.

The State Bar Trusts and Estates Section "has considerable interest in the statute of limitations for attorney malpractice claims potentially arising from services performed on behalf of its members' clients — both as attorneys attempting to rectify potential harm done to the clients' interests, as well as attorneys against whom claims might be made." Exhibit p. 18. The Trusts and

Estate Section supports the proposed new tolling provision, but with qualifications. *Id*. at 18, 19.

The group likes the first sentence of proposed new subdivision (c)(5), which establishes the tolling provision. *Id*. at 19. The group believes that tolling pursuant to this provision should continue until all rights of appeal or other review in the underlying proceeding are exhausted, not just until the trial court or other initial tribunal resolves the matter. *Id*. at 20. But the group suggests that the second sentence, which "sets forth three pre-conditions for the application of the tolling provision of the first sentence, be modified to establish only one condition to tolling: reasonable written notice to the attorney by the plaintiff of the potential action for a wrongful act or omission." *Id*. at 19.

The Trusts and Estates Section explains that each of the three pre-conditions — the plaintiff acts reasonably and in good faith, the plaintiff gives reasonable notice of the potential malpractice case, and the attorney is not unreasonably prejudiced in gathering evidence to defend against the potential action — "injects the potential for a factual dispute into a tolling provision that is otherwise designed to reduce the likelihood of expensive and fractious litigation." *Id*. The group states that these conditions "should limit the applicability of the tolling provision only if the benefits of the condition outweigh the costs of creating possible factual disputes." *Id*.

With regard to the requirement of reasonable notice, the Trusts and Estates Section believes that the benefits outweigh the costs. "An attorney subject to a potential claim that is allowed to remain unfiled while another proceeding is resolved should be given notice of this possible liability and the opportunity to take steps to defend himself or herself." *Id*. According to the group, "the concept of 'reasonable notice' is limited, discrete, and subject to articulable standards." *Id*. The group suggests adding the requirement that the notice be in writing, to "further limit the number of factual issues arising from the imposition of this condition." *Id*. The Trusts and Estates Section "does not believe that the requirement of 'reasonable written notice' will create unnecessary factual disputes or lead to unpredictable results." *Id*.

As for the other two requirements (good faith and lack of prejudice), however, the group concludes that the costs outweigh the benefits:

> Neither condition is limited, discrete, or subject to readily articulable standards. Both conditions are invitations to factual disputes that defy predictable results. The practical effect of

> including these two conditions on the [new tolling provision] is that no attorney advising a potential attorney malpractice client will counsel the client to take the risk that the tolling provision might not be applied to the client's claim. Instead, the attorney will counsel the client to obtain a tolling agreement or file suit, just as is the law and practice now. The inclusion of such broad, undefined conditions on the application of the tolling provision will likely negate the benefits sought to be achieved by the addition of the express tolling provision in the first place.

Id.

Opposition

Attorneys David Gubman and Ronald Mallen, the San Diego County Bar Association, and the State Bar Committee on Administration of Justice all commented negatively on the proposed new tolling provision.

Mr. Gubman of Alschuler Grossman Stein & Kahan LLP does not like the proposed new tolling provision because it is "going to lead to uncertainty on several levels, and it will take another 25 years to sort it out." Exhibit p. 1. He writes:

> What does it mean that an attorney's liability may depend on the outcome? If there is some remotely conceivable outcome that changes whether the attorney is liable, then the statute doesn't run? What does that do to the rule that having to incur attorneys' fees was enough to trigger the statute?
>
> Worse, creating subjective tests, such as "unreasonable" prejudice to the attorney by the delay, will lead to complex pre-trial motions on the applicability of the statute. As one who has represented both sides in such cases over the years, the overall change is probably good for the plaintiff, but the implementation may allow the defendant to bleed the plaintiff dry in smaller cases.

Id.

Mr. Mallen, who played a large role in drafting Section 340.6 in the late 1970s, voices similar concerns. Legal malpractice defense has been his principal occupation for more than 30 years. Exhibit p. 2. In his experience, although the problems described in the tentative recommendation are "theoretically legitimate," they arise infrequently. *Id*. Rather, he says "these problems are routinely handled by tolling agreements." *Id*. at 3. He also points out that when a party is unwilling to enter into a tolling agreement, "the other party can seek to

have the legal malpractice action stayed." *Id*. In his view, "[a]lthough these are not ideal solutions, they do work." *Id*.

Mr. Mallen cautions that the proposed cure for the problem of simultaneous litigation "is worse than the problem being addressed." *Id*. He stresses that the proposed new tolling provision would inject "inherently fact-based criteria," such as:

> "*Reasonably foreseeable* civil or criminal action;"
> "*Fully* resolved;"
> "Only if the plaintiff acts *reasonably*;"
> "And in *good faith*;"
> "The plaintiff gives the attorney *reasonable* notice;" and
> "The attorney is not *unreasonably prejudiced*."

Id. at 2-3 (emphasis in original). According to Mr. Mallen, if the statute was amended to incorporate these requirements, "tolling or the end of tolling will *always* be an issue of fact," precluding resolution short of trial. *Id*. at 2 (emphasis in original). He warns that this "will result in further litigation, increased expense to lawyers in an already expensive insurance market, and essentially eliminate an important protection of the present statute of limitations." *Id*. at 3.

The San Diego County Bar Association ("SDCBA") takes a similar position. The group "recognizes that the current state of the law does create some degree of ambiguity and uncertainty in the context of concurrent litigation." Exhibit p. 4. In the group's opinion, however, "the proposed revision, while well intentioned, will only create more confusion, additional litigation and increased cost." *Id*. According to the group, although the "dilemma created by concurrent litigation is a common issue for attorneys who defend claims for legal malpractice," typically any issue "can be resolved amicably by way of a voluntary tolling agreement or through a motion to stay proceedings." *Id*.

Like Messrs. Gubman and Mallen, SDCBA expresses concern that "[a] number of potentially ambiguous terms are incorporated into the proposed provision which will likely lead to an increase in litigation and costs rather than the reduction anticipated in the comments." *Id*. at 5. In particular, SDCBA comments:

> [P]roposed 340.6(c)(5) references a "reasonabl[y] foreseeable civil or criminal action etc ...." and applies if the Plaintiff acts "reasonably and in good faith," provides the attorney with "reasonable notice" and that the attorney is not "unreasonably prejudiced" in gathering evidence. The reasonableness standards proposed in the revisions

> will undoubtedly lead to exhaustive litigation by virtue of the fact that it creates an entirely subjective standard that will require significant clarification through the courts.

Id.

SDCBA also believes that the proposed new tolling provision will have adverse effects relating to malpractice insurance:

> The proposed new provision will also have a negative impact on the practitioner's ability to procure professional liability insurance, as it will increase the limitation period thus encouraging more claims and allowing additional evidence to be accumulated. Additionally, it is likely that practitioners will be faced with increased premiums due to longer extended reporting periods. Delay in pursuing claims after receiving/providing reasonable notice creates a period of uncertainty where insurers could become insolvent or in some fashion undertake actions having a negative impact on coverage or the availability of funds.

Id.

The State Bar Committee on Administration of Justice ("CAJ") has provided a long and very thorough analysis of the proposed new tolling provision, which raises numerous concerns. Exhibit pp. 8-17. CAJ acknowledges that it may be hard for a client to simultaneously pursue both an underlying proceeding and a malpractice case. As CAJ says, a client "who is forced in such circumstances to wage war on two fronts' may be placed in a difficult position, and in fact may be substantially prejudiced in one or both actions." *Id*. at 8. For three main reasons, however, CAJ believes that the proposed new tolling provision is a bad idea.

First, CAJ "questions whether a legislative 'fix' is truly called for." *Id*. The committee "is aware of no specific information shedding light on how frequently the problems identified by the CLRC actually arise." *Id*. Like Mr. Mallen and SDCBA, CAJ points out that the burden of pursuing simultaneous litigation may be alleviated by entering into a tolling agreement or seeking a stay of the malpractice case pending resolution of the underlying proceeding. *Id.* CAJ recognizes that these approaches "do not entirely eliminate the potential problems identified by the CLRC." *Id*. at 9. In particular, "[t]here may be circumstances where a defendant attorney is unwilling to enter into a tolling agreement, and where the trial court concludes either that it is not authorized to stay the malpractice action or that a stay is not justified on the facts before it." *Id*. There is also the possibility that "the allegations raised in the plaintiff's

malpractice complaint could prove useful to plaintiff's adversary in the ongoing, underlying litigation, or could result in harmful admissions or a waiver of attorney-client privilege." *Id*. at 13; see also pp. 8 & 9 & n. 42 of the tentative recommendation. "However, absent some reason to believe that there are a substantial number of cases where such approaches are inadequate and the potential problems identified by CLRC will become manifest, CAJ questions whether a legislative fix is warranted." Exhibit p. 9.

Second, CAJ concurs with the other commentators that the requirements of the proposed new tolling provision "are too vague to establish the 'bright-line rule' sought by the CLRC." *Id*. at 10. CAJ poses numerous questions regarding interpretation of each of the three prerequisites for application of the proposed new tolling provision: "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." *Id*. at 11-12. CAJ also points to ambiguities in the first sentence of the proposed tolling provision, which states that the limitations periods are tolled when an attorney's liability for malpractice "*may depend* on the outcome of a pending or *reasonably foreseeable* civil or criminal action ...." (Emphasis added.) Specifically, CAJ says:

> Initially, it would appear to be necessary to determine whether the word "depend" is intended to mean "be *affected* by" or "be *wholly and necessarily determined* by." If one assumes the former interpretation, it seems more than theoretical that even a small issue being litigated in another action "may" in some way affect an attorney's liability (or perhaps more accurately, the *extent* of liability) for an alleged wrongful act or omission. Would this mean that a plaintiff could avail himself or herself of the much longer proposed limitations period whenever he or she could demonstrate any plausible theory by which an issue in dispute in some other action could in some way affect the attorney's liability to the plaintiff in a potential malpractice action? If not, what is the standard that would be applied? On the other hand, if the word "depend" is intended to mean "wholly and necessarily determined by," could invocation of the exception be defeated by an argument that at least some aspect of the attorney's liability would not be determined in the other proceeding (and thus did not "depend" on the outcome of the other proceeding)?
>
> The term "reasonably foreseeable" appears to present problems of both interpretation and application. Given that this language

> contemplates an action that does not yet exist, may a plaintiff take advantage of the extended limitations period by simply claiming a subjectively "reasonable" good faith belief — based on whatever information the plaintiff had at the time of decision — that such action would eventually be filed? Alternatively, if the term "reasonably foreseeable" is to be objectively assessed, should the focus be on what a hypothetical "reasonable" lay plaintiff should have known or believed, or should the focus be on what a presumably more sophisticated "reasonable" plaintiff's *counsel* should have known or believed? What about plaintiffs who are unrepresented (by *new* counsel) at the time the presumptive limitations period is about to expire? Are they to be allowed greater leeway than represented plaintiffs? Finally, what will happen if the anticipated potential action has a very long limitations period itself, or even no limitations period (for example, certain criminal actions)? Wouldn't this aspect of the proposed statutory language potentially extend the limitations period in Section 340.6 indefinitely?

Exhibit p. 10. CAJ believes that "these unanswered questions, and many more, will serve to obscure the 'bright line' the CLRC is seeking on this issue." *Id.* at 12.

This conclusion feeds into CAJ's third main point: "[T]he existence of so many unanswered questions will likely deter most plaintiffs from even seeking to utilize the provided exception, which in turn will lead to a dearth of clarifying appellate opinions." *Id.* at 12. CAJ explains that "if a plaintiff attempts to make use of the exception, and the defendant attorney is then able to persuade a court that even one of the tolling requirements has not been satisfied, the plaintiff's malpractice action will be forever barred." *Id.* "Given the arguable vagueness of each of the multiple requirements ..., and given that a plaintiff trying to decide whether to allow the shorter limitations period to expire would have no way to obtain an advance ruling on whether each of the requirements has been satisfied, CAJ feels that it would be rare for an attorney to advise a plaintiff to allow the otherwise applicable limitations period to run." *Id.* at 9. Rather, CAJ predicts that "the risk of an unfavorable tolling ruling down the road would almost always be perceived as too great (for both the plaintiff and the advising attorney) to justify any advantage." *Id.*

CAJ therefore urges the Commission to drop the idea of the proposed new tolling provision. *Id.* at 13. CAJ also offers suggestions for refining the provision if the Commission is determined to pursue the idea. *Id.* at 13-17. In addition, CAJ proposes an alternative legislative solution, for consideration "[i]f the CLRC

continues to believe that a legislative solution to the identified problems is needed ...." *Id*. at 12. CAJ's proposed alternative solution is similar to an idea suggested by Mr. Gubman.

Possible Alternative Approach: Statutory Authority to Stay the Malpractice Case

Mr. Gubman suggests a possible alternative approach to the problem of simultaneous litigation. He would create a presumptive right to a stay of a legal malpractice case pending resolution of the underlying proceeding:

> Why not instead create a presumptive right to a stay in the same situations? That way the court can determine on motion whether the malpractice case should go forward and there's no uncertainty. Unless you stipulate to extend the statute, you file. If the court stays, you're safe. If it doesn't, you litigate. Why have hard and fast rules for which cases should or shouldn't go forward when the truth is that they should be decided case by case?

Exhibit p. 1.

Along the same lines, CAJ proposes "to require a plaintiff contemplating a malpractice action in a 'simultaneous litigation' situation to file the malpractice action within the otherwise prescribed time period, but to provide a *statutory stay* of such action, upon noticed motion, immediately following filing and service." Exhibit p. 12 (emphasis in original). CAJ contemplates that this statutory stay "would be premised largely on the same grounds as those underlying the CLRC's proposed equitable tolling provision." *Id*.

CAJ is not aware of any existing statutory provision authorizing a court to stay a malpractice case pending resolution of an underlying proceeding. *Id.* at 8. "[T[he anecdotal experience of CAJ members is that some trial courts presently do employ this approach, sometimes in the context of ruling on a demurrer." *Id*. at 8-9. Other members report, however, "that the authority to issue a stay in the absence of specific statutory authority is questionable." *Id*. at 9.

Providing clear authority to stay a malpractice case may thus be useful. CAJ believes this approach would be good policy. The group acknowledges that the approach would "add more filings to court dockets," but says that it would "appear to solve virtually all of the other 'simultaneous litigation' problems (i.e. burden on litigants, waste of judicial resources, inconsistent positions by plaintiff, inconsistent results)." *Id*. at 12 (footnote omitted).

CAJ also points out that the approach would free a plaintiff "from the task of predicting, in advance, how a court is likely to rule on the various equitable tolling requirements." *Id*. at 12-13. "Under CAJ's proposal, the plaintiff's claim would be protected by the act of filing a lawsuit, if otherwise timely." *Id*. at 13.

CAJ further states that its proposal "would largely negate the need for a definitive determination of when 'actual injury' had occurred, because the malpractice action could be filed whether 'actual injury' had yet occurred or not." *Id*. That may be true to some extent. The definition of "actual injury" would remain important, however, whenever the attorney could argue that the client filed the malpractice case more than the statutorily allowable time after "actual injury" occurred.

A potential drawback to CAJ's proposed approach is that "allegations raised in the plaintiff's malpractice complaint could prove useful to plaintiff's adversary in the ongoing, underlying litigation, or could result in harmful admissions or a waiver of attorney-client privilege." *Id*. For example, suppose an attorney missed the statute of limitations in filing a client's claim. Publicly filing a malpractice complaint alleging as much might alert the client's adversary to a limitations defense that the adversary would otherwise have overlooked. "CAJ therefore suggests that if a legislative proposal along these lines is pursued, other related issues should also be explored, including (a) legislative permission to file any legal malpractice complaint under seal until the hearing on the stay (or an otherwise prescribed time period if no stay was sought), and (b) some provision so that, while the complaint is under seal or during the pendency of a granted stay, any allegations in the complaint may not be considered as an admission, as a waiver of the attorney-client privilege, or the subject of a discovery request." *Id*. These points may require care to address, because any restrictions on access to the malpractice complaint must be sensitive to the constitutional right of access to both civil and criminal trials. *See, e.g.*, *NBC Subsidiary (KNBC-TV) v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999).

CAJ also cautions that it would be necessary to examine the impact of its proposed approach on the time limits for bringing a case to trial. Exhibit p. 13. See Sections 583.310 (action shall be brought to trial within five years after it is commenced), 583.320 (three year time limit for new trial); see also Sections 583.110-583.430 (dismissal for delay in prosecution). Notably, in computing whether a litigant has satisfied the time limit of Section 583.310 or 583.320, a court must exclude any time during which "[p]rosecution or trial of the action was

stayed or enjoined." Section 583.340(b). That provision may solve much, if not all, of the coordination problem CAJ raises.

Finally, CAJ points out that it would be necessary to resolve whether the statutory stay "should be mandatory (assuming grounds for the stay were established), or discretionary." *Id*. A third option would be to have a presumptive stay, as Mr. Gubman suggests. Exhibit p. 1. CAJ was unable to reach consensus on the proper extent of court discretion in granting a stay. The committee did, however, identify a number of relevant considerations:

> [A mandatory stay] would obviously provide a greater degree of protection, for both litigants and the judicial system in general against the various identified problems with simultaneous litigation in the malpractice context; [a discretionary stay] would allow a court to find that such concerns were nevertheless outweighed by some other consideration mandating that the filed action go forward. Without a mandatory stay, however, many plaintiffs might perceive that the public filing of a malpractice complaint could adversely affect the ongoing underlying litigation to such a degree as to preclude the filing of the malpractice action at all.

Exhibit p. 13.

If the Commission were to pursue the concept of a statutory stay, it would need to figure out what type of a stay to propose. The Commission would also need to investigate the possibility of sealing the malpractice case or imposing other restrictions to minimize prejudice to the plaintiff, and means of coordinating the statutory stay with the time limits on bringing a case to trial.

Analysis and Recommendation

The arguments against the new tolling provision as proposed in the tentative recommendation are persuasive, particularly the concerns about potential vagueness of some of the proposed requirements. **The Commission should not proceed with the proposal in its present form.** Given the input received thus far and the likelihood of further input before the Commission meets, the staff **sees three possible options:**

(1) **Refine the proposed new tolling provision (proposed Section 340.6(c)(5)) to provide greater clarity and a more bright-line rule.** As suggested by the Trusts and Estates Section, it may be appropriate to eliminate the requirements that "the plaintiff acts reasonably and in good faith" and "the attorney is not

unreasonably prejudiced in gathering evidence to defend against the potential action for a wrongful act or omission." The notice requirement could be modified to make clear that the notice must be in writing and "timely" (as defined by CAJ at Exhibit pp. 15-16, or perhaps in some other manner), and must "apprise the attorney of the general legal and factual bases of the potential claim" (see Exhibit pp. 14, 16). Instead of applying when an "attorney's liability ... may depend" on the outcome of an underlying proceeding, the new tolling provision should perhaps apply when the "existence or amount of the plaintiff's damages depends" on the outcome of an underlying proceeding (see Exhibit pp. 14-15). Other modifications may also be in order to make the proposed new provision more workable and address the many potential issues identified by CAJ and others. If the Commission decides to pursue this approach, the staff would develop the idea in a memorandum for a future meeting.

(2) **Pursue the idea of proposing a statute that would authorize a court to stay a legal malpractice case pending resolution of an underlying proceeding.** If the Commission is interested in this approach, the staff would develop the idea in a memorandum for a future meeting. It probably would be appropriate to circulate a new tentative recommendation for comment before the Commission approves a final recommendation. This probably would also be advisable if the Commission pursues the first option.

(3) **Drop the idea of attempting to address the problems arising from the requirement of "actual injury" and necessity of simultaneous litigation.** If the Commission drops this idea, it should consider the impact of that decision on its goal of developing a balanced package of reforms, favoring neither client nor attorney.

As between these options, the staff makes no recommendation at this time. The proper choice may be more clear by the time the Commission meets, when more information is likely to be available.

BURDEN OF PROVING TIME OF DISCOVERY

The second reform proposed in the tentative recommendation would reallocate the burden of proof on the time of discovery of legal malpractice, placing that burden on the plaintiff instead of on the defendant attorney. The input on that proposal was mixed, but more positive than the input on the first reform.

Support

The State Bar Trusts and Estates Section "supports without qualification the addition of a new subsection (b) to place on the plaintiff the burden of proof regarding the reasonableness of discovery of the allegedly wrongful act or omission in cases filed more than a year after the alleged wrong occurred." Exhibit p. 18. The group does not elaborate on this point.

Neutral

"CAJ was split on the CLRC's proposed reallocation of the burden of proof." Exhibit p. 6. The split "was not along any traditional plaintiff/defendant lines." *Id*.

Some members of CAJ concurred with the California Supreme Court's reasoning in *Samuels v. Mix*, 22 Cal. 4th 1, 989 P.2d 701, 91 Cal. Rptr. 2d 273 (1999), which held that the defendant attorney bears the burden of proof on the time of the plaintiff's actual or constructive discovery of legal malpractice. Exhibit p. 6. In *Samuels*, the Court stressed that allocating the burden of proof to the defendant attorney is consistent with the plain language of Section 340.6 and Evidence Code Section 500. 22 Cal. 4th at 7-8. As CAJ puts it, the Court declined to "distur[b] the policy balance the Legislature achieved in enacting [Section 340.6], including the interests in hearing meritorious malpractice suits, extinguishing stale claims, and avoiding consumer costs attendant on indefinite malpractice exposure." Exhibit p. 7.

"Other members of CAJ, who favor reallocating the burden of proof to the plaintiff, view the issue as primarily one of fairness to the accused attorney, and agree with the reasoning of the CLRC's Tentative Recommendation." *Id*. "In the context of legal malpractice, evidence regarding when the client discovered or should have discovered the alleged malpractice is often within the client's access and control." *Id*. In particular, "[i]t is thought ... that plaintiffs frequently learn of the likelihood of an act of legal malpractice from a successor attorney." *Id*.

According to CAJ, "unless the plaintiff chooses to waive his or her own attorney-client privilege in these situations, there will almost certainly be broad speculation by the finder of fact as to the correct date of reference for purposes of determining the bar date of the statute of limitations." *Id* "[I]f the burden of proof is on the defendant attorney, the plaintiff client will have no need or incentive to waive the attorney-client privilege, and critical evidence may be shielded." *Id*. "By shifting the burden of proof to the plaintiff client, the plaintiff may elect to

waive the attorney-client privilege to establish the time of discovery, so the facts can be presented to the finder of fact." *Id*. Some members of CAJ "believe that creating an evidentiary rule that pressures a client to waive the attorney-client privilege is poor social policy, while others believe that, in this particular circumstance, access to evidence and the concomitant lessening of speculation that occurs when the plaintiff waives the attorney-client privilege are important protections for the accused attorney who raises the statute of limitations as a defense to a legal malpractice claim." *Id*.

Opposition

SDCBA writes that the proposed reallocation of the burden of proof "will have no practical impact on the current application of the standard governing discovery." Exhibit p. 4. SDCBA explains:

> There is no mandatory waiver of the attorney-client privilege and thus it will remain within the discretion of the client on whether to waive the privilege with new counsel. Also it would seem that the client's assertion that they have no knowledge or reason to suspect and were not informed of the malpractice prior to a certain date would likely be deemed sufficient to create a triable issue of fact. The current procedure on the discovery issue is for the defendant attorney to raise numerous facts and circumstances and argue through inference that the claimant should have discovered the alleged malpractice thus shifting the burden to the claimant. The claimant is then in the same practical position created by proposed 340.6(b).

Id. SDCBA thus "sees no real impact from the proposed change and notes that it appears to outwardly favor the interests of the attorney while having no practical substantive impact." *Id*.

Analysis and Recommendation

Although there is a split of opinion regarding the proposed reallocation of the burden of proof, this reform as proposed in the tentative recommendation appears more promising than the one previously discussed. SDCBA's concern is that the change will not have much impact, not that the change will have harmful effects.

The staff questions whether the impact will be as limited as SDCBA predicts. Even if a client elects not to waive the attorney-client privilege as to conversations with new counsel, and the evidence presented by the defendant

attorney and the client on the issue of discovery is much the same as before, the result may be different because under the new approach it will be the client's obligation "to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." Evid. Code § 115.

Based on the input received so far, the staff **tentatively recommends going forward with the proposed reallocation of the burden of proof, as long as it is part of a balanced package of reforms.** As with the first reform, the proper course of action may become more clear upon receiving further input.

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

The third reform in the tentative recommendation is the proposal to delete existing Section 340.6(b), which provides:

> (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.

Mr. Mallen's published critique of subdivision (b) was the impetus for the Commission's proposal to delete the provision. See Mallen, *An Examination of a Statute of Limitations for Lawyers*, 53 Cal. State Bar J. 166, 168 (1978).

The State Bar Trusts and Estates Section "supports without qualification the elimination of current subsection (b) to eliminate the unnecessary and confusing language of that provision." Exhibit p. 18. None of the other comments take a position on this point.

Given the support expressed by the Trusts and Estates Section, the lack of objections, and the compelling logic of Mr. Mallen's published critique, **this reform appears advisable based on the information available to the Commission so far.**

OTHER INPUT

John T. George has "worked in the legal industry for over twelve years." Exhibit p. 21. After the Commission approved the tentative recommendation but before the staff posted and distributed it for comment, he sent the Commission an email message raising an issue that is not addressed in the tentative

recommendation. Specifically, he proposes a four year statute of limitations for legal malpractice:

> I have witnessed clients' cases not handled appropriately. Once the case is over, the firm will write a letter requesting that the client pay off their bill. However, the firm will not go after the client until the one year statute for legal malpractice has run. Since the firm has a four year statute (written contract with the client) they choose to wait out the one year before aggressively demanding payment. The one year statute of limitation for legal malpractice fails to provide the client/public adequate protection. What would be wrong with a four year statute of limitations for legal malpractice? I have never seen an attorney take a legal malpractice case when the issue was four years from discovery — it is always the one year standard. Is this a problem that could be rectified by a state proposition?

Id. Although he does not say as much, the staff assumes Mr. George is proposing a limitations period of four years from *plaintiff's actual or constructive discovery* of the legal malpractice, not four years from *occurrence* of the legal malpractice (which is already the longer of the alternate limitations periods under Section 340.6).

A reform along these lines is likely to meet with stiff resistance from attorneys. It might be warranted if the underhanded billing tactic Mr. George describes were widespread, but the Commission has no evidence of that. Moreover, even if the statute of limitations for legal malpractice has expired, an attorney's incompetence in providing services should be a defense to any claim for recovery of legal fees. The alternate limitations periods of Section 340.6 — one-year-from-discovery and four-years-from occurrence — represent a legislative balancing of the policy interests in affording a remedy for legal malpractice, ensuring that legal malpractice claims are promptly litigated when evidence is readily available, and providing certainty, repose, and stability in legal affairs. The staff thinks **it would be unwise to pursue Mr. George's suggestion and attempt to alter that balance unless there is compelling evidence of a need for change.**

Respectfully submitted,

Barbara Gaal
Staff Counsel

Exhibit

COMMENTS OF DAVID GUBMAN

Date: Tuesday, December 28, 2004
From: David Gubman
Subject: CLRC TR - statute of limitations for legal malpractice

On an initial read, I don't like it. It's going to lead to uncertainty on several levels, and it will take another 25 years to sort it out.

What does it mean that an attorney's liability may depend on the outcome? If there is some remotely conceivable outcome that changes whether the attorney is liable, then the statute doesn't run? What does that do to the rule that having to incur attorneys' fees was enough to trigger the statute?

Worse, creating subjective tests, such as "unreasonable" prejudice to the attorney by the delay, will lead to complex pre-trial motions on the applicability of the statute. As one who has represented both sides in such cases over the years, the overall change is probably good for the plaintiff, but the implementation may allow the defendant to bleed the plaintiff dry in smaller cases.

Why not instead create a presumptive right to a stay in the same situations? That way the court can determine on motion whether the malpractice case should go forward and there's no uncertainty. Unless you stipulate to extend the statute, you file. If the court stays, you're safe. If it doesn't, you litigate. Why have hard and fast rules for which cases should or shouldn't go forward when the truth is that they should be decided case by case?

David S. Gubman
Direct Dial: 310-255-9020
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HINSHAW

January 11, 2005

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Barbara S. Gaal
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Law Revision Commission Study Of Statute Of Limitations For Legal Malpractice

Dear Ms. Gaal:

I provide comments on the proposed statute of limitations. My response, unfortunately, is less expositive than I would like because of the press of other matters. I believe you know of my interest in the subject of lawyers' liability and my early interest in drafting the article that became the prototype for present Section 340.6.

The California Supreme Court has construed the language of "actual injury" to mean any legally cognizable damage. That is a correct interpretation of the statutory language. The problem, as noted in the Commission's analysis, is that a legal malpractice claim may turn out to not be warranted, as a result of continued or subsequent review of the issues of errors or damage, or both. Several concerns are expressed, including waiver of the lawyer-client privilege and uncertainty in application.

Although the concerns are theoretically legitimate, I have encountered very few situations where they have actually surfaced in legal malpractice cases. In that regard, the defense of lawyers has been my principal occupation for over 30 years, and I head our firm's practice group in those areas, which includes almost 100 lawyers. These issues usually are dealt with by a tolling agreement.

My concern is that the cure for these problems is worse than the problem being addressed. Succinctly, the amendment assures that tolling or the end of tolling will always be an issue of fact. Instead of simplifying the application of the statute of limitations, the proposed amendment would exacerbate litigation. It reaches this result by injecting factors that are factual. The following are inherently fact-based criteria:

"Reasonably foreseeable civil or criminal action;"

"Fully resolved;"

EX 2

"Only if the plaintiff acts reasonably;"

"And in good faith;"

"The plaintiff gives the attorney reasonable notice;" and

"The attorney is not unreasonably prejudiced."

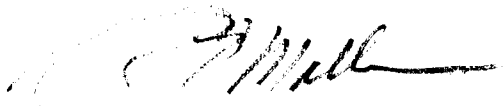
Each of these terms is factual. Cumulatively, they preclude a resolution short of trial. Disposition by demurrer or summary judgment would be extraordinarily rare. This is inconsistent with the purpose of a statute of limitations, which is intended to cut off claims and, importantly, avoid the very substantial litigation cost. Statutes of limitations are inherently unfair, because they arbitrarily cut off rights. That certainly, however, is the purpose of the statute of limitations.

Further, the vague terms and new language of the proposed amendment would generate its own satellite litigation. For example, when is a matter "fully resolved?" What is, in the context of the statute of limitations, the concept of "good faith?"

In conclusion, although it is true that the present law, as judicially construed, creates the risk of a legal malpractice being pursued while the "underlying" action is pending, these situations are routinely handled by tolling agreements. When a party is unwilling to enter into such an agreement, as our Supreme Court has suggested, the other party can seek to have the legal malpractice action stayed. Although these are not ideal solutions, they do work.

In closing, I wish to be clear. My disagreement with the amendment is not a matter of degree but a very strong belief that the amendment will cause more problems than it solves. Those problems will result in further litigation, increased expense to lawyers in an already expensive insurance market, and essentially eliminate an important protection of the present statute of limitations.

Sincerely,



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REM/dap

EX 3

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March 30, 2005

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Law Revision

APR - 4 2005

File:

By Fax 650/494-1827 and U.S. Mail

Subject: Statute of Limitations for Legal Malpractice

Dear Commissioners:

The San Diego County Bar Association (SDCBA) offers the following comments with regard to the commission's proposed changes to the statute of limitations applicable to legal malpractice claims (CCP 340.6). The SDCBA's comments focus on proposed Sections 340.6(b) and 340.6(c)(5). SDCBA has no comments and takes no position with respect to the proposed deletion of current Section 340.6(b).

COMMENTS TO PROPOSED 340.6(b):

The SDCBA submits that the proposed wording of Section 340.6(b) will have no practical impact on the current application of the standard governing discovery. There is no mandatory waiver of the attorney-client privilege and thus it will remain within the discretion of the client on whether to waive the privilege with new counsel. Also it would seem that the client's assertion that they have no knowledge or reason to suspect and were not informed of the malpractice prior to a certain date would likely be deemed sufficient to create a triable issue of fact. The current procedure on the discovery issue is for the defendant attorney to raise numerous facts and circumstances and argue through inference that the claimant should have discovered the alleged malpractice thus shifting the burden to the claimant. The claimant is then in the same practical position created by proposed 340.6 (b). As such SDCBA sees no real impact from the proposed change and notes that it appears to outwardly favor the interests of the attorney while having no practical substantive impact.

COMMENTS TO PROPOSED 340.6(c)(5):

The SDCBA recognizes that the current state of the law does create some degree of ambiguity and uncertainty in the context of concurrent litigation. However, the proposed revision, while well intentioned, will only create more confusion, additional litigation and increased cost.

The dilemma created by concurrent litigation is a common issue for attorneys who defend claims for legal malpractice. Typically, any issue can be resolved amicably by way of a voluntary tolling agreement or through a motion to stay proceedings.

A number of potentially ambiguous terms are incorporated into the proposed provision which will likely lead to an increase in litigation and costs rather than the reduction anticipated in the comments. Notably, proposed 340.6(c)(5) references a "reasonable foreseeable civil or criminal action etc..." and applies if the Plaintiff acts "reasonably and in good faith" , provides the attorney with "reasonable notice" and that the attorney is not "unreasonably prejudiced" in gathering evidence. The reasonableness standards proposed in the revisions will undoubtedly lead to exhaustive litigation by virtue of the fact that it creates an entirely subjective standard that will require significant clarification through the courts.

The proposed provision will also have a negative impact on the practitioner's ability to procure professional liability insurance, as it will increase the limitation period thus encouraging more claims and allowing additional evidence to be accumulated. Additionally, it is likely that practitioners will be faced with increased premiums due to longer extended reporting periods. Delay in pursuing claims after receiving/providing reasonable notice creates a period of uncertainty where insurers could become insolvent or in some fashion undertake actions having a negative impact on coverage or the availability of funds.

CONCLUSION:

SDCBA appreciates the opportunity to provide comment on the proposed changes to CCP 340.6. As indicated, the SDCBA believes that the proposed changes to the statute addressed above will likely create additional uncertainty and resultant litigation rather than achieving the stated goal of clarifying existing areas of ambiguity.

Sincerely,

Wells B. Lyman

Wells Lyman, President
San Diego County Bar Association

THE STATE BAR OF CALIFORNIA

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— COMMITTEE ON ADMINISTRATION OF JUSTICE

TO: The California Law Revision Commission

FROM: The State Bar of California's Committee on Administration of Justice

DATE: April 25, 2005

SUBJECT: Statute of Limitations for Legal Malpractice – Tentative Recommendation

The State Bar of California's Committee on Administration of Justice ("CAJ") has reviewed and analyzed the November 2004 Tentative Recommendation of the California Law Revision Commission ("CLRC"), S*tatute of Limitations for Legal Malpractice*, and appreciates the opportunity to submit these comments.

I. Proposed Code of Civil Procedure Section 340.6(b)

Under Code of Civil Procedure 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 this issue. The California Supreme Court has interpreted the statute to place that burden on the defendant attorney. The CLRC proposes to shift the burden of proof to the plaintiff client.

CAJ was split on the CLRC's proposed reallocation of the burden of proof. CAJ discussed the fact that the CLRC's proposed reallocation of the burden of proof would tip the balance toward the defendant attorney, but the split within CAJ was not along any traditional plaintiff/defendant lines. CAJ also discussed the fact that the CLRC's tolling proposal (discussed in detail below) would tip the balance toward the plaintiff client, but CAJ ultimately considered each proposal on its own merits, rather than considering the two proposals as a package with counterbalancing policy considerations.

With respect to the proposed reallocation of the burden of proof, some members of CAJ concur with the Supreme Court's reasoning in *Samuels v. Mix* 22 Cal. 4th 1 (1999), where the Court held that it is the duty of the defendant attorney to affirmatively raise as a defense the bar of the statute of limitations, and that the defendant attorney has the burden of proving that the alleged act(s) of legal malpractice occurred more than one year after the plaintiff knew or should have known of those acts.

In *Samuels*, the Supreme Court reasoned that the plain language of Section 340.6 places the burden of proof on the defendant. Based on the text of Section 340.6, the Court rejected the "common law discovery rule" under which the plaintiff bears the burden of proof. The Court emphasized that judicially carved exceptions risk disturbing the policy balance the Legislature achieved in enacting the statute, including the interests in hearing meritorious malpractice suits, extinguishing stale claims, and avoiding consumer costs attendant on indefinite malpractice exposure. *Samuels*, *supra* at 13. The Court also rejected the analogy to fraud actions, where the burden of proof is on the plaintiff to show when he or she actually uncovered the fraud or should have done so.

Other members of CAJ, who favor reallocating the burden of proof to the plaintiff, view the issue as primarily one of fairness to the accused attorney, and agree with the reasoning of the CLRC's Tentative Recommendation. In the context of legal malpractice, evidence regarding when the client discovered or should have discovered the alleged malpractice is often within the client's access and control. There will, of course, be some cases in which discovery of an alleged act of legal malpractice occurs as a result of a public disclosure, such that both plaintiff and defendant will have equal access to those facts. In those cases, allocation of the burden of proof will, as a practical matter, likely be irrelevant. It is thought, however, that plaintiffs frequently learn of the likelihood of an act of legal malpractice from a successor attorney.

Although the *timing* of conversations with the successor attorney may not be privileged, the *content* is appropriately protected by the attorney-client privilege. Thus, unless the plaintiff chooses to waive his or her own attorney-client privilege in these situations, there will almost certainly be broad speculation by the finder of fact as to the correct date of reference for purposes of determining the bar date of the statute of limitations.

By shifting the burden of proof to the plaintiff client, the plaintiff may elect to waive the attorney-client privilege to establish the time of discovery, so the facts can be presented to the finder of fact. If the plaintiff chooses not to waive his or her own attorney-client privilege, the finder of fact may be justified, absent other inconsistent evidence, in drawing an inference that the plaintiff knew or should have known of the alleged acts of malpractice at or about the time the successor attorney began the initial representation of the client. In either event, however, if the burden of proof is on the defendant attorney, the plaintiff client will have no need or incentive to waive the attorney-client privilege, and critical evidence may be shielded. Some believe that creating an evidentiary rule that pressures a client to waive the attorney-client privilege is poor social policy, while others believe that, in this particular circumstance, access to evidence and the concomitant lessening of speculation that occurs when the plaintiff waives the attorney-client privilege are important protections for the accused attorney who raises the statute of limitations as a defense to a legal malpractice claim.

II. Proposed Code of Civil Procedure Section 340.6(c)(5)

A. CAJ agrees that the problems identified by the CLRC exist, but questions whether any legislative fix is needed.

The Tentative Recommendation identifies several potential problems that exist under current law and form the basis of the proposed new tolling provision. The statute of limitations on a cause of action for legal malpractice is tolled until the client (and potential malpractice plaintiff) suffers "actual injury" attributable to the alleged malpractice by the attorney (and potential malpractice defendant). Civ. Proc. Code §340.6(a)(1). What constitutes "actual injury" depends on the specific circumstances of the case, and the issue has not proved susceptible to "bright-line" rules. See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 743-44 (1988). It is clear, however, that in some circumstances the plaintiff client will have suffered "actual injury" as a result of the alleged malpractice before the underlying litigation[1] is fully resolved. *Id.* Thus, the plaintiff client may feel compelled to file a malpractice action (in order to stop the running of the statute of limitations) during the pendency of the underlying litigation. A plaintiff who is forced in such circumstances to "wage war on two fronts" may be placed in a difficult position, and in fact may be substantially prejudiced in one or both actions. See Tentative Recommendation at 6-9.

CAJ recognizes that the problems identified by the CLRC exist under current law, but questions whether a legislative "fix" is truly called for. While there always will be difficult or problematic cases on the margin, CAJ is aware of no specific information shedding light on how frequently the problems identified by the CLRC actually arise. Moreover, CAJ believes that mechanisms and practices exist under current law that may, in many cases, eliminate or at least mitigate the potential problems intended to be addressed by the CLRC's proposed statutory amendments.

For example, the plaintiff client and defendant attorney may, under current law, enter into a tolling agreement pending the outcome of the underlying litigation. In many cases, such an agreement would seem to be a "win-win" proposition that would be acceptable to both sides. Tolling the running of the statute of limitations would eliminate any perceived need for an early, "protective" filing of a malpractice action by the client, who thus would avoid the difficulties of simultaneous litigation. The defendant attorney would, in turn, at least delay the filing of the malpractice action against him or her, and might be able to avoid it altogether depending upon the outcome of the underlying litigation.

Alternatively, if the parties are unable to agree to a pre-filing tolling agreement, a malpractice action may be filed – thereby preventing the statute of limitations from continuing to run – but stayed pending the resolution of the underlying litigation. CAJ is not aware of any specific statutory authority authorizing the issuance of a stay in these circumstances, but the anecdotal experience of CAJ members is that some trial courts presently do employ this

[1] The term "underlying litigation" is used as a shorthand reference to litigation in which the client (and potential malpractice plaintiff) is represented by an attorney (and potential malpractice defendant), and in which the outcome may be dispositive of the potential for malpractice liability and/or the existence or amount of damages.

approach, sometimes in the context of ruling on a demurrer. Others, however, report that the authority to issue a stay in the absence of specific statutory authority is questionable.

These existing approaches do not entirely eliminate the potential problems identified by the CLRC. There may be circumstances where a defendant attorney is unwilling to enter into a tolling agreement, and where the trial court concludes either that it is not authorized to stay the malpractice action or that a stay is not justified on the facts before it. However, absent some reason to believe that there are a substantial number of cases where such approaches are inadequate and the potential problems identified by CLRC will become manifest, CAJ questions whether a legislative fix is warranted.

B. To the extent a legislative fix is called for, the CLRC's proposed legislative solution has at least two intrinsic and potentially significant drawbacks.

The concept of amending Section 340.6 to add a new statutory tolling provision arises because courts have not applied the doctrine of equitable tolling in the context of legal malpractice actions, given the current language of Section 340.6. CAJ recognizes that the CLRC's proposed statutory fix is drawn from the doctrine of equitable tolling. CAJ believes, however, that the CLRC's proposed legislative solution has potentially significant drawbacks, and that it would not succeed in establishing the bright-line rule that is sought.

1. There is a substantial possibility that few plaintiffs would utilize the optional tolling provision.

In effect, any plaintiff electing to take advantage of the proposed tolling provision under Section 340.6(c)(5) would intentionally be allowing a presumptive limitations period to expire, and, if it later proved necessary to file a malpractice action, relying on the ability to persuade a court that all of the requirements for tolling set forth in the proposal had been satisfied. If upon a defense challenge a court were to rule that any one of the prerequisites had not been satisfied, the plaintiff would forever lose his or her malpractice claim since the shorter limitations period provided would already have expired. Given the arguable vagueness of each of the multiple requirements (discussed in detail below), and given that a plaintiff trying to decide whether to allow the shorter limitations period to expire would have no way to obtain an advance ruling on whether each of the requirements has been satisfied, CAJ feels that it would be rare for an attorney to advise a plaintiff to allow the otherwise applicable limitations period to run. Absent unusual circumstances, the risk of an unfavorable tolling ruling down the road would almost always be perceived as too great (for both the plaintiff and the advising attorney) to justify any advantage.

2. The requirements specified to invoke the tolling extension in the CLRC proposal are too vague to establish the "bright-line rule" sought by the CLRC.

As indicated in the Tentative Recommendation, one objective of the proposal is to establish a bright-line rule for filing a malpractice action in a "simultaneous litigation" situation, keyed to termination of the underlying proceeding. Moreover, it is the CLRC's expressed hope that the proposal would promote certainty and consistency in applying the statute of limitations in legal malpractice matters. However, it is CAJ's view that, due to the vagueness of the multiple requirements underlying the provided equitable tolling exception, no such bright-line rule would be established, nor would there exist any true certainty or consistency in applying the statute.

First, there exists some arguable uncertainty with regard to the initial premise for the provided exception, as defined – that "the attorney's liability for a wrongful act or omission . . . *may depend* on the outcome of a pending or *reasonably foreseeable* civil or criminal action. . . ." Each of the italicized terms presents potential problems of interpretation.

Initially, it would appear to be necessary to determine whether the word "depend" is intended to mean "be *affected* by" or "be *wholly and necessarily determined* by." If one assumes the former interpretation, it seems more than theoretical that even a small issue being litigated in another action "may" in some way affect an attorney's liability (or perhaps more accurately, the *extent* of liability) for an alleged wrongful act or omission. Would this mean that a plaintiff could avail himself or herself of the much longer proposed limitations period whenever he or she could demonstrate any plausible theory by which an issue in dispute in some other action could in some way affect the attorney's liability to the plaintiff in a potential malpractice action? If not, what is the standard that would be applied? On the other hand, if the word "depend" is intended to mean "wholly and necessarily determined by," could invocation of the exception be defeated by an argument that at least some aspect of the attorney's liability would not be determined in the other proceeding (and thus did not "depend" on the outcome of the other proceeding)?

The term "reasonably foreseeable" appears to present problems of both interpretation and application. Given that this language contemplates an action that does not yet exist, may a plaintiff take advantage of the extended limitations period by simply claiming a subjectively "reasonable" good faith belief – based on whatever information the plaintiff had at the time of decision – that such action would eventually be filed? Alternatively, if the term "reasonably foreseeable" is to be objectively assessed, should the focus be on what a hypothetical "reasonable" lay plaintiff should have known or believed, or should the focus be on what a presumably more sophisticated "reasonable" plaintiff's *counsel* should have known or believed? What about plaintiffs who are unrepresented (by *new* counsel) at the time the presumptive limitations period is about to expire? Are they to be allowed greater leeway than represented plaintiffs? Finally, what will happen if the anticipated potential action has a very long limitations period itself, or even no limitations period (for example, certain criminal actions)? Wouldn't this aspect of the proposed statutory language potentially extend the limitations period in Section 340.6 indefinitely?

CAJ believes interpretation of the three additional conditions is also problematic. The requirement that the plaintiff seeking to rely on the exception must be found to have acted "reasonably" and "in good faith" appears to need some clarification. Again, it would seem important to know whether the specified "good faith" is to be evaluated based solely on the plaintiff's subjective state of mind, or on some objective standard. Moreover, it is not clear what type of "good faith" is contemplated. For example, would the "good faith" requirement be satisfied if the plaintiff openly declared that he or she was relying on the provided exception, given that the plaintiff may be using the statute simply to gain maximum tactical advantage against the defendant attorney? In addition, it is not clear whether the "good faith" requirement is intended to refer to the plaintiff's motivation in seeking to rely on the exception, or something else. For example, could a defendant attorney defeat applicability of the longer limitations period by offering evidence of some "bad faith" litigation tactic on the part of the plaintiff, which had nothing to do with the plaintiff's filing decision? Finally, it is not clear whether the requirement of acting reasonably and in good faith refers to the client plaintiff's conduct in connection with pursuit of the malpractice action itself (for example, the absence of "bad faith" delay in filing the malpractice action), or to the client plaintiff's conduct in connection with pursuit of the underlying action (to ensure that the defendant attorney cannot be held liable for damages that the plaintiff could have avoided by litigating the *underlying* proceeding reasonably and in good faith).

The requirement of providing "reasonable" notice to the defendant attorney of the prospective action may also result in disputed interpretations. One area of potential dispute would appear to relate to the information that must be contained in the "reasonable" notice. Would it be sufficient for the plaintiff simply to inform the prospective defendant attorney in general terms that plaintiff may be filing a malpractice action at the conclusion of the pending (or reasonably foreseeable) third party action? Would it be necessary for the plaintiff to inform the prospective attorney defendant of the circumstances that would determine whether the plaintiff would or would not sue? More importantly, would the plaintiff be required to provide notice of the specific wrongful act(s) or omission(s) the attorney is alleged to have committed? If not, how could the attorney prepare to defend the potential action, or gather and preserve evidence, without knowing what he or she is alleged to have done improperly? But if so, would the plaintiff then be limited to the allegations in the notice, if and when a malpractice action was filed? Additionally, the proposed statutory language does not specify when the required notice must be provided, or whether it may be oral or must be in writing.

Finally, the meaning of the requirement that the defendant attorney must not be "*unreasonably* prejudiced" in gathering evidence to defend against the action is uncertain. First, the quoted phrase seems to imply that some amount of prejudice suffered by the attorney would not bar reliance on the exception, as long as it was not an "unreasonable" amount of prejudice, a concept that could create significant problems of interpretation. Second, is only prejudice *caused by the plaintiff* to be considered, or can prejudice that occurs simply due to the passage of time, and through no one's fault, constitute grounds for finding the exception inapplicable? Third, does the defendant attorney, once notified of the potential lawsuit, have an affirmative duty – *that the attorney otherwise would not have* – to gather and preserve needed exculpatory evidence to defend against this prospective lawsuit? If the defendant attorney fails to gather or

preserve such evidence (over what could be years before the plaintiff's action is filed), and, when the action is eventually filed, is able to offer a substantial justification for his or her failure (e.g., personal circumstances, cost of gathering and preserving the evidence at issue), which party would effectively lose by default?

CAJ believes these unanswered questions, and many more, will serve to obscure the "bright line" the CLRC is seeking on this issue. Moreover, as noted earlier, the existence of so many unanswered questions will likely deter most plaintiffs from even seeking to utilize the provided exception, which in turn will lead to a dearth of clarifying appellate opinions. Again, it must be kept in mind that if a plaintiff attempts to make use of the exception, and the defendant attorney is then able to persuade a court that even one of the tolling requirements has not been satisfied, the plaintiff's malpractice action will be forever barred. In such a scenario, the defendant attorney will have a substantial incentive to make as many creative arguments as possible relating to the various requirements, which may only add to a continuing lack of certainty regarding interpretation of the proposed statutory exception.

C. If a legislative solution is pursued, CAJ proposes an alternative to the CLRC's tolling proposal.

If the CLRC continues to believe that a legislative solution to the identified problems is needed, CAJ proposes consideration of an alternative legislative solution, which CAJ believes would address most of the concerns relating to "simultaneous litigation" but avoid the perceived problems discussed above.

CAJ's alternative proposal would be to require a plaintiff contemplating a malpractice action in a "simultaneous litigation" situation to file the malpractice action within the otherwise prescribed time period, but to provide a *statutory stay* of such action, upon noticed motion, immediately following filing and service. That stay would be premised largely on the same grounds as those underlying the CLRC's proposed equitable tolling provision.[2]

While it is true that this alternative proposal would add more filings to court dockets, the proposal would appear to solve virtually all of the other "simultaneous litigation" problems (i.e. burden on litigants, waste of judicial resources, inconsistent positions by plaintiff, inconsistent results).[3] Moreover, this proposal offers several advantages. First, it frees plaintiffs from the task of predicting, in advance, how a court is likely to rule on the various equitable tolling

[2] CAJ discussed that an alternative basis of the stay could be that the plaintiff had not yet suffered "actual injury" but that would appear to duplicate the tolling provision provided in section 340.6(c)(1) relating to "actual injury," and would not assist in resolving any of the difficulties surrounding the issue of "actual injury."

[3] This alternative proposal does not completely resolve issues relating to increased malpractice insurance premiums caused by the filing of potentially unnecessary malpractice actions. However, CAJ believes the CLRC proposal would also not solve such problem, which is likely unsolvable. Given the language of most if not all malpractice insurance policies, once a plaintiff provided even the notice of potential action required by the CLRC proposal, the defendant attorney would then be required to report to his or her carrier knowledge of a "potential" adverse claim. From an underwriting perspective, the defendant attorney at that point is in substantially the same position as if an action had been filed, but immediately stayed – under the cloud of a potential future adverse judgment based on a specific identified complaint, which may nevertheless disappear based on the outcome of another underlying action.

requirements. Under CAJ's proposal, the plaintiff's claim would be protected by the act of filing a lawsuit, if otherwise timely. Second, CAJ's proposal would largely negate the need for a definitive determination of when "actual injury" had occurred, because the malpractice action could be filed whether "actual injury" had yet occurred or not. This proposal would therefore appear to provide the "bright-line rule" the CLRC is seeking with regard to the statute of limitations in legal malpractice matters.

CAJ did perceive one potential drawback to its proposal, in that the allegations raised in the plaintiff's malpractice complaint could prove useful to plaintiff's adversary in the ongoing, underlying litigation, or could result in harmful admissions or a waiver of attorney-client privilege.[4] At the same time, to the extent the purpose of the statute of limitations is to provide timely notice to a defendant of claims asserted against him or her, the defendant attorney in the malpractice action would presumably need to be apprised of the allegations in the malpractice action that is the subject of the stay. CAJ therefore suggests that if a legislative proposal along these lines is pursued, other related issues should also be explored, including (a) legislative permission to file any legal malpractice complaint under seal until the hearing on the stay (or an otherwise prescribed time period if no stay was sought), and (b) some provision so that, while the complaint is under seal or during the pendency of a granted stay, any allegations in the complaint may not be considered as an admission, as a waiver of the attorney-client privilege, or the subject of a discovery request. CAJ believes that issues relating to the potential impact of this proposal on the time limits for bringing a case to trial would also need to be examined. CAJ also notes, however, that issues relating to the stay may not arise very often in practice. It is quite possible that the mere availability of a statutory stay – particularly if the stay is mandatory – would, by itself, encourage attorneys on both the plaintiff's and the defendant's side to enter into *pre-filing* tolling agreements in circumstances where, under current law, one side or the other is unwilling to do so.

There was no consensus within CAJ as to whether a statutory stay should be mandatory (assuming grounds for the stay were established), or discretionary. The former would obviously provide a greater degree of protection, for both litigants and the judicial system in general, against the various identified problems with simultaneous litigation in the malpractice context; the latter would allow a court to find that such concerns were nevertheless outweighed by some other consideration mandating that the filed action go forward. Without a mandatory stay, however, many plaintiffs might perceive that the public filing of a malpractice complaint could adversely affect the ongoing underlying litigation to such a degree as to preclude the filing of the malpractice action at all.

D. In the event the CLRC decides to pursue a new statutory tolling provision, CAJ believes the proposed statutory language should be changed.

For the reasons discussed above, CAJ does not believe a statutory tolling proposal should be pursued. However, in the event the CLRC decides to pursue such a proposal, CAJ believes, for the reasons discussed below, that the proposed language of subdivision (c)(5) should be

[4] These same potential problems would arguably be created by the required notice of prospective action in the CLRC proposal.

revised to read as follows, to minimize some of the issues that CAJ believes will result from any such statutory amendment.

> "The ~~attorney's liability for a wrongful act or omission in performing professional services may~~ existence or amount of the plaintiff's damages depends on the outcome of a pending or reasonably foreseeable 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 applies only if (i) the plaintiff ~~acts~~ acted reasonably and in good faith in pursuing the proceeding[5], (ii) the plaintiff ~~gives~~ gave the attorney ~~reasonable~~ adequate notice of the potential action for a wrongful act or omission before the time that the limitations period applicable to the potential action would have expired absent the tolling provided by this paragraph, and (iii) the attorney is not ~~unreasonably~~ prejudiced in gathering evidence to defend against the potential action for a wrongful act or omission. To be adequate, notice must be in writing and must apprise the attorney of the general legal and factual bases of the potential action."

1. Tolling should apply regardless of when the plaintiff first suffers actual injury.

The Tentative Recommendation discusses the difficulties in determining when the client suffered actual injury, the divergent opinions by California Supreme Court justices on this question, and the evolving position of the court as a whole. Tentative Recommendation at 3-6. Recent Supreme Court opinions recognize that actual injury can occur before the client suffers an adverse judgment or termination of the underlying action. *Id*. at 5-6. If the client can suffer actual injury before the termination of the litigation in which the malpractice occurred, the attorney can be held liable for malpractice before the termination of that litigation. If the attorney can be held liable for malpractice before the termination of the litigation, the attorney's malpractice liability does not depend on the outcome of the litigation.

Under the CLRC's proposal, the new tolling provision would apply only if: "The attorney's liability for a wrongful act or omission in performing professional services *may* depend on the outcome of a pending or reasonably foreseeable 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 . . ." Italics added.[6]

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[5] As discussed below, if the requirement that plaintiff acted "reasonably and in good faith" is intended to apply to some other or additional aspect of the plaintiff's conduct, such as plaintiff's conduct in connection with pursuit of the malpractice action itself, that should be specified in the statute.

[6] As discussed above, CAJ sees some inherent problems with the "may depend" formulation. Perhaps "may" suggests that the client may suffer no actual injury if the client prevails in the underlying litigation. But even if the client prevails in the underlying litigation, the client suffers actual injury if the attorney's malpractice caused the

This language suggests that tolling does *not* apply if the client suffered actual injury *before* the termination of the underlying litigation, because the attorney's liability in that case would not "depend" on the outcome of the underlying litigation. If the new tolling provision depends on the absence of actual injury, the provision preserves all the uncertainty inherent in the existing law, with the concomitant problems. Tentative Recommendation at 6-10.

Rather than apply only if the attorney's liability may depend on the outcome of the underlying litigation, the new tolling provision – if pursued at all – should apply if the "existence or amount of the client's damages" depends on the outcome of the underlying litigation.

2. The statute should describe more clearly the requirement of acting reasonably and in good faith.

CAJ recognizes that the requirement of acting "reasonably and in good faith" is drawn from the cases that have applied the common law doctrine of equitable tolling, but the exact nature of the proposed requirement is not clear. Some cases refer to conduct in connection with pursuit of the first action (e.g., *Addison v. State of California* 21 Cal.3d 313, 318 (1978)) while other cases refer to conduct in connection with pursuit of the second action (e.g., *McMahon v. Albany Unified School Dist*. 104 Cal. App 4th 1275, 1293 (2002)).

CAJ believes that codification of this element as a statutory requirement using only the language "reasonably and in good faith" without some clarification could lead to confusion. If the requirement of acting reasonably and in good faith is to ensure that the defendant attorney cannot be held liable for damages that the plaintiff could have avoided by litigating the prior proceeding reasonably and in good faith, subdivision (c)(5) should be clarified to expressly state that tolling applies only if the plaintiff acted "reasonably and in good faith *in pursuing the proceeding*." If the requirement that plaintiff act "reasonably and in good faith" is intended to apply to some other or additional aspect of the plaintiff's conduct, such as plaintiff's conduct in connection with pursuit of the malpractice action itself, that should be specified in the statute.

3. The statute should require timely notice and lack of prejudice in accordance with the case law.

The CLRC's proposed tolling provisions would apply only 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." Italics added. The italicized language quoted above differs somewhat from the language used by California courts to describe the equitable tolling doctrine. Moreover, that language could describe more clearly the proper questions to be decided in applying the new tolling provision.

The cases uniformly refer to "timely notice" of a potential claim against the defendant, rather than "reasonable notice." See, e.g., *Addison v. State of California* 21 Cal.3d 313, 319 (1978); *Downs v. Department of Water & Power* 58 Cal.App.4th 1093, 1100 (1997). Notice is

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client to suffer greater litigation costs. Tentative Recommendation at 5. Prevailing in the underlying litigation therefore does not necessarily vitiate actual injury.

timely if it is given before the expiration of the limitations period that applies to the action in which the statute of limitations defense is raised. *Elkins v. Derby* 12 Cal.3d 410, 417-418 & fn. 5 (1974); *Collier v. City of Pasadena* 142 Cal.App.3d 917, 927 (1983). Although some opinions do not clearly state that this is what "timely notice" means, and could be read to suggest that notice is timely if the plaintiff in the first proceeding filed a claim within the limitations period applicable to the first proceeding, a closer examination of those cases shows that in each case the court found that the notice was timely because the plaintiff in the first proceeding filed a claim within the limitations period applicable to the second action. See, e.g., *Addison*, at pp. 317, 319 (prior federal action filed within 6-month state limitations period applicable to second action); *Elkins*, at pp. 413, 417-418 & fn. 5 (same limitations period for both actions); *Bollinger v. National Fire Ins. Co.* 25 Cal.2d 399, 407-408 (1944) (same). This is consistent with the operation of tolling generally. Tolling does not revive expired claims, that is, claims on which the limitations period had run when the tolling began. Rather, tolling suspends the running of the limitations period when the period had not run as of the commencement of tolling. *Lantzy v. Centex Homes* 31 Cal.4th 363, 370-371 (2003); *Elkins*, at p. 413, fn. 1.

If pursued at all, the new statutory language should require "timely" notice, rather than "reasonable" notice, and should state what timely notice means. It is not clear whether "reasonable notice" means "timely notice" and use of the term "reasonable" may introduce a more subjective and less predictable element to the determination of whether notice was timely.

Moreover, it is not clear whether "reasonable" as used in the proposed statutory language refers to the *time* of notice, or some other or separate elements of notice. A commonly unstated essential element of equitable tolling is that the *content* of the notice must be adequate to apprise the defendant in the second action of the nature of the potential claim against that defendant. *Aerojet General Corp. v. Superior Court* 177 Cal.App.3d 950, 954-957 (1986); *Loehr v. Ventura County Community College Dist.* 147 Cal.App.3d 1071, 1086 (1983); see *Collier v. City of Pasadena* 142 Cal.App.3d 917, 924 (1983). This element commonly is unstated because most cases applying the doctrine seem to involve similar claims against the same defendant asserted in two different actions. See, e.g., *Addison v. State of California*, *supra*, 21 Cal.3d 313; *Elkins v. Derby*, *supra*, 12 Cal.3d 410. If the claims or defendants are different, as ordinarily occurs when the second action is a legal malpractice action, it becomes more important to consider the adequacy of notice to the defendant, apart from the time of notice. "Reasonable notice" might refer to the time of notice, the adequacy of notice, or both. The statute should separately state that the notice must apprise the defendant of the basis for the potential claim.

Another concern is the prejudice element. Most cases refer to the absence of "substantial prejudice" to the defendant, or simply "lack of prejudice," rather than the absence of "reasonable prejudice." See, e.g., *Addison v. State of California*, *supra*, 21 Cal.3d at 318, 319 ("no substantial prejudice" and "lack of prejudice"); *Collier v. City of Pasadena, supra*, 142 Cal.App.3d at p. 924 ("lack of prejudice"); see *Lantzy v. Centex Homes, supra*, 31 Cal.4th at 370 ("no prejudice").[7] Moreover, as discussed above, the concept of "reasonable" prejudice may suggest that prejudice to the defendant should be weighed against some other interests advanced by the application of equitable tolling, and makes application of the tolling provision less predictable. In the interests of clarity, predictability, and consistency with established case law,

[7] CAJ is not aware of any case that has used the "reasonable prejudice" language.

the statute should refer to the absence of "substantial prejudice" or "lack of prejudice." Alternatively, if the intent of the proposed statutory language is, indeed, to preclude "unreasonable" prejudice, some guidance should be provided on the considerations that should be used in determining what degree of prejudice is and is not "reasonable."

4. The CLRC should consider addressing whether the court or trier of fact should make the necessary findings, and what the standard of review on appeal should be.

The proposed statutory language could be construed to mean that the requirements for tolling present questions of fact for the jury or other trier of fact. Although the case law is not clear on this point, it appears that the requirements for equitable tolling are questions for the court to decide unless the underlying facts are disputed, in which case the trier of fact should decide those facts. Some may believe, however, that because equitable tolling is "equitable" all issues may be decided by the court, including disputed facts. Others may question whether rules that have been established in connection with the common law doctrine of equitable tolling apply to the new *statutory* tolling provision, even if the language in the statute is based on the common law. For all of these reasons, CAJ suggests that if this proposal is pursued, the CLRC may wish to consider specifying in the statute whether the court or the trier of fact should (a) decide whether the requirements for equitable tolling are satisfied, and (b) resolve factual disputes underlying those requirements.

The standard of review of a court's decision on equitable tolling is somewhat unclear, and it is also not clear what the standard of review should be for a court's decision on tolling under the statute. If this proposal is pursued, the CLRC may wish to consider addressing the standard of review in subdivision (c)(5).

III. Conclusion

CAJ believes the issues raised by the CLRC's Tentative Recommendation are worthy of further exploration, and remains available to work with the CLRC on those issues.

DISCLAIMER

This position is only that of the State Bar of California's Committee on Administration of Justice. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

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March 28, 2005

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: **Tentative Recommendation re Statute of Limitations for Legal Malpractice**

Dear Mr. Sterling:

These comments on the California Law Revision Commission's Tentative Recommendation regarding Statute of Limitations for Legal Malpractice (November 2004) are submitted on behalf of the Trusts and Estates Section of the State Bar of California. The Section has considerable interest in the statute of limitations for attorney malpractice claims potentially arising from services performed on behalf of its members' clients -- both as attorneys attempting to rectify potential harm done to the clients' interests, as well as attorneys against whom claims might be made. Recognizing the benefits that additional clarity and predictability will bring to this complex area of law, the Section generally supports all three of the proposed changes to Section 340.6 of the Code of Civil Procedure set forth at page 1 of the Tentative Recommendation.

The Section supports without qualification the addition of a new subsection (b) to place on the plaintiff the burden of proof regarding the reasonableness of discovery of the allegedly

wrongful act or omission in cases filed more than a year after the alleged wrong occurred. The Section also supports without qualification the elimination of current subsection (b) to eliminate the unnecessary and confusing language of that provision.

The Section also supports the addition of an express tolling provision in what will become subsection (c)(5) under the Tentative Recommendation. However, in this instance the Section's support is qualified. The Section supports the first sentence of new subsection (c)(5), which establishes the tolling provision. However, the Section suggests that the second sentence of new subsection (c)(5), which sets forth three pre-conditions for the application of the tolling provision of the first sentence, be modified to establish only one condition to tolling: reasonable notice to the attorney by the plaintiff of the potential action for a wrongful act or omission.

Each of the three conditions of the second sentence of new subsection (b)(5) – "the plaintiff acts reasonably and in good faith," "the plaintiff gives reasonable notice," and "the attorney is not unreasonably prejudiced in gathering evidence" – injects the potential for a factual dispute into a tolling provision that is otherwise designed to reduce the likelihood of expensive and fractious litigation. These conditions should limit the applicability of the tolling provision only if the benefits of the condition outweigh the costs of creating possible factual disputes.

In the case of "reasonable notice," that balance favors the condition. An attorney subject to a potential claim that is allowed to remain unfiled while another proceeding is resolved should be given notice of this possible liability and the opportunity to take steps to defend himself or herself. While the injection of "reasonable notice" will create the possibility of a factual dispute, the concept of "reasonable notice" is limited, discrete, and subject to articulable standards. The Section does not believe that this requirement will create unnecessary factual disputes or lead to unpredictable results.

The same cannot be said for the requirements that the "plaintiff acts reasonably and in good faith" or "the attorney is not unreasonably prejudiced." Neither condition is limited, discrete, or subject to readily articulable standards. Both conditions are invitations for factual disputes that defy predictable results. The practical effect of including these two conditions on the tolling provision of the first sentence of new subsection (b)(5) is that no attorney advising a potential attorney malpractice client will counsel the client to take the risk that the tolling provision might not be applied to the client's claim. Instead, the attorney will counsel the client to obtain a tolling agreement or file suit, just as is the law and practice now. The inclusion of such broad, undefined conditions on the application of the tolling provision will likely negate the benefits sought to be achieved by the addition of the express tolling provision in the first place.

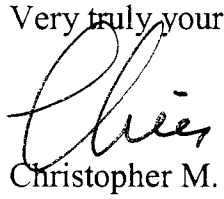
The Tentative Recommendation seeks comments as to whether potential malpractice claims should be tolled until an underlying dispute is "settled or fully resolved" or only until there is an adjudication "by the trial court or other initial tribunal." The Section believes that the benefits to be achieved by the inclusion of a tolling provision can best be secured by allowing

potential claims to be tolled until the underlying matter is resolved by settlement or final judgment (i.e., after all rights of appeal have been exhausted).

Finally, the Section notes that the Tentative Recommendation defers consideration of any reform to address the difficult problems faced by estate planners and other transactional lawyers who may be subject to claims long after performing legal services for their clients due to the application of the actual injury rules to estate plans that do not take effect for many years. The Section appreciates the consideration given to its concerns by the Commission and looks forward to working with the Commission in the future for possible solutions to this problem, either in conjunction with the State Bar or through future legislation.

Please feel free to contact the undersigned if the Commission desires any further comments from the Trusts and Estates Section on this subject.

Very truly yours,



Christopher M. Moore
Chair, CLRC Subcommittee

cc: Barry C. Fitzpatrick, Esquire
Charles P. Wolff, Esquire
Silvio Reggiardo III, Esquire
Tracy M. Potts, Esquire

COMMENTS OF JOHN T. GEORGE

Date: Monday, November 8, 2004
From: John T. George <johntgeorge37@hotmail.com>

Message: Good Day:

I have worked in the legal industry for over twelve years. I have witnessed clients' cases not handled appropriately. Once the case is over, the firm will write a letter requesting that the client pay off their bill. However, the firm will not go after the client until the one year statute for legal malpractice has run. Since the firm has a four year statute (written contract with the client) they choose to wait out the one year before aggressively demanding payment. The one year statute of limitation for legal malpractice fails to provide the client/public adequate protection. What would be wrong with a four year statute of limitations for legal malpractice? I have never seen an attorney take a legal malpractice case when the issue was four years from discovery — it is always the one year standard. Is this a problem that could be rectified by a state proposition?

Please advise. Thanks, John T. George