Study J-111 September 26, 2005

Memorandum 2005-36

Statute of Limitations for Legal Malpractice (Draft of Revised Tentative Recommendation)

Earlier this year, the Commission considered comments on a tentative recommendation proposing three reforms of the statute of limitations for legal malpractice. The Commission decided to further pursue two of the reforms, but to abandon the proposal to add a new tolling provision based on the doctrine of equitable tolling. Instead, the Commission decided to investigate the possibility of providing express statutory authority to stay a legal malpractice action while a related proceeding that may affect the outcome of the malpractice action is pending. This possibility was suggested by the State Bar Committee on Administration of Justice ("CAJ") and attorney David Gubman.

Attached for the Commission's consideration is a draft of a revised tentative recommendation that would implement this new approach. A number of issues relating to the attached draft are discussed below. Also attached is a memorandum pertaining to one of these issues (Exhibit pp. 1-6), which was prepared by Sara Poster, a third-year student at Boalt Hall School of Law who is currently doing research for the Commission on a work-study basis. The Commission needs to decide whether to approve the attached draft for circulation for comment, with or without revisions.

Procedure for Obtaining or Lifting a Stay of a Legal Malpractice Action

The attached draft would require a legal malpractice plaintiff who wants a stay of the malpractice action to file a motion for a stay and provide notice of that motion to the defendant attorney. This approach was recommended by CAJ in its comments on the previous tentative recommendation. The requirement of notice would alert the defendant attorney to the existence of the malpractice action if the complaint has not yet been served. The notice requirement would also enable the attorney to either contest the request for a stay or gather and preserve relevant evidence in the event that the stay is granted and litigation of the malpractice action is delayed.

Similarly, the attached draft would require a noticed motion to lift the stay. This would help ensure that all parties are aware when the malpractice action is reactivated, have an opportunity to challenge that step before it occurs, and are not taken by surprise when litigation deadlines begin running again.

Does the Commission see any problem with use of the noticed motion procedure?

Standard for Granting a Stay of a Legal Malpractice Action Pending Resolution of a Related Proceeding

In drafting a statute authorizing a court to stay a legal malpractice action, an important issue is whether the stay should be mandatory, permissive, presumptive, some combination of these approaches, or an alternative approach.

The staff initially attempted to draft a statute that would make a stay mandatory, at least in some circumstances. As CAJ stated in its comments on the previous tentative recommendation, 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.

Memorandum 2005-20, Exhibit p. 13.

We quickly found, however, that making a stay mandatory raised difficult drafting issues. For example, should a stay be mandatory pending resolution of a related proceeding that is anticipated but not yet pending? Does it matter how likely it is that the anticipated proceeding will actually be filed? Should a stay be mandatory if a related proceeding is only tangentially related to a legal malpractice action and the likelihood of impact on the malpractice action is minimal or remote? Should a stay be mandatory if the outcome of the related proceeding could only affect the amount of damages in the malpractice action but not the determination of malpractice liability? Should a stay be mandatory in some circumstances and discretionary in others? If so, what rules should apply with regard to lifting the stay? Should the rules for lifting a stay be different when a malpractice plaintiff moves to lift a stay, as opposed to an attorney

defendant or the court in which the malpractice action is pending? Should a mandatory stay remain in effect until the related proceeding is fully and finally resolved, including any appeal or other review process, or is it enough if the related proceeding is resolved by the trial court or other initial tribunal?

Our efforts to draft a mandatory stay provision became mired in complicated drafting, which could be the subject of disputes in the legislative process and further disputes if the Legislature were to enact the provision. In the interest of simplicity, we decided to abandon the effort.

Instead, the attached draft would make a stay permissive, not mandatory. The proposed provision would allow, but not require, a court to stay a legal malpractice action "if there is a reasonable likelihood that the existence or amount of the plaintiff's damages in the malpractice action will depend on the outcome of the other proceeding." Under this provision, a court would have discretion to take into account the particular circumstances of the malpractice action and the related proceeding. If the court decides that a stay is inappropriate, it would be able to deny the stay.

To provide a measure of protection to the malpractice plaintiff, however, the draft would require the court to state its reasons for denying the stay in writing or on the record. This would help to protect a malpractice plaintiff from arbitrary denial of a stay, or denial of a stay on a basis unrelated to achieving justice in the malpractice action or a related proceeding.

Similarly, the attached draft would give a court discretion to lift a stay before the related proceeding is fully and finally resolved. If the court decides to exercise that discretion over the plaintiff's objection, however, the court would have to state the reasons for its decision in writing or on the record.

Does the Commission agree with this approach, or would some other approach be better?

Factors for a Court to Consider in Deciding Whether to Stay a Legal Malpractice Action Pending Resolution of a Related Proceeding

In deciding whether to grant a stay pursuant to the proposed provision, many factors would be relevant. For example, a court might examine factors such as:

(1) The interest in litigating the malpractice action when evidence is accessible, memories are fresh, and witnesses are available.
(2) The extent to which the malpractice plaintiff and attorney defendant would be able to gather and effectively preserve

evidence relating to the malpractice action if that action were stayed.

(3) The interest in providing certainty and stability by promptly resolving the malpractice action.

(4) The extent to which the interest in providing certainty and stability has been served by filing the malpractice action, thus alerting the attorney defendant to the allegations and permitting the attorney defendant to take the claim into account in future planning.

(5) The financial burden, time demands, and emotional stress of simultaneously litigating the malpractice action and a related proceeding, and the ability of the malpractice plaintiff to cope with those constraints.

(6) The danger of inconsistent judgments or problematic application of collateral estoppel if the malpractice action is litigated before the related proceeding is fully resolved.

(7) The likelihood that the malpractice plaintiff would be forced to take inconsistent positions in the malpractice action and the related proceeding if those matters were pursued simultaneously, and the degree to which that would adversely affect public respect for, and confidence in, the judicial system.

(8) The likelihood that resolution of the related proceeding would make the malpractice action unnecessary.

(9) The likelihood that simultaneously litigating the malpractice action and the related proceeding would force the malpractice plaintiff to reveal privileged communications, other privileged material, or other information that could be used against the plaintiff in the related proceeding, and the extent to which such harm could be prevented by a protective order.

(10) The likelihood that the outcome of the related proceeding would have no effect, or only a minimal effect, on the malpractice action.

(11) If a related proceeding is anticipated but has not yet commenced, the likelihood that the anticipated proceeding will actually commence and, if so, how soon that is likely to occur.

(12) Any other factor that is relevant to achieving justice in the malpractice action or a related proceeding.

The staff considered the possibility of including a list like this in the attached draft, either in the narrative portion (preliminary part), proposed Comment, or proposed statutory text, or in more than one of these places. What does the Commission think of this idea? If a list of factors would be useful, is the above list satisfactory or should changes be made to it?

Sealing of Court Records in the Legal Malpractice Action

In its comments on the previous tentative recommendation, CAJ recognized that filing a malpractice complaint before resolution of a related proceeding "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." Memorandum 2005-20, Exhibit p. 13. CAJ therefore suggested that if the Commission decided to pursue the possibility of providing express statutory authority to stay a legal malpractice action pending resolution of a related proceeding, the Commission should explore ideas such as "(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*.

The staff asked Boalt student Sara Poster to look into these ideas. Her memorandum on this subject is attached at Exhibit pp. 1-6. The staff is grateful to Ms. Poster for her assistance with this matter.

Ms. Poster concludes that a "default rule that any malpractice action may be filed under seal would likely violate the First Amendment right of public access and California's Rules of Court." Exhibit p. 1. She points out, however, that "[i]ndividual requests to seal part or all of a record for the malpractice action would be acceptable" under California Rule of Court 243.1(d). *Id*. at 3. To satisfy the requirements of that rule, a malpractice plaintiff would have to show all of the following:

(1) There exists an overriding interest that overcomes the right of public access to the record.
(2) The overriding interest supports sealing the record.
(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed.
(4) The proposed sealing order is narrowly tailored.
(5) No less restrictive means exist to achieve the overriding interest.

The staff agrees with Ms. Poster that it would be ill-advised to propose a special new rule governing sealing of the court records of a legal malpractice action. "[T]raditional Anglo-American jurisprudence distrusts secrecy in judicial

proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals." *Estate of Hearst*, 67 Cal. App. 3d 777, 784, 136 Cal. Rptr. 821 (1977). In drafting Rule 243.1, the Judicial Council endeavored to provide guidance on sealing court records consistent with the constraints of the constitutional right of access. The staff believes it would be a mistake to try to reinvent the wheel in the context of legal malpractice. Instead, the attached draft would refer to Rule 243.1 and other relevant authorities in the proposed Comment. That would help to alert parties, attorneys, and courts to the applicable requirements.

Is this approach acceptable to the Commission?

Interrelationship With Other Deadlines

In urging the Commission to pursue the option of a statutory stay, CAJ cautioned that "issues relating to the potential impact of this proposal on the time limits for bringing a case to trial would ... need to be examined." Memorandum 2005-20, Exhibit p. 13. As suggested, the staff researched this point.

The attached draft (p. 11, n.42) explains that coordination with other litigation deadlines does not seem to be a problem:

> Under existing law, the period during which an action is stayed does not count for purposes of the mandatory three-year limit on serving a summons and complaint (Section 583.210). See Section 583.240 (computation of time for purposes of three-year mandatory limit on serving summons and complaint). Similarly, the period during which an action is stayed does not count for purposes of the mandatory five-year limit on bringing an action to trial (Section 583.310) or the mandatory three-year limit on commencing a new trial (Section 583.320) See Section 583.340 (computation of time for purposes of mandatory limits on commencing trial or new trial). The same rule applies in calculating the time limits applicable to a discretionary dismissal of an action for delay in prosecution. See Section 583.420(b).

The proposed Comment would refer to the applicable provisions.

Is the Commission or anyone else aware of any coordination problem that the staff has overlooked?

Respectfully submitted,

Barbara Gaal
Staff Counsel

Exhibit

MEMORANDUM ON SEALING MALPRACTICE CASES WHILE UNDERLYING PROCEEDINGS ARE PENDING

I. ISSUE

You have asked me to evaluate the possibility of sealing a legal malpractice case while an underlying proceeding that may affect the outcome of the malpractice case is pending in light of First Amendment considerations.

II. DISCUSSION

A default rule that any malpractice action may be filed under seal would likely violate the First Amendment right of public access and California's Rules of Court. While individual requests to seal such records may be granted in compelling cases, the practical difficulties these requests could cause may outweigh the benefits of pursuing a statutory stay.

A. The Legal Standard

Court records are presumed to be open unless confidentiality is required by law. Cal. Rules of Ct., Rule 243.1(c); *Estate of Hearst*, 67 Cal. App. 3d 777, 782 (1977), 136 Cal. Rptr. 821.[1] However, a trial court may order that a record be filed under seal if it expressly finds that:

[1] A court "record" is all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court. *See* Cal. Rules of Ct., Rule 243(b)(1).

1. There exists an overriding interest that overcomes the right of public access to the record;
2. The overriding interest supports sealing the record;
3. A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
4. The proposed sealing is narrowly tailored; and
5. No less restrictive means exist to achieve the overriding interest.

Cal. Rules of Ct., Rule 243.1(d).

This rule reflects the test the California Supreme Court articulated in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1217-18 (1999), 86 Cal. Rptr. 2d 778, which applies to the sealing of records. Advisory Committee Comment to Cal. Rules of Ct., Rule 243.1 (2004), citing *NBC Subsidiary*, 20 Cal. 4th at 1217-18. While the standard for sealing a record is demanding, courts have considerable discretion in determining whether it has been met. *See* Cal. Rules of Ct., Rule 243.1(d); *In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 299 (2002), 116 Cal. Rptr. 2d 833. Thus, a reviewing court may only reverse such a decision if it concludes that the discretion was abused—i.e., exceeded the bounds of reason. *In re Providian*, 96 Cal. App. 4th at 299, citing *Mission Imports, Inc. v. Superior Court*, 31 Cal. 3d 921, 932 (1982), 184 Cal. Rptr. 296; *Shamblin v. Brattain*, 44 Cal. 3d 474, 478 (1988), 243 Cal. Rptr. 902.

Rule 243.1 does not define the term "overriding interest," but rather leaves this task to the developing case law. Advisory Committee Comment to Cal. Rules of Ct., Rule 243.1 (2004). In *NBC Subsidiary*, the Supreme Court provided various examples of

"overriding interests" recognized by case law. These examples include various statutory privileges, trade secrets, and privacy interests when "properly asserted" under "appropriate circumstances." *See NBC Subsidiary*, 20 Cal. 4th at 1222 n. 46. A civil litigant's right to a fair trial, binding contractual obligations not to disclose, and protection of witnesses from extreme embarrassment or intimidation also likely qualify as overriding interests. *Id.* Recently, in *The People v. Jackson*, a court of appeal maintained that "the protection of a defendant from the public dissemination of inaccurate or inadmissible evidence" may also constitute such an interest. 128 Cal. App. 4th 1009, 1023 (2005), 27 Cal. Rptr. 3d 596.

B. Analysis

Express legislative authorization to file any malpractice action under seal would likely invite serious First Amendment challenges. Given the well-settled right of public access to court records and the high standard one must meet to seal a record, CLRC would have difficulty successfully persuading the Legislature that all malpractice actions that accrue while the underlying proceeding is pending should presumptively be filed under seal. Individual requests to seal part or all of a record for the malpractice action would be acceptable, however, under Rule 243.1(d).

Two potential overriding interests are the litigant's right to a fair trial and the protection of the attorney from the public's ability to access the malpractice record. Sealing the malpractice record may be necessary to preserve a litigant's right to a fair trial. The CAJ observed 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." CAJ Exhibit p. 13. Should these possibilities occur, plaintiffs may be at a distinct disadvantage vis-à-vis their adversaries in trial by involuntarily providing their opponents material that could undermine their case. In addition, failure to seal the malpractice file could unduly prejudice the attorney accused of malpractice. If the underlying proceeding reveals that no harm was caused, for instance, then the attorney may have unnecessarily suffered reputational harm and/or lost business while the underlying matter was being litigated.[2] Insofar as these concerns satisfy the Rule's first three requirements and the request is narrowly tailored and the least restrictive means of achieving the overriding interest, sealing the malpractice record may be appropriate in certain situations.

Although the legal standard allows for some malpractice records to be sealed, practical difficulties associated with sealing such records may arise. Critically, parties may engage in protracted litigation over whether or not their request satisfies Rule 243.1(d) in order to persuade the court to grant their proposed order. For example, much effort may be spent arguing over whether an interest is sufficiently "overriding" in light of the term's ambiguity. While California courts provide examples of such interests, they do not provide concrete guidelines or an exhaustive list of the interests that qualify. In addition, whether or not that interest supports impeding First Amendment rights could also incite contentious litigation. Parties may argue over the remaining three requirements as well. Ultimately, then, the increased litigation that the statutory stay/sealing option could provoke may exacerbate the very concerns of judicial economy, litigation expenses, and malpractice premiums that initially motivated CLRC to propose

[2] While CLRC has generally justified its proposal on pro-plaintiff rationales, this concern could nonetheless constitute an acceptable "overriding interest."

statutory reform. While these difficulties caution against the sealing option, CLRC should consider concrete evidence of the likelihood that these difficulties will actually arise. CLRC should also consider proposing more specific guidelines as to which interests qualify as overriding if it pursues the statutory stay.

III. CONCLUSION

The statutory stay/presumptive sealing option is unlikely to pass constitutional muster in light of the well entrenched public access rights and high standard that applies to filing records under seal. Though the possibility of pursuing a statutory stay during which some parties may individually obtain permission to file malpractice records under seal may be viable, CLRC should conduct further research on the potential drawbacks such a process could entail.

RELEVANT CAL. RULES OF COURT

243.1
(b) Definitions.
(1) "Record." Unless the context indicates otherwise, "record" as used in this rule means all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court.
(2) "Sealed." A "sealed" record is a record that by court order is not open to inspection by the public.
(3) "Lodged." A "lodged" record is a record that is temporarily placed or deposited with the court but not filed.
(d) Express factual findings required to seal records. The court may order that a record be filed under seal only if it expressly finds facts that establish:
(1) There exists an overriding interest that overcomes the right of public access to the record;
(2) The overriding interest supports sealing the record;
(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
(4) The proposed sealing is narrowly tailored; and
(5) No less restrictive means exist to achieve the overriding interest
(e) Content and scope of the order

(1) An order sealing the record must (i) specifically set forth the facts that support the finding and (ii) direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.

243.2 (Logistics concerning sealing records)

243.2(a) (Party must obtain a court order to file a record under seal)

243.2(h)(2)
A party or member of the public may move, apply, or petition, or the court on its own motion may move, to unseal a record. Notice of any motion, application, or petition to unseal must be filed and served on all parties in the case. The motion, application, or petition and any opposition, reply, and supporting documents must be filed in a public redacted version and a sealed complete version if necessary to comply with (c).
(3). If the court proposes to order a record unsealed on its own motion, the court must mail notice to the parties stating the reason therefore. Any party may serve and file an opposition within 10 days after the notice is mailed or within such time as the court specifies. Any other party may file a response within 5 days after the filing of an opposition.
(4) In determining whether to unseal a record, the court must consider the matters addressed in rule 243.1(c)—(e).
(5) The order unsealing a record must state whether the record is unsealed entirely or in part. If the court's order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular records that are unsealed, the particular persons who may have access to the record, or both. If, in addition to the records in the envelope or the container, the court has previously ordered the sealing order, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed.

#J-111

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft
REVISED TENTATIVE RECOMMENDATION

Statute of Limitations for Legal Malpractice

September 2005

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

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

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF REVISED TENTATIVE RECOMMENDATION

Under the statute of limitations for legal malpractice (Code Civ. Proc. § 340.6), it is sometimes necessary for a plaintiff to file a legal malpractice action before final resolution of a related proceeding affecting the plaintiff's rights, such as a case in which malpractice allegedly occurred. But it may be prohibitively expensive or otherwise problematic for the plaintiff to simultaneously pursue both the malpractice action and the related proceeding. The Law Revision Commission proposes to address this situation by expressly authorizing a court to stay a legal malpractice action on motion of the plaintiff if there is a reasonable likelihood that the existence or amount of the plaintiff's damages in the malpractice action will depend on the outcome of another proceeding.

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

STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE

To comply with the statute of limitations for legal malpractice (Code of Civil Procedure Section 340.6),[1] a plaintiff may have to file a legal malpractice action before final resolution of a related proceeding affecting the plaintiff's rights, such as a proceeding in which the malpractice allegedly occurred. Simultaneously litigating a malpractice action and a related proceeding may be prohibitively expensive for a plaintiff, however, and may also entail other drawbacks. The Law Revision Commission recommends enactment of a statute to alleviate these problems. The proposed new statute would expressly authorize a court to stay a legal malpractice action on motion of the plaintiff if there is a reasonable likelihood that the existence or amount of the plaintiff's damages in the malpractice action will depend on the outcome of another proceeding.[2]

Requirements of the Statute of Limitations for Legal Malpractice

The statute of limitations for legal malpractice establishes alternate one-year and four-year limitations periods for legal malpractice.[3] The provision codifies the

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

2. The Law Revision Commission has also explored other possible reforms of the statute of limitations for legal malpractice. In particular, the Commission examined whether to: (1) add a new tolling provision based on the doctrine of equitable tolling, (2) reallocate the burden of proof regarding the time of discovery of legal malpractice, and (3) delete a sentence in Section 340.6 pertaining to "an action based upon an instrument in writing, the effective date of which depends upon some act or event in the future." See Tentative Recommendation on *Statute of Limitations for Legal Malpractice* (Nov. 2004) (available from the Commission, www.clrc.ca.gov). The Commission abandoned the first proposal (the proposed new tolling provision) as unworkable, but plans to pursue the other two proposals.

In addition, the Commission has investigated concerns regarding application of the statute of limitations for legal malpractice in the context of estate planning. That portion of its study is on hold pending further action by the State Bar, which may be better-suited to address the situation than the Commission. The Commission still welcomes input on this or any other aspect of its work on the statute of limitations for legal malpractice.

3. Section 340.6 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

discovery doctrine, under which the limitations period does not begin to run until the client "discovers, or through the use of reasonable diligence should have discovered" the attorney's malpractice.[4] The client must commence the malpractice action within one year from the date of actual or constructive discovery. To preclude endless potential exposure, however, the statute also requires the client to bring the case within four years from the date of the wrongful act or omission.[5]

The alternate limitations periods (one-year-from-discovery and four-years-from-occurrence) are tolled[6] so long as the allegedly negligent attorney continues to represent the client "regarding the specific subject matter in which the alleged wrongful act or omission occurred."[7] Even after the client replaces the attorney, the limitations periods are tolled until the client sustains actual injury.[8]

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(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.

This provision does not apply to an action for actual fraud. Quintilliani v. Mannerino, 62 Cal. App. 4th 54, 72 Cal. Rptr. 2d 359 (1998); Stoll v. Superior Court, 9 Cal. App. 4th 1362, 12 Cal. Rptr. 2d 354 (1992).

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

5. In *Neel*, the Supreme Court recognized that application of the discovery doctrine in legal malpractice actions would "impose an increased burden on the legal profession." 6 Cal. 3d at 192. The Court observed that an attorney's mistake "may not work damage or achieve discovery for many years after the act, and the extension of liability into the future poses a disturbing prospect." *Id.* The Court acknowledged, however, that an outer limit on delayed accrual of legal malpractice actions might be desirable. *Id.* The Legislature established such an outer limit by codifying the four year alternate limitations period. Due to the tolling provisions in Section 340.6, however, that four year limit is not absolute. Finlayson v. Sanbrook, 10 Cal. App. 4th 1436, 1442 n.6, 13 Cal. Rptr. 2d 406 (1992) ("The outside limit is four years *plus* any time the statute is tolled.") (emphasis in original).

6. The concept of tolling is distinct from the concept of delayed accrual. A rule of delayed accrual postpones the accrual of a cause of action until a specified event occurs (e.g., until discovery of the facts constituting malpractice). Once the cause of action accrues, the statute of limitations begins to run. A tolling provision may suspend (temporarily stop) the running of the statute of limitations after a cause of action has accrued. See Cuadra v. Millan, 17 Cal. 4th 855, 864-65 & n.11, 952 P.2d 704, 72 Cal. Rptr. 2d 687 (1998); Bonifield v. County of Nevada, 94 Cal. App. 4th 298, 303-04, 114 Cal. Rptr. 2d 207 (2001); see also Woods v. Young, 53 Cal. 3d 315, 326 n.3, 807 P.2d 455, 279 Cal. Rptr. 613 (1991) ("Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended.").

7. Section 340.6(a)(2); see, e.g., Crouse v. Brobeck, Phleger & Harrison, 67 Cal. App. 4th 1509, 1535, 80 Cal. Rptr. 2d 94 (1998) ("The tolling provision of section 340.6, subdivision (a)(2) applies to both the one-year and the four-year time limitations."). See also Gold v. Weissman, 114 Cal. App. 4th 1195, 8 Cal. Rptr. 3d 480 (2004); Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort, 91 Cal. App. 4th

Actual Injury and the Necessity of Simultaneous Litigation

The tolling provision for actual injury is key in understanding the need for reform. This tolling provision stems from the elementary principle of tort law that damages are an essential element of a cause of action for negligence. Until an attorney's negligence harms a client, the client cannot state a cause of action.[9] It would be unfair to start the running of the limitations period before the client is able to bring suit.

There is no statutory definition of actual injury. From case law, it is clear that the mere fact of sustaining injury constitutes actual injury and is sufficient to end the tolling period.[10] It is not necessary that the injury exceed a threshold amount[11] or that the total amount of injury from the malpractice be calculable.[12]

An important issue is whether the fact of injury is sufficiently well-established to constitute actual injury. For example, suppose an attorney fails to timely file a claim on behalf of a client. It could be argued that actual injury occurs when the attorney misses the statute of limitations, diminishing the value of the client's claim. It could also be argued that actual injury does not occur until the client

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875, 110 Cal. Rptr. 2d 877 (2001); Kulesa v. Castleberry, 47 Cal. App. 4th 103, 54 Cal. Rptr. 2d 669 (1996); Worthington v. Rusconi, 29 Cal. App. 4th 1488, 35 Cal. Rptr. 2d 169 (1994).

8. See, e.g., Johnson v. Haberman & Kassoy, 201 Cal. App. 3d 1468, 1474, 247 Cal. Rptr. 614 (1988) (Tolling provisions of Section 340.6 "apply to the one-year, as well as the four-year, provision."); Gurkewitz v. Haberman, 137 Cal. App. 3d 328, 336 & n.5, 187 Cal. Rptr. 14 (1982) (Legislature made change "in order to clearly toll both the one- and four-year provisions of the statute when the plaintiff sustains no actual injury....").

Both the one-year and the four-year limitations periods are also tolled when the client is under a legal or physical disability that prevents the client from commencing legal action. Section 340.6(a)(4); *Gurkewitz*, 137 Cal. App. 3d at 336 & n.5. Only the four-year period is tolled when the attorney willfully conceals the malpractice. Section 340.6(a)(3).

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

10. "The first injury of any kind to the plaintiff, attributable to the defendant attorney's malfeasance or nonfeasance, should suffice." Radovich v. Locke-Paddon, 35 Cal. App. 4th 946, 971, 41 Cal. Rptr. 2d 573 (1995); see also Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 752, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998) ("[T]he fact of damage, rather than the amount, is the critical factor."); Adams v. Paul, 11 Cal. 4th 581, 589, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995) (plurality opinion) (same); Laird v. Blacker, 2 Cal. 4th 606, 612, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992) (same).

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

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

learns of the problem and incurs fees seeking advice about it. Alternatively, one could say that actual injury occurs even later — when the client's adversary asserts the statute of limitations as a defense, when the trial court enters judgment against the client based on the statute of limitations, or when the client loses on appeal and has no further right of review.

The definition of actual injury can thus affect whether a client must simultaneously litigate both a legal malpractice action and a related lawsuit or other proceeding:

(1) If the statute is interpreted to mean that actual injury does not occur until the related proceeding is decided and all appeals or other review processes are resolved, the alternate limitations periods are tolled through the appellate process and the malpractice action need not be commenced until after the related proceeding is fully and finally determined.

(2) If the statute is interpreted to mean that actual injury does not occur until the related proceeding is either settled or resolved by the trial court or other initial tribunal, simultaneous litigation will be necessary only if a party seeks to overturn the initial result and the review process cannot be completed before the statutory period expires.

(3) If the statute is interpreted to mean that actual injury can occur before the related proceeding is resolved by the initial tribunal, it may be necessary to commence the malpractice action while the related proceeding is still pending in the initial tribunal.

In recent cases, the California Supreme Court has adopted the third approach,[13] although it appeared to support the second approach in earlier decisions.[14] The Court has consistently rejected the first approach, under which all appeals or other review processes in a related proceeding must be complete before actual injury occurs.[15] Consequently, it may be necessary for a plaintiff to file a legal

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13. See *Jordache*, 18 Cal. 4th at 743, 764-65, in which the Court endorsed four principles: "(1) determining actual injury is predominately a factual inquiry; (2) actual injury may occur without any prior adjudication, judgment, or settlement; (3) nominal damages, speculative harm, and the mere threat of future harm are not actual injury; and (4) the relevant consideration is the fact of damage, not the amount." See also Coscia v. McKenna & Cuneo, 25 Cal. 4th 1194, 1210, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001) (criminal defendant could sustain actual injury from malpractice *before* obtaining postconviction exoneration); *Adams*, 11 Cal. 4th at 593 (court must examine "the point at which the fact of damage became palpable and definite even if the amount remained uncertain, taking into consideration all relevant circumstances.").

14. See ITT Small Business Finance Corp. v. Niles, 9 Cal. 4th 245, 258, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994) ("[I]n transactional legal malpractice cases, when the adequacy of the documentation is the subject of dispute, an action for attorney malpractice accrues *on entry of adverse judgment, settlement, or dismissal of the underlying action*.") (emphasis added); *Laird*, 2 Cal. 4th at 608 ("[T]he limitations period of section 340.6 commences when a client *suffers an adverse judgment or order of dismissal in the underlying action* on which the malpractice action is based.") (emphasis in original).

15. *Laird*, 2 Cal. 4th at 608; *see also Coscia*, 25 Cal. 4th at 1210; *Jordache*, 18 Cal. 4th at 755; *Adams*, 11 Cal. 4th at 591 n.4; *ITT*, 9 Cal. 4th at 615-16.

malpractice action while a related proceeding is still pending, and simultaneously litigate the malpractice action and the related proceeding.

Policy Implications of Simultaneously Litigating a Legal Malpractice Action and a Related Proceeding

Early assertion of a legal malpractice action has important advantages. It helps to ensure that the action is litigated when evidence is accessible, memories are fresh, and witnesses are available.[16] It also promotes the interest in repose, the need for a measure of certainty and stability in conducting one's affairs.[17] The attorney is promptly alerted to the claim and thus can take it into account in making decisions, instead of being surprised by it long after the alleged malpractice incident.[18]

But simultaneous litigation of a malpractice action and a related proceeding has drawbacks. These include: (1) the burden of simultaneously litigating multiple cases, (2) the possibility of inconsistent positions or results, (3) adverse impacts on judicial economy, litigation expenses, and the cost of malpractice insurance, and (4) the potential for unfair prejudice in the related proceeding resulting from waiver of privileges or disclosure of information in pursuing the malpractice action.

Burden of Simultaneously Pursuing Multiple Cases

Conducting simultaneous litigation is a significant burden on clients.[19] Prosecuting or defending a lawsuit is expensive, time-consuming, and emotionally

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In *Laird*, Justice Mosk took the position that actual injury does not occur and the limitations period does not begin to run until the appeal is resolved. *Id.* at 621-28 (Mosk, J., dissenting). He reiterated that view in *ITT*, 9 Cal. 4th at 258 (Mosk, J., concurring).

16. As time passes, documents or other tangible evidence may be lost or destroyed, memories may fade, and witnesses may die or disappear, making it difficult to litigate the case. A key function of a statute of limitation is to compel resolution of a claim before the evidence deteriorates. See, e.g., *Jordache,* 18 Cal. 4th at 756; Addison v. State, 21 Cal. 3d 313, 317, 578 P.2d 941, 146 Cal. Rptr. 224 (1978); Elkins v. Derby, 12 Cal. 3d 410, 417, 525 P.2d 81, 115 Cal. Rptr. 641 (1974); Ochoa & Wistrich, *Limitation of Legal Malpractice Actions: Defining Actual Injury and the Problem of Simultaneous Litigation*, 24 Sw. U. L. Rev. 1, 14-15 (1994).

17. For authorities explaining that repose is a key purpose of a statute of limitation, see, e.g., *Jordache*, 18 Cal. 4th at 756; *Valley Circle Estates v. VTN Consolidated, Inc.*, 33 Cal. 3d 604, 615, 659 P.2d 1160, 189 Cal. Rptr. 871 (1983); *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 787, 598 P.2d 45, 157 Cal. Rptr. 392 (1979); *Foxborough v. Van Atta*, 26 Cal. App. 4th 217, 227, 31 Cal. Rptr. 2d 525 (1994); Ochoa & Wistrich, *supra* note 16, at 15.

18. If a claim is not promptly asserted, the potential defendant may be oblivious to the threat of liability and plan accordingly. Surprising that person with a claim for alleged misconduct in the distant past not only contravenes basic notions of fairness, but also undermines stability and predictability in legal affairs.

19. Sirott v. Latts, 6 Cal. App. 4th 923, 934, 8 Cal. Rptr. 2d 206 (1992) (Johnson, J., dissenting) (hair trigger approach is bad for clients because it requires them to proceed with two lawsuits at a time); see also *Jordache*, 18 Cal. 4th at 769 (Mosk, J., dissenting).

draining. For some clients, the burden of simultaneously litigating a legal malpractice action and a related proceeding may be prohibitive.[20]

Inconsistent Positions

Simultaneous litigation of a malpractice action and a related proceeding may force a client to simultaneously take inconsistent positions. For example, it may be debatable whether an attorney timely filed a proceeding on behalf of a client.[21] As a result, the client may have to show the attorney's timeliness in the related proceeding, while at the same time proving the attorney's untimeliness in a malpractice action.[22] The result may be inconsistent judgments or application of collateral estoppel in a manner harmful to the client.[23] In addition, respect for the legal system is undermined when a litigant is compelled to take inconsistent positions before different decisionmakers.[24]

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20. Ochoa & Wistrich, *supra* note 16, at 21-22. As a court explained in a similar context:

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

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

21. This could occur if there is a dispute over interpretation of a limitations provision, such as Code of Civil Procedure Section 351, which tolls limitations periods when the defendant is out of state.

22. See, e.g., Pleasant v. Celli, 18 Cal. App. 4th 841, 849-50, 22 Cal. Rptr. 2d 663 (1993); see also Adams v. Paul, 11 Cal. 4th 581, 605, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995) (Lucas, J., dissenting). A further problem in this situation is that the mere assertion of the malpractice claim may alert the defendant in the underlying proceeding to the limitations defense.

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

23. *Sirott*, 6 Cal. App. 4th at 934 (Johnson, J., dissenting); Ochoa & Wistrich, *supra* note 16, at 20-21.

24. Elkins v. Derby, 12 Cal. 3d 410, 420, 525 P.2d 81, 115 Cal. Rptr. 641 (1974) (Respect for legal system is "hardly enhanced by an incongruent procedural structure which causes an injured party simultaneously to allege before different tribunals propositions which are mutually inconsistent.").

Judicial Economy, Litigation Expenses, and Malpractice Premiums

Often, resolution of a related proceeding may render a malpractice action unnecessary.[25] For example, when an attorney misses the statute of limitations, the other side may never realize that the lawsuit was untimely.[26]

Forcing a client to pursue a malpractice action without awaiting the outcome of a related proceeding may thus waste judicial resources.[27] By clogging court dockets, it can also impede access to justice.[28] Perhaps most significantly, if a client must pursue a malpractice action while a related proceeding is pending, clients, attorneys, and witnesses may be subjected to the financial and emotional stress of litigation that ultimately proves unnecessary.

Further, parties will expend more effort litigating malpractice actions than they would if a client could refrain from litigating against counsel until the result of a related proceeding was clear.[29] This may drive up malpractice insurance premiums, which in turn may increase legal fees.

Waiver of Lawyer-Client or Work Product Privilege, or Other Harmful Disclosure of Information

Simultaneous litigation of a malpractice action and a related proceeding may also result in a prejudicial waiver of the lawyer-client or work product privilege.[30]

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25. Ochoa & Wistrich, *supra* note 16, at 22-23; see ITT Small Business Finance Corp. v. Niles, 9 Cal. 4th 245, 257, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994) (had client prevailed in adversary proceeding, malpractice action would have been unnecessary).

26. As one court explained,

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

Pleasant, 18 Cal. App. 4th at 850 (emphasis in original).

If the underlying proceeding is settled, rather than decided on the merits, the impact of the attorney's error may not be totally clear. Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 754-55, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998). Many different factors can influence the decision to settle a suit. *Id.* Nonetheless, the amount of a settlement likely will shed some light on the impact of the malpractice. For instance, if a client receives a large settlement in a suit that the attorney filed late, the late filing probably did not adversely affect the client's recovery.

27. See, e.g., *Jordache*, 18 Cal. 4th at 769 (Mosk, J., dissenting); *Adams*, 11 Cal. 4th at 605 (Lucas, C.J., dissenting); Laird v. Blacker, 2 Cal. 4th 606, 626, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992) (Mosk, J., dissenting); *Sirott*, 6 Cal. App. 4th at 934-35 (Johnson, J., dissenting).

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

29. *Jordache*, 18 Cal. 4th at 767 (George, C.J., dissenting) ("[A] rule that measures the running of the statute of limitations from an early date — before the underlying litigation or controversy has been resolved — inevitably will require (or at least encourage) the early filing of legal malpractice actions that might otherwise not be brought...."); see also *Sirott*, 6 Cal. App. 4th at 934 (Johnson, J., dissenting) (hair trigger lawsuits are bad for lawyers "because there probably will be many more malpractice suits filed").

30. Ochoa & Wistrich, *supra* note 16, at 21.

To establish malpractice, the client may need to disclose the attorney's work product or confidential communications with the attorney. But such a disclosure may waive the work product or lawyer-client privilege, giving the opposing party in the related proceeding access to information that would otherwise be privileged. This may seriously prejudice the client's case.[31]

Similarly, in pursuing a malpractice action the plaintiff may have to disclose non-privileged information that could be harmful in a related proceeding. Such disclosure may alert an opponent in the related proceeding to that information, to the detriment of the malpractice plaintiff.

Tolling Agreement

Often, it is possible for a client with a legal malpractice claim to avoid simultaneous litigation and the concomitant problems by entering into a tolling agreement with the attorney who allegedly committed malpractice.[32] The attorney may be amenable to this approach because defending a malpractice claim can be costly, time-consuming, and stressful, and may adversely affect the cost or availability of the attorney's malpractice insurance. By entering into a tolling agreement, the attorney can postpone some, if not all, of these problems. With the passage of time and resolution of the related proceeding, the malpractice action may even become unnecessary and the attorney can escape it altogether.

In some instances, however, a client may be hesitant to ask for a tolling agreement or an attorney may be unwilling to enter into a tolling agreement.[33] For example, the attorney may regard the malpractice allegations as a frivolous attempt to pressure the attorney into reducing a fee bill. Rather than acceding to the client's demands or agreeing to delay resolution of the malpractice allegations, the attorney may wish to have a court promptly review and dispose of those allegations. In such a situation, the client may have to file a malpractice action before a related proceeding is fully resolved.

Stay of a Legal Malpractice Action Pending Resolution of a Related Proceeding

Once a plaintiff files a legal malpractice action, the parties may be under immediate pressure to proceed with it. Such pressure can stem from a number of sources, such as delay reduction deadlines,[34] the deadline for service of a summons

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31. *Id.*

32. Letter from Ronald Mallen to Barbara Gaal (Jan. 11, 2005), attached as Exhibit pp. 2-3 to Law Revision Commission Staff Memorandum 2005-20 (available from the Commission, www.clrc.ca.gov); Letter from Wells Lyman to California Law Revision Commission (March 30, 2005), attached as Exhibit pp. 4-5 to Law Revision Commission Staff Memorandum 2005-20 (available from the Commission, www.clrc.ca.gov); Letter from State Bar Committee on Administration of Justice to California Law Revision Commission (April 25, 2005), attached as Exhibit pp. 6-17 to Law Revision Commission Staff Memorandum 2005-20 (available from the Commission, www.clrc.ca.gov) (hereafter, "CAJ Letter").

33. See, e.g., Ochoa & Wistrich, *supra* note 16, at 66; CAJ Letter, *supra* note 32.

34. See, e.g, Gov't Code §§ 68600-68620; Cal. R. Ct. 205-210.

and complaint,[35] the deadlines for responding to a complaint,[36] and other deadlines.

Instead of proceeding with the malpractice action, the plaintiff may prefer to keep it on the court's docket without actively pursuing it. To be able to do this, a plaintiff must seek a stay of the malpractice action from the trial court.

Most of the problems arising from simultaneously litigating a legal malpractice action and a related proceeding can be alleviated to some extent by staying the malpractice action until the related proceeding is resolved.[37] For example, when a malpractice action is stayed, both the plaintiff and the attorney defendant are temporarily spared the expense, time demands, and stress inherent in litigating the malpractice action. This may be particularly critical to the plaintiff, who may lack the resources to simultaneously pursue both the malpractice action and a related proceeding.

So long as a malpractice action is stayed pending the outcome of a related proceeding, the danger of inconsistent judgments is eliminated, as is the danger of a ruling in the malpractice action that will collaterally estop the plaintiff in the related proceeding. It may still be necessary for the malpractice plaintiff to take inconsistent positions in the malpractice action and the related proceeding, but the likelihood of this is reduced because the plaintiff only has to plead the malpractice claim and does not have to get into the details of the dispute.

If a malpractice action is stayed until a related proceeding is resolved, the plaintiff will know the outcome of the related proceeding before having to litigate the malpractice action. In some instances, the outcome of the related proceeding will make the malpractice action unnecessary. Staying the malpractice action will thus help to conserve judicial resources, reduce litigation expenses, and perhaps also control legal malpractice premiums.

By staying a malpractice action pending resolution of a related proceeding, a court may spare a client from having to disclose work product, confidential attorney-client communications, or other information while there is a danger of prejudice to the client in the related proceeding. In some cases, such disclosure might still be necessary for purposes of pleading the malpractice claim, but if the potential prejudice is sufficiently severe, it might be possible to prevent adverse effects by sealing the complaint.

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35. Section 583.240.

36. See, e.g., Sections 412.20, 428.50, 430.40, 430.90, 432.10.

37. See Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 758, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998) ("The case management tools available to trial courts, including the inherent authority to stay an action when appropriate and the ability to issue protective orders when necessary, can overcome problems of simultaneous litigation if they do occur.").

Statutory Guidance on Staying a Legal Malpractice Action Pending Resolution of a Related Proceeding

A court has inherent authority to stay a legal malpractice action in appropriate circumstances.[38] A court may be reluctant to exercise that authority, however, either because it is unaware or uncertain that the power exists,[39] or because it is concerned about controlling its docket.[40]

The Law Revision Commission recommends adding a provision to the codes that would expressly authorize a court to stay a legal malpractice action pending the resolution of a related pending or anticipated civil or criminal action, administrative adjudication, arbitration, tax audit, or other formal proceeding. Such a provision would help alert parties, attorneys, and courts to the option of a stay, and would demonstrate legislative support for that approach in appropriate circumstances. A statutory provision would also be a means of providing a number of procedural protections.[41]

In particular, the proposed provision would require a malpractice plaintiff to seek a stay by a noticed motion. The notice requirement would serve to alert the defendant attorney to the existence and proposed dormant status of the malpractice action. The attorney would thus be able to either contest the request for a stay or gather and preserve relevant evidence in the event that the stay is granted and litigation of the malpractice action is delayed.

Under the proposed provision, a stay would be permissive, not mandatory. The provision would give a court discretion to take into account the particular circumstances of the legal malpractice action and the related proceeding. For example, a court could consider whether a related proceeding is already pending or only a vague possibility, whether a related proceeding would potentially have a significant effect on the malpractice action or only a minimal impact, and other relevant factors.

If the court denies a stay, the proposed provision would require the court to state the reasons for its decision in writing or on the record. This would help assure a

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38. Coscia v. McKenna & Cuneo, 25 Cal. 4th 1194, 1211, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001); *Jordache*, 18 Cal. 4th at 758; Adams v. Paul, 11 Cal. 4th 581, 593, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995) (plurality opinion).

39. CAJ Letter, *supra* note 32; see also Rosenthal v. Wilner, 197 Cal. App. 3d 1327, 1331, 243 Cal. Rptr. 472, 474 (1998) (trial court erred in denying stay but ruling was reversed in writ proceeding).

40. Ochoa & Wistrich, *supra* note 16, at 66.

41. By expressly authorizing a court to stay a legal malpractice action pending resolution of a related proceeding, the proposed provision would address most of the problems associated with simultaneously litigating a malpractice action and a related proceeding. See discussion of "Stay of a Legal Malpractice Action Pending Resolution of a Related Proceeding" *supra*. In some instances, however, filing a malpractice complaint may necessitate disclosure of information that could have an adverse impact on a related proceeding. See *id*.; see also discussion of "Waiver of Lawyer-Client or Work Product Privilege, or Other Harmful Disclosure of Information" *supra*. The proposed provision would not address this situation, but the proposed Comment would refer to case law and other authorities providing guidance on the requirements for sealing court records.

malpractice plaintiff that a court will not deny a stay arbitrarily or for reasons unrelated to achieving justice in the malpractice action or a related proceeding.

A stay granted under the proposed provision would remain in effect until the court lifts it.[42] The court would be required to lift the stay on noticed motion once the related proceeding is fully and finally resolved, including any appeal or other review process. The court would also have discretion to lift the stay earlier. If the court exercises that discretion, however, it would have to state its reasons for doing so in writing or on the record.

The proposed provision would thus set forth simple procedural rules for granting and lifting a stay of a legal malpractice action pending resolution of a related proceeding that may affect the outcome of the malpractice action. While establishing these rules, the proposed provision would also afford a court flexibility to account for the particular circumstances of the action before it.

42. Under existing law, the period during which an action is stayed does not count for purposes of the mandatory three-year limit on serving a summons and complaint (Section 583.210). See Section 583.240 (computation of time for purposes of three-year mandatory limit on serving summons and complaint). Similarly, the period during which an action is stayed does not count for purposes of the mandatory five-year limit on bringing an action to trial (Section 583.310) or the mandatory three-year limit on commencing a new trial (Section 583.320). See Section 583.340 (computation of time for purposes of mandatory limits on commencing trial or new trial). The same rule applies in calculating the time limits applicable to a discretionary dismissal of an action for delay in prosecution. See Section 583.420(b). The Commission is not proposing to revise any of these provisions.

PROPOSED LEGISLATION

Code Civ. Proc. § 340.7 (added). Stay of legal malpractice action pending resolution of related proceeding

SECTION 1. Section 340.7 is added to the Code of Civil Procedure, to read:

340.7. (a) The plaintiff in an action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services may file a noticed motion for a stay of that action pending the resolution of a related pending or anticipated civil or criminal action, administrative adjudication, arbitration, tax audit, or other formal legal proceeding.

(b) In its discretion, the court may grant the motion for a stay if there is a reasonable likelihood that the existence or amount of the plaintiff's damages in the action for a wrongful act or omission will depend on the outcome of the other proceeding.

(c) If a court denies a motion for a stay under this section, it shall state the reasons for its decision in writing or on the record.

(d) A stay under this section shall remain in effect until the court issues an order lifting the stay. The court shall lift the stay on noticed motion of the plaintiff or defendant, or on its own noticed motion, when the related proceeding is fully and finally resolved, including any appeal or other review process. In the interests of justice, the court may lift the stay before the related proceeding is fully and finally resolved. If the court lifts the stay over the plaintiff's objection before the related proceeding is fully and finally resolved, the court shall state the reasons for its decision in writing or on the record.

Comment. Section 340.7 is added in recognition that (1) complying with the statute of limitations for legal malpractice may sometimes necessitate filing a malpractice action before a related proceeding is resolved, and (2) simultaneously pursuing a malpractice action and a related proceeding may be prohibitively expensive or otherwise problematic for a malpractice plaintiff. The provision authorizes, but does not compel, a court to stay a legal malpractice action on motion of the plaintiff if there is a reasonable likelihood that the existence or amount of the plaintiff's damages in the malpractice action will depend on the outcome of another proceeding.

The period during which a malpractice action is stayed under this section does not count for purposes of the mandatory three-year limit on serving a summons and complaint (Section 583.210). See Section 583.240 (computation of time for purposes of three-year mandatory limit on serving summons and complaint). Similarly, the period during which a malpractice action is stayed does not count for purposes of the mandatory five-year limit on bringing an action to trial (Section 583.310) or the mandatory three-year limit on commencing a new trial (Section 583.320). See Section 583.340 (computation of time for purposes of mandatory limits on commencing trial or new trial). The same rule applies in calculating the time limits applicable to a discretionary dismissal of an action for delay in prosecution. See Section 583.420(b).

In some instances, a plaintiff might suffer adverse consequences from making malpractice allegations public before resolution of a related proceeding. For example, suppose a client sues an attorney for malpractice in missing a statute of limitations. If the complaint is accessible to the public, it might alert a party in the underlying proceeding to a limitations defense that the party would otherwise have overlooked. For guidance on whether it is possible to seal the malpractice

complaint or other court records of the malpractice action in such circumstances, see Cal. R. Ct. 243.1; see also NBC Subsidiary (KNBC-TV) v. Superior Court, 20 Cal. 4th 1178, 1212, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999) ("[I]n general, the First Amendment provides a right of access to ordinary civil trials and proceedings...."); Estate of Hearst, 67 Cal. App. 3d 777, 784, 136 Cal. Rptr. 821 (1977) ("Absent strong countervailing reasons, the public has a legitimate interest and right of general access to court records ....").