

Memorandum 2006-17

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

For several years, the Commission has been studying the statute of limitations for legal malpractice (Code Civ. Proc. § 340.6). One of the issues the Commission has examined is the problem of simultaneous litigation, in which a client is compelled to commence a legal malpractice suit to satisfy the statute of limitations, even though underlying litigation that might influence the outcome of the malpractice suit is still pending. The Commission initially proposed to address this problem by adding a new tolling provision to Section 340.6, which was based on the doctrine of equitable tolling. The Commission dropped that proposal because it was not well-received. The Commission then circulated a revised tentative recommendation that proposed a new approach: Expressly authorizing a court to stay a legal malpractice suit on motion by a party if there is a reasonable likelihood that the existence or amount of the plaintiff’s damages in the malpractice suit will depend on the outcome of underlying litigation. The Commission received the following comments on the revised tentative recommendation:

	<i>Exhibit p.</i>
• Mike Belote, California Defense Counsel (2/16/06)	1
• Scott Bloom, San Francisco (2/17/06)	3
• David Evans & Scott Bloom, <i>Who Benefits From More Time for Legal-Malpractice Claims?</i> , S.F. Daily J., Feb. 16, 2006, at 9	4
• Peter Glaessner, Association of Defense Counsel of Northern California and Nevada (2/16/06)	5
• State Bar Committee on Administration of Justice (3/23/06)	8
• Gloria Wolk (2/20/06 feedback form)	10
• Gloria Wolk, Laguna Hills (2/22/06 letter)	11

Also attached are two court opinions discussed later in this memorandum (Exhibit pp. 21-40). The Commission needs to consider the comments, together with the overall status of this study, and then decide how to proceed.

BACKGROUND

In conducting this study, the Commission has been striving for a balanced package of reforms, one that favors neither clients nor attorneys. The Commission's original tentative recommendation proposed to:

- (1) Delete an unnecessary and confusing 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 of the future."
- (2) Require the plaintiff, rather than the defendant attorney, to bear the burden of proof regarding when the plaintiff discovered, or through reasonable diligence should have discovered, the facts constituting the malpractice.
- (3) Add a new tolling provision to Section 340.6, which would apply when an attorney's liability for malpractice may depend on the outcome of an underlying proceeding, such as a lawsuit that the attorney allegedly mishandled.

Tentative Recommendation on *Statute of Limitations for Legal Malpractice* (Nov. 2004) (available from the Commission, www.clrc.ca.gov).

The tentative recommendation also mentioned that estate planning attorneys had expressed concerns about overly long exposure to claims of estate planning malpractice. The tentative recommendation did not attempt to address those concerns; it explained that the State Bar was suited for that undertaking because the Bar could explore a variety of solutions, not just legislative action. *See id.* at 20-21.

The first reform in the revised tentative recommendation, proposing to delete the sentence in Section 340.6 pertaining to an action based upon an instrument in writing, would help everyone by eliminating confusing and unnecessary language. It was based on a critique prepared by attorney Ronald Mallen, who was involved in the legislative process leading to the enactment of Section 340.6. *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 (hereafter, "Trusts and Estates Section") supported the proposal "without qualification." *See Memorandum 2005-20, Exhibit p. 18* (available from the Commission, www.clrc.ca.gov). The proposal received no other input. The Commission decided to go forward with the proposal, preferably as part of a balanced package of reforms. *Minutes* (May 2005), p. 9 (available from the Commission,

www.clrc.ca.gov). The proposal has not yet been incorporated into a final recommendation.

The second proposal, relating to the burden of proof on the time of discovery, would benefit attorneys by placing that burden on the client, who typically has better access to evidence bearing on whether the burden is satisfied. Again, the Trusts and Estates Section supported the proposal “without qualification.” See Memorandum 2005-20, Exhibit p. 18. The State Bar Committee on Administration of Justice (“CAJ”) was split on the proposal; the split “was not along any traditional plaintiff/defendant lines.” *Id.* at Exhibit p. 6. The San Diego County Bar Association (“SDCBA”) opposed the proposal, contending that it would “have no practical impact on the current application of the standard governing discovery.” *Id.* at Exhibit p. 4. Again, the Commission decided to go forward with the proposal, preferably as part of a balanced package of reforms. Minutes (May 2005), p. 9. Like the first proposal, this proposal has not yet been incorporated into a final recommendation.

The third proposal, the new tolling provision based on the doctrine of equitable tolling, was intended to benefit a client by unambiguously tolling the malpractice statute of limitations until underlying litigation was resolved, sparing the client from the burden of simultaneously pursuing two lawsuits. We also thought that the proposal would benefit courts and attorneys to some extent, by providing a clear, predictable rule and eliminating unnecessary malpractice litigation. See Memorandum 2005-20, p. 5. But the input on that proposal was quite negative. The only support came from the Trusts and Estates Section, which urged the Commission to make certain changes in the proposal. *Id.* at pp. 5-7 & Exhibit pp. 18, 19. Attorneys David Gubman and Ronald Mallen, CAJ, and SDCBA all commented negatively on the proposed new tolling provision. The chief concerns were:

- The requirements for application of the new tolling provision are vague and ambiguous and may generate disputes.
- Due to the ambiguities, potential malpractice plaintiffs would not feel comfortable relying on the proposed new tolling provision, so it would be practically useless.
- There does not seem to be a need for the proposed new tolling provision.

See *id.* at pp. 7-12 & Exhibit pp. 1, 2-3, 4-5, 8-17.

Mr. Gubman suggested an alternative approach: creating a presumptive right to a stay of a legal malpractice case pending resolution of related underlying litigation. *Id.* at Exhibit p. 1. CAJ suggested something similar, a statutory stay of a legal malpractice case “premised largely on the same grounds as those underlying the CLRC’s proposed equitable tolling provision.” *Id.* at 12. CAJ expressed doubt, however, about whether legislation along these lines was really needed. *Id.* at Exhibit pp. 8-9.

The Commission somewhat reluctantly decided to pursue this alternative. Minutes (May 2005), p. 9. The Commission viewed it as not altogether satisfying but (1) potentially more promising than attempting to refine the proposed new tolling provision, and (2) preferable to simply dropping its efforts to address the simultaneous litigation problem.

The Commission’s revised tentative recommendation implemented the approach by proposing to:

- Add a new provision expressly authorizing a court to stay a legal malpractice action on motion by a party (either the client plaintiff or the attorney defendant) 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 underlying proceeding.
- Make issuance of a stay permissive, not mandatory. The Comment to the proposed new provision includes a list of factors for a court to consider in deciding whether to grant a stay.
- Require a court to state its reasons in writing or on the record if the court denies a stay.
- Require a court to lift the stay once the underlying proceeding is fully and finally resolved, including any appeal or other review process.
- Allow a court to lift the stay earlier in the interests of justice, provided that the court states its reasons for doing so in writing or on the record when a party has objected to lifting the stay.

This proposal was posted to the Commission’s website and circulated to interested parties for comment.

INPUT ON THE REVISED TENTATIVE RECOMMENDATION

The comments on the revised tentative recommendation are mixed, but mostly negative.

Support

The most supportive comments are from an individual, Gloria Wolk. She says that her situation “is a perfect example of why this revision is needed.” Exhibit p. 10. She explains:

The underlying lawsuit was not concluded and was “in the hands” of another lawyer when the statute of limitations was about to run out for filing suit against the first lawyers. Malpractice attorneys were not interested until the first was done, telling me that how it ended might mitigate the damages of the first lawyers. To preserve the right to sue, I filed the complaint in pro per — days before I would have lost the chance to sue. Now I am trying to get a lawyer but the judge is very annoyed with me for not having one BEFORE filing the complaint.

Additionally, I was not aware that the complaint had to be served within 60 days of filing. One of the lawyers who I contacted about representing me warned me of this. So I had to serve the lawyers I am suing — in pro per. Now I have to handle the law firm hired by the malpractice insurer, while trying to find a lawyer for the legal malpractice (and hope I don’t make such a mess that no lawyer will want to take over).

Id. (emphasis in original); see also *id.* at Exhibit pp. 12, 15-16.

Ms. Wolk states that “[i]f the statute of limitations was tolled until the underlying case was concluded, I would not have been forced to file the complaint until August 2006.” *Id.* at Exhibit p. 13. That would have been less burdensome; it “would have given [her] time to start earning a living again, to acquire funds for the lawsuit, and to find a lawyer with some leisure rather than communicating to them in a panic state.” *Id.*

These comments seem directed to the previously-explored concept of a new tolling provision, not the current concept of a statute expressly authorizing a court to stay a legal malpractice case. But Ms. Wolk probably would consider the current concept a step forward as well. She describes how bewildering and burdensome it was for her to timely serve the defendants with the malpractice complaint and defend in pro per against their change of venue motion. *Id.* at Exhibit pp. 12, 15-16. Under the approach in the revised tentative recommendation, she could have moved to stay the malpractice case. She would still have had to serve the defendants, or at least notify them of the lawsuit and her motion for a stay. But if the court granted a stay, she would not have had to deal with the change of venue motion, nor would she have been under as much time pressure to hire counsel for the malpractice case.

Ms. Wolk describes in detail her efforts to hire counsel for the malpractice case. *Id.* at Exhibit pp. 10, 12-13, 15-17. Although she “began to seek an attorney when she first became aware that she had grounds for a legal malpractice suit, she was advised to wait until the underlying suit was concluded.” *Id.* at Exhibit p. 15. When the malpractice statute of limitations was about to run, she filed suit in pro per and then spent considerable time unsuccessfully trying to hire counsel, while also trying to support herself and figure out how to finance legal representation. *Id.* Her difficulties stemmed in part from her need to hire counsel on a contingency fee basis, apparent reluctance of counsel in northern California to sue a local colleague, and unwillingness of southern California counsel to represent her if venue was changed to northern California. *Id.* at Exhibit pp. 10, 12-13, 15-17. She says:

Several times the judge criticized me for not having an attorney before the complaint was filed. He clearly does not understand how complicated the situation is. That is what prompted me to write to you now — at three thirty in the morning, after doing work.

Id. at Exhibit p. 13. She was “touched to find that the Commission understood the hardship the present situation causes, and the potential harm it [does] to victims of negligent lawyers.” *Id.*

Opposition

The Commission received negative comments from three organizations: The California Defense Counsel (“CDC”), a related organization known as the Association of Defense Counsel of Northern California and Nevada (“ADC”), and the State Bar Committee on Administration of Justice (“CAJ”).

CDC is the “government relations arm of the combined Association of Defense Counsel of Northern California and Nevada, and the Association of Southern California Defense Counsel.” Exhibit p. 1. CDC speaks for about 3,000 lawyers who represent civil defendants; some of these lawyers specialize in legal malpractice. *Id.* According to CDC, the reform proposed in the revised tentative recommendation is “unnecessary and unwise.” *Id.*

CDC explains that “the California Supreme Court has clearly recognized in at least two cases that trial courts already possess the requisite power to stay malpractice actions pending resolution of underlying cases.” *Id.* The revised tentative recommendation refers to that case law (see pp. 10, 14 & n.39), but cautions that a court may be reluctant to grant a stay “either because it is

unaware or uncertain that the power exists, or because it is concerned about controlling its docket” (p. 10, fns omitted). CDC says, however, that its members “report no difficulty in obtaining stays in legal malpractice actions when appropriate and necessary.” *Id.*

CDC also questions some of the other justifications given in the revised tentative recommendation. For example, the proposal states that ... “[s]taying the malpractice action may ... spare the 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” (see p. 10). CDC counters that “in reality, any [privilege] waivers occur upon the filing of malpractice actions regardless of later stays.” Exhibit p. 2. Similarly, the revised tentative recommendation states that staying the malpractice action might help to control malpractice premiums (pp. 9-10). CDC says that because the malpractice action must be filed before it is stayed, the proposal will have “little or no prophylactic benefit” with regard to malpractice insurance premiums. Exhibit p. 2. CDC does not specifically address the Commission’s arguments that staying the malpractice action would help to conserve judicial resources, decrease litigation expenses, and eliminate the danger of inconsistent judgments (pp. 9-10).

CDC further comments that the proposed legislation “could create confusion and result in stays where not appropriate.” Exhibit p. 2. CDC explains that courts might feel unduly pressured to grant a stay, leading to confusion over which malpractice carrier bears responsibility for the claim:

While stays are routinely granted in appropriate cases now, the proposal could send a message to courts that the issuance of stays are somehow favored. If granted improvidently, stays of actions could result in confusion as to which malpractice policies, most of which are “claims made” policies, will afford coverage. This will result in disputes between insurance companies and needlessly increase litigation over defense and indemnity obligations.

Id.

ADC, consisting of approximately 1,000 lawyers, is one of the groups represented by CDC. ADC sent a separate letter commenting on the revised tentative recommendation, which makes some of the same points as CDC but also expresses an additional concern. Exhibit pp. 5-7.

Like CDC, ADC says that the proposed reform is unnecessary. In the collective experience of ADC members, simultaneous litigation problems “are

almost always resolved by a private tolling agreement.” Exhibit p. 5. In the unusual case where such an agreement cannot be reached, “the Supreme Court has already recognized that trial courts already possess the inherent power to stay malpractice actions pending resolution of the underlying case.” *Id.*

ADC also raises a concern about the drafting of the proposed legislation. The proposed new provision would provide:

340.7. (a) In an action against an attorney for a wrongful act or omission arising in the performance of professional services, other than actual fraud, the plaintiff or the defendant may file a noticed motion for a stay of the 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.

....

(Emphasis added.) ADC says that the italicized language is “both unnecessary and potentially confusing.”

ADC explains:

A trial court considering a stay motion should never be concerned with the “*existence*” of damages because ... some “harm” or “damage” must always exist for a legal malpractice action. Put differently, if a legal malpractice action is filed, the “*existence*” of damages should never be in question. If no damage exists when the action is filed, the legal malpractice action should be dismissed without prejudice, not stayed.

The ADC also questions why the “amount” of damages should be a factor in deciding the merits of a stay motion. Unless *all* damage has occurred, then the legal malpractice action should be stayed because plaintiff’s proof of damages is speculative and uncertain. Judicial economy is not served by allowing a legal malpractice action to proceed to trial when damages in the underlying case are undetermined, speculative or uncertain.

Exhibit p. 6 (emphasis in original). ADC maintains that if the proposal is introduced in the Legislature, “subdivision (b) should be deleted because it is unnecessary to the stay issue and invites potential confusion over the trigger of the statute of limitations.” *Id.* at 7. The Commission should consider this point if it decides to proceed with its proposal.

In addition to CDC and ADC, CAJ opposes the stay proposal. Exhibit pp. 8-9. CAJ is a committee of attorneys from diverse practice areas, with expertise in civil procedure, court rules and administration, rules of evidence, and other matters affecting the administration of justice in civil cases.

Again, a key concern is whether the proposed legislation is necessary. CAJ “believes that counsel (or a court) faced with potential simultaneous litigation should have little difficulty finding” the recent case law that authorizes a court to stay a legal malpractice case pending resolution of an underlying proceeding. *Id.* at 9. CAJ also discounts the possibility that a court will deny a stay due to pressure to control its docket: “Because a court ordinarily would not want to try a malpractice action that may be rendered moot, it appears unlikely that a court would deny a stay simply to move a case along.” *Id.*

CAJ is unpersuaded by the procedural protections in the proposed legislation, including the requirement that a stay be sought by noticed motion and the rule that a court denying or prematurely lifting a stay must state its reasons in writing or on the record. CAJ “questions whether the benefits of the procedural protections are so substantial as to justify enacting a new statute establishing procedures and guidelines in an area ordinarily left to the court’s discretion.” *Id.* CAJ also “questions whether providing a statutory list of factors for the court to consider in deciding whether to order a stay offers any advantage over simply leaving the decision to the sound discretion of the court.” *Id.*

Further, CAJ is concerned that “the proposed statute, which makes no mention of a court’s stay on its own motion, may restrict the court’s inherent authority to order a stay with or without those procedural protections.” *Id.* In raising this concern, CAJ makes no reference to the Commission’s proposed Comment, which says that the “express statutory authority and procedural rules provided in this section *supplement and reinforce* a court’s inherent authority to stay a legal malpractice action in appropriate circumstances.” (Emphasis added.)

For all of these reasons, CAJ “continues to question whether any legislative fix — including a statute authorizing a stay — is needed or appropriate.” *Id.* at 8. Should the Commission decide to proceed with its proposal, CAJ urges it to consider:

- Whether to put the list of factors to consider in the statute itself rather than in the Comment;
- Whether the list of factors should be shortened by eliminating factors that seem duplicative and consolidating other factors; and

- Whether the list should include a reference to the burden on the courts and the malpractice defendant of litigating a malpractice action that could be rendered moot.

Id. at 9.

Other

The Commission also received an email message from attorney Scott Bloom, transmitting an article he co-wrote with his colleague David Evans. Exhibit pp. 3-4. Messrs. Bloom and Evans regularly represent lawyers and law firms in professional liability actions.

Their article describes the Commission's study and extensively criticizes the Commission's previous proposal to add a new tolling provision based on the doctrine of equitable tolling. See Evans & Bloom, *Who Benefits From More Time For Legal-Malpractice Claims?*, S.F. Daily J., Feb. 16, 2006, at 9 (reproduced at Exhibit p. 4). The article also briefly describes the statutory stay proposal currently under consideration. *Id.*

In his email message, Mr. Bloom states that "the article suggests that the proposed stay provision is a much better alternative than the previously proposed tolling period." Exhibit p. 3. He does not say whether the proposed stay provision would be preferable to leaving the law as is.

He does mention that the "primary concern over the proposed stay is the absence of mutuality — procedurally, a stay should not be limited to plaintiffs." *Id.* The staff was initially somewhat confused by this comment, because the revised tentative recommendation would allow *either* a plaintiff or a defendant to seek a stay (see pp. 10-11, 13). Through further communication with Mr. Bloom, it became clear that he mistook the staff draft tentative recommendation attached to Memorandum 2005-36 (available from the Commission, www.clrc.ca.gov) for the actual revised tentative recommendation. The proposal in the staff draft was one-sided, allowing only a plaintiff to seek a stay. To prevent similar confusion in the future, the staff revised its template for a staff draft tentative recommendation; the template now more clearly indicates that the document is a **STAFF DRAFT**.

Mr. Bloom's email message is helpful, however, because it provides a detailed explanation of why a defendant should be allowed to seek a stay of a legal malpractice case, not just a plaintiff:

The typical scenario in which a defendant might want to request a stay is as follows: a defendant in the underlying proceeding alleges the malpractice of an attorney in response to a claim brought by an underlying plaintiff. A similar argument is an “advice of counsel” defense, in which the attorney’s advice becomes an issue in the underlying matter. In an attempt to involve the attorney or trigger the attorney’s malpractice insurance (perhaps for a settlement contribution), the underlying plaintiff aggressively pursues litigation with the attorney before the underlying matter is resolved. As the former client has not yet suffered any damage in the underlying action, the attorney defendant may not have caused any damage to his or her former client. In such cases, the stay allows the attorney-defendant to “put the brakes” on the malpractice claim until the underlying proceeding is resolved. If the underlying defendant is not damaged, the claim against the attorney conceivably evaporates.

Exhibit p. 3. Messrs. Bloom and Evans have thus found that “typically it is defendants who benefit from a stay of the malpractice action while the underlying action is resolved — if the underlying action is resolved in favor of the plaintiff, the likelihood increases that the professional negligence action will not be pursued.” *Id.* at 4. The Commission might want to incorporate some of these comments into its proposal if it decides to proceed with the proposal.

OPTIONS AND ANALYSIS

Given the input on the revised tentative recommendation, the staff sees a number of options.

Option 1. Proceed with the Statutory Stay Approach

One possibility would be to proceed with the present proposal, perhaps with some modifications to address specific concerns. The staff is not optimistic about this possibility.

The proposal faces serious opposition from CDC and ADC (it is less likely that CAJ or a related entity would actually take an oppose position in the Legislature). The concerns voiced by these organizations go to the heart of the proposal; it seems unlikely that the proposal could be modified in a manner eliminating their opposition.

A major concern is that the proposed legislation is unnecessary. To overcome that concern in the legislative process, the Commission would have to demonstrate that a significant problem exists. Ms. Wolk’s comments indicate that

the problem of simultaneous litigation is not purely hypothetical. To convince the Legislature to act, however, we would need to be able to point to many more real life examples.

Thus far, we have not received such evidence and the proposal has no organized support. We cannot think of any new groups to contact that might be interested in supporting the proposal. We have already contacted a number of plaintiffs' legal malpractice lawyers and plaintiff-oriented organizations. None of them have submitted comments.

Absent substantial support, the proposal probably will not get very far in the legislative process. If the Commission receives additional input supporting the proposal and showing the existence of a significant problem, prospects for the reform would be better.

Option 2. Revisit and Refine the Previously Proposed New Tolling Provision

Another possibility would be to revisit and refine the previously proposed new tolling provision based on the doctrine of equitable tolling. Again, the staff is not optimistic about this possibility.

A primary concern about the previously proposed new tolling provision, voiced in different ways by a number of different sources, was that the requirements for application of the provision were vague and ambiguous and were likely to generate disputes. See Memorandum 2005-20, pp. 7-12 & Exhibit pp. 1, 2-3, 4-5, 9-12, 13-17, 19; see also Exhibit p. 4. Both the Trusts and Estates Section and CAJ offered suggestions for elimination of some of the perceived ambiguities. See Memorandum 2005-20 at Exhibit pp. 13-17, 19. Implementing those suggestions, or taking other steps to try to clarify the proper application of the provision, might alleviate some of the expressed concerns. We suspect, however, that some degree of concern about ambiguity might be impossible to eliminate, no matter how the Commission drafts the tolling provision.

More importantly, the concerns about ambiguity were not the only objections raised. See *id.* at 7-8, 9-10 & Exhibit pp. 2-3, 4-5, 8-9; see also Exhibit p. 4. A key concern expressed in several comments was the same "ain't broke, don't fix it" sentiment raised in connection with the revised tentative recommendation. See Memorandum 2005-20 at 7-8, 9-10 & Exhibit pp. 2-3, 4, 8-9; see also Exhibit p. 4. As with the statutory stay proposal, this concern would be difficult to overcome absent additional evidence that a significant real life problem exists. If interested persons can provide such evidence, it would be helpful to have it. Without such

evidence, it may be a waste of time for the Commission to revisit the previously proposed new tolling provision.

Option 3. Abandon the Effort to Address the Simultaneous Litigation Problem

A further option would be to abandon the effort to address the simultaneous litigation problem. This would be disappointing, because the Commission has invested time in examining the topic and because the problem is not merely hypothetical, as Ms. Wolk's comments demonstrate. The staff is not altogether convinced that the problem is minimal as some of the comments indicate.

Nonetheless, it may not be productive for the Commission to pursue the matter further. The Commission has plenty of other topics to work on, which may be a better use of its time and limited resources. **Unless the Commission receives significant new input suggesting that the statutory stay approach or new tolling provision might be politically viable, the staff reluctantly recommends that it drop its attempt to address the simultaneous litigation problem.**

If the Commission decides to do that, it will need to make some additional decisions about other aspects of its study of the statute of limitations for legal malpractice. Possible approaches include:

Option 3A. Finalize and Seek Enactment of the Two Proposals the Commission Has Already Developed

The Commission could have the staff prepare a draft of a final recommendation, consisting of the two proposals it has already decided to pursue:

- (1) The proposal to delete an unnecessary and confusing 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 of the future."
- (2) The proposal to require the plaintiff, rather than the defendant attorney, to bear the burden of proof regarding when the plaintiff discovered, or through reasonable diligence should have discovered, the facts constituting the malpractice.

If that draft is acceptable, with or without modifications, the Commission could then approve it as a final recommendation and seek enactment of the proposals in the Legislature.

A problem with this approach is that the Commission has been trying to prepare a balanced package of reforms, favoring neither client plaintiffs nor

attorney defendants. A proposal consisting of these two reforms would not be balanced. The first reform would be neutral in effect but the second would favor attorneys. Although the Commission has concluded that the second reform would be good policy, the support for the proposal was not overwhelming. Unless that proposal is coupled with another reform favoring client plaintiffs, it may well encounter anti-lawyer resistance in the legislative process. As a recent article stated, “[n]o one seems to like lawyers.” Jossen, *Attorneys Must Fight Bad PR, Convey Virtues to Public*, S.F. Daily J., March 18, 2005, at 6. Attitudes like that surfaced when the legislation that became Section 340.6 was pending in the Legislature years ago. See Memorandum 2003-14, pp. 37-38 (available from the Commission, www.clrc.ca.gov). There’s no reason to think that it’d be less of a problem now. The staff therefore cautions against seeking enactment of a proposal that would be seen as one-sided, particularly if it is a proposal that would favor attorneys over their clients.

Option 3B. Finalize and Seek Enactment Only of the Proposal to Delete Section 340.6(b)

Another alternative would be to finalize and seek enactment only of the proposal to delete Section 340.6(b), the sentence pertaining to “an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future.” That proposal appears to be impartial in effect and there were no negative comments on it. The language has been in the statute since Section 340.6 was enacted in 1977, yet there do not seem to be any published cases interpreting it. Mr. Mallen has explained in detail that the sentence is unneeded, confusing, and a vestige of the legislative process. See Mallen, *supra*, 53 Cal. State Bar J. at 168; see also Tentative Recommendation on *Statute of Limitations for Legal Malpractice*, *supra*, at 19-20. A bill deleting the provision would not make a major change in the law; it would just be a minor reform. Such a proposal would have a reasonable chance of enactment, however, and would save numerous litigants, attorneys, judges, and other persons from wasting effort trying to make sense of the provision. The staff thinks **this might be a good option.**

Option 3C. Study One or More Additional Issues Before Finalizing a Proposal

Yet another option would be to explore additional issues before finalizing a proposal for introduction in the Legislature.

In particular, Section 340.6(a)(3) tolls the statute of limitations as long as the allegedly negligent attorney “continues to represent the plaintiff regarding the

specific subject matter in which the alleged wrongful act or omission occurred.” A recent opinion by the Second District Court of Appeal holds that “the limitations period for a legal malpractice action under section 340.6 is tolled as to the attorney *and the attorney’s former law firm and its attorneys* while the attorney continues to represent the client in the same specific subject matter in which the alleged malpractice occurred.” *Beal Bank, SSB v. Arter & Hadden, LLP*, 135 Cal. App. 4th 643, 652, 37 Cal. Rptr. 3d 680 (2006) (emphasis added). Earlier opinions by the Third District Court of Appeal and the Fourth District Court of Appeal split on the issue of whether the tolling provision applies to an attorney’s former law firm. In 1993, the Third District concluded that tolling does apply to an attorney’s former partners so long as the attorney continues to represent the client. *Beane v. Paulsen*, 21 Cal. App. 4th 89, 98-99, 26 Cal. Rptr. 2d 486 (1993). Several years later, however, the Fourth District reached the opposite conclusion. *Crouse v. Brobeck, Phleger & Harrison*, 67 Cal. App. 4th 1509, 1535-40, 80 Cal. Rptr. 2d 94 (1998). In deciding to follow *Beane* rather *Crouse*, the Second District in *Beal Bank* extensively criticized the reasoning of *Crouse* and explained why the alternative approach was better policy. 135 Cal. App. 4th at 649-52.

On preliminary consideration, the staff is inclined to agree with the Second District and wonder whether it would be appropriate to codify that approach to resolve the split in the courts of appeal. If the Commission agrees after further research and analysis (including circulation of a new tentative recommendation), that could be another way to develop a balanced legislative proposal. Codifying the *Beal Bank* approach would favor client plaintiffs and might thus be an appropriate counterbalance to the burden of proof proposal favoring attorney defendants.

To assist the Commission in evaluating whether to pursue this issue, the *Beal Bank* opinion and the pertinent portions of the *Crouse* opinion are attached as Exhibit pages 21-40. If the Commission expresses interest in this idea, we would need to inform the Judiciary Committees that the Commission wants to look into it. **As between this approach and Option 3B (finalize and seek enactment only of the proposal to delete Section 340.6(b)), the staff does not have a strong view.**

It is also possible that there are other issues relating to Section 340.6 that the Commission could productively explore. We encourage interested persons to bring any such matters to the Commission’s attention.

NEXT STEP

The Commission needs to decide which of the various options it would like to pursue. Input from interested persons or groups who have not yet commented, or further input from those who have commented but want to raise additional points, is likely to be helpful to the Commission in making this decision. The Commission encourages and welcomes such input.

Respectfully submitted,

Barbara Gaal
Staff Counsel

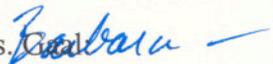
CALIFORNIA ADVOCATES, INC.



-VIA ELECTRONIC MAIL-

February 16, 2006

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

Dear Ms. 

On behalf of our client, the California Defense Counsel (CDC), we are pleased to submit comments on the CLRC Revised Tentative Recommendation relating to statutes of limitation in legal malpractice actions, and proposed Code of Civil Procedure Section 340.7. As you may be aware, the California Defense Counsel is the government relations arm of the combined Association of Defense Counsel of Northern California and Nevada, and the Association of Southern California Defense Counsel. As such, CDC represents the views of over 3000 lawyers specializing in trial and appellate practice on behalf of civil defendants. A number of our members practice specifically in the area of legal malpractice.

While CDC supports the role and value of the Law Revision Commission generally, we respectfully believe that it is unnecessary and unwise to proceed with proposed CCP Section 340.7. The California Supreme Court has clearly recognized in at least two cases that trial courts already possess the requisite power to stay malpractice actions pending resolution of underlying cases. (See *Adams v. Paul* (1985) 11 Cal. 4th 593; *Jordache Enterprises, Inc. v. Brobeck, Phleger and Harrison* (1998) Cal. 4th 739.) As the court stated in *Jordach*:

“Moreover, as Adams observed, existing law provides the means for courts to deal with potential problems that may arise when related litigation is pending. (*Adams, supra*, 11 Cal 4th at pages 582-583). 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.” *Id.* at 758.

Our members report no difficulty in obtaining stays in legal malpractice actions when appropriate and necessary. The factors cited in the Tentative Recommendation in support

Barbara S. Gaal, Esq.
Staff Counsel
California Law Revision Commission
February 16, 2006
Page 2

of the legislative change, including the burden of simultaneous litigation, the possibility of inconsistent results, adverse impacts on judicial economy, and the possibility of prejudice in related proceedings are already being considered by trial courts in routinely granting motions for stay; we are aware of no evidence suggesting the need for legislative correction.

Other arguments put forward in support of the proposal are similarly not compelling. For example, material in support of the tentative recommendation argues that the absence of legislation in this area might increase the number of malpractice actions and thereby create upward pressure on increase insurance premiums. But logically, in order for a malpractice action to be stayed, it must first be filed, so we see little or no prophylactic benefit. The material also suggests that the proposed legislation will preserve attorney-client privileges by causing actions which result in waivers to be stayed. But in reality, any such waivers occur upon the filing of malpractice actions regardless of later stays.

Second, the proposed legislation is unwise because it could create confusion and result in stays where not appropriate. While stays are routinely granted in appropriate cases now, the proposal could send a message to courts that the issuance of stays are somehow favored. If granted improvidently, stays of actions could result in confusion as to which malpractice policies, most of which are "claims made" policies, will afford coverage. This will result in disputes between insurance companies and needlessly increase litigation over defense and indemnity obligations.

In summary, we believe that the proposed legislation is unnecessary and unwise, in that trial courts have been and will continue to manage their dockets appropriately under powers already vested in them.

We again appreciate the opportunity to comment on the Tentative Recommendation, and applaud the work of the Commission.

Sincerely,



Michael D. Belote

MDB:cs

COMMENTS OF SCOTT BLOOM

From: Scott Bloom <sbloom@HBBLaw.com>
Re: Statute of Lim. - CCP340.6
Date: Feb. 17, 2006
To: Barbara Gaal <bgaal@clrc.ca.gov>

Barbara,

Attached is a copy of an article printed in the San Francisco Daily Journal, regarding the proposed revisions to CCP section 340.6. As you will note upon review, the article suggests that the proposed stay provision is a much better alternative than the previously proposed tolling period. The primary concern over the proposed stay is the absence of mutuality--procedurally, a stay should not be limited to plaintiffs.

The typical scenario in which a defendant might want to request a stay is as follows: a defendant in the underlying proceeding alleges the malpractice of an attorney in response to a claim brought by an underlying plaintiff. A similar argument is an "advice of counsel" defense, in which the attorney's advice becomes an issue in the underlying matter. In an attempt to involve the attorney or trigger the attorney's malpractice insurance (perhaps for a settlement contribution), the underlying plaintiff aggressively pursues litigation with the attorney before the underlying matter is resolved. As the former client has not yet suffered any damage in the underlying action, the attorney defendant may not have caused any damage to his or her former client. In such cases, the stay allows the attorney-defendant to "put the brakes" on the malpractice claim until the underlying proceeding is resolved. If the underlying defendant is not damaged, the claim against the attorney conceivably evaporates.

Please contact me if you have any questions or comments.

Scott Bloom

Scott M. Bloom, Esq.
Haight Brown & Bonesteel LLP
100 Bush St., 27th Fl.
San Francisco, CA 94104
(415) 986-7700
(415) 986-6945 (fax)

Who Benefits From More Time For Legal-Malpractice Claims?

By David Evans
and Scott Bloom

California's legal malpractice statute of limitations (Code of Civil Procedure Section 340.6) may be getting a facelift, the first since the statute was enacted in 1977. If the proposed changes are adopted, they will mean a longer life for malpractice claims.

The California Law Revision Commission has been studying various changes to the statute of limitations. The latest includes an indefinite stay of malpractice lawsuits until the underlying matter concludes. The revised recommendations are open for comment until tomorrow, however, and the issue is by no means resolved. California attorneys and their malpractice insurers should be concerned about any proposal that effectively extends the life of a malpractice claim.

Section 340.6 requires a plaintiff to file suit within one year of the actual or constructive discovery of facts constituting alleged malpractice, and in any event within four years after the occurrence of the wrongful act or omission. The statute does not apply to claims of actual fraud and is tolled in only four circumstances: 1) the plaintiff has not sustained actual injury; 2) the attorney continues to represent the plaintiff in the same matter; 3) the attorney conceals the facts; or 4) the plaintiff suffers from a legal or physical disability that precludes commencing an action.

When actual injury occurs before the underlying proceedings are resolved and an informal tolling agreement is not possible, plaintiffs have often been forced to litigate both the underlying case and the malpractice action simultaneously. The proposed revisions to Section 340.6 were designed, in part, to put the malpractice action and limitations period on hold while the underlying case is pending, thereby relieving plaintiffs of the "burden" of simultaneously litigating two actions. Although the California Law Revision Commission cited the "significant burden" of litigating two matters at the same time, there is no empirical evidence supporting this conclusion.

Nevertheless, the filing of a malpractice action prior to the resolution of an underlying matter may require a plaintiff to adopt inconsistent positions. For example, a party defending the underlying action by claiming there are no damages may allege in a malpractice complaint that he or she is exposed to substantial damages because of

the attorney's conduct. In addition, the filing of a malpractice lawsuit is deemed to waive the attorney-client privilege where such communications have been placed in issue by the plaintiff. See *Chicago Title Insurance Co. v. Superior Court*, 174 Cal.App.3d 1142 (1985).

If the underlying matter remains active, the plaintiff risks disclosure of privileged documents and information by having to file a malpractice suit. The California Law Revision Commission also noted the possible judicial inefficiency of having two actions pending. However, some of these concerns were addressed by the California Supreme Court in 1995 when it noted that the possible "premature" filing of legal malpractice claims and the risk of inconsistent pleadings or judgments could be "readily overcome under existing law." See *Adams v. Paul*, 11 Cal.4th 583 (1995).

The California Law Revision Commission also assumed that errors-and-omissions insurance premiums would rise if plaintiffs were forced to sue attorneys simply to avoid expiration of the limitations period. However, the proposed tolling provision may actually have the opposite effect where the basis for a claim evaporates based on the manner in which the underlying case is resolved. The commission's approach underscores what appears to be a lack of direct experience with insurance underwriting practices in this area. There are, however, some potential impacts.

Almost all presently available malpractice policies are written on a claims-made basis. A claim is usually deemed "made" when an attorney receives a complaint or written demand for money or services. At that point, the attorney is required to report the claim or those "facts or circumstances" that can be expected to lead to a claim in order to obtain insurance coverage. The proposed revisions to Section 340.6 require the plaintiff to give the attorney notice of a potential claim in order to toll the limitations period. The attorney would thus be required to disclose the claim to the insurer, which in turn will investigate the claim and possibly appoint coverage counsel and/or defense counsel.

Indefinite tolling while the underlying matter is resolved may increase claims expense, as the requirements of "reasonable notice" will likely lead plaintiffs to send precautionary notices before suffering any tangible harm, even where the underlying claim is successfully resolved. In addition, because the limits of liability of most malpractice policies are eroded by defense costs and indemnity payments, long-duration claims may actually accelerate the erosion of limits.

Historically, attorneys and their insurers have been wary of long-term exposures. Insurers may have difficulty quantifying the ultimate exposure presented by a pend-

ing claim that is tolled while the other matter is resolved. The outcome of the underlying matter is uncertain, and may never amount to a full-blown claim against the attorney. The insurer must try to quantify the likelihood of a result adverse to the plaintiff in the underlying proceeding (in which the insurer plays no part, and the insured attorney has no involvement), a task fraught with speculation and uncertainty.

Despite the stated purpose of clarifying an existing area of law, the proposed revisions probably add more variables and may cause greater confusion. Conditioning the tolling period on proof that "the attorney is not unreasonably prejudiced" will require a factual determination of whether there was prejudice and whether it was unreasonable. Moreover, it is unclear whether a judge or a jury decides whether the client has acted "reasonably and in good faith." At a minimum, procedural guidelines and safeguards for this determination needed to be included.

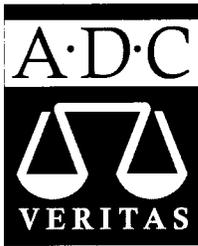
The revisions proposed in 2005 generated just five (mostly negative) comments in a state with 200,000 attorneys. As a result, the California Law Revision Commission withdrew those proposals and has now published a narrower revision (available on the commission Web site at www.clrc.gov) that authorizes an automatic stay of proceedings while the underlying matter is active. This proposal codifies a common practice that currently lacks express statutory authorization.

Although defendants typically request a stay where the underlying matter is not concluded, the California Law Revision Commission proposes a new statute, Code of Civil Procedure Section 340.7, which would permit the plaintiff to file a motion for stay. The court would have discretion to grant the 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." The stay remains in effect until the court issues an order lifting the stay "when the related proceeding is fully and finally resolved" or sooner "in the interest of justice."

The proposal does not authorize a defendant to seek a stay, although typically it is defendants who benefit from a stay of the malpractice action while the underlying action is resolved — if the underlying action is resolved in favor of the plaintiff, the likelihood increases that the professional negligence action will not be pursued.

David Evans, managing partner of the San Francisco office of Haight Brown & Bonesteel, and **Scott Bloom**, senior counsel to the firm, regularly represent lawyers and law firms in professional liability actions.





Association of Defense Counsel of Northern California and Nevada

Phone: (916) 239-4060

Fax: (916) 924-7323

E-mail: adcnc@camgmt.com

www.adcnc.org

OFFICERS

PRESIDENT
PETER O. GLAESSNER
Lombardi, Loper & Conant, LLP
1999 Harrison Street, Suite 2600
Oakland, CA 94612
510.433.2600 - phone
510.433.2699 - fax
pog@lclp.com

1ST VICE PRESIDENT
JONATHAN C. BACON
Walnut Creek

2ND VICE PRESIDENT
PATRICIA TWEEDY
Sacramento

SECRETARY/TREASURER
MARK BONINO
Redwood City

EXECUTIVE DIRECTOR
JENNIFER BLEVINS, CMP
Sacramento

IMMEDIATE PAST PRESIDENT
DOUGLAS A. SEARS
Sacramento

BOARD OF DIRECTORS

JOHN A. ABERASTURI
MELISSA BLAIR ALIOTTI
MARTIN I. AMBACHER
PATRICK BEASLEY
SARAH BURKE
KEITH D. CHIDLAW
DANIEL I. CRAWFORD
MICHAEL G. DESCALSO
ROBERT J. FRASSETTO
THOMAS J. GEORGOUSES
KAREN JACOBSEN
DAVID R. LUCCHESI
KATHERINE MOORE
MICHAEL MORDAUNT
MARGO PISCHEVICH
J. BRIAN POWERS
JOSEPH SALAZAR
STEPHEN A. SCHRAM
JAMES N. SINUNU
JEANE STRUCK
DONALD SULLIVAN
ANDREW R. WEISS
CHRISTOPHER W. WOOD
ION B. ZIMMERMAN

PAST PRESIDENTS

1960 ROBERT M. DAVIS, SR.
1961 EDWARD T. MORAN
1962 J. BARTON PHELPS
1963 VERNON GOODIN
1964 W.W. GUDMUNDSON
1965 CARL R. VENDT
1966 EUGENE J. MAJESKI
1967 DUDLEY W. SHEPPARD
1968 JOSEPH W. ROGERS, JR.
1969 LEWIS L. FENLON
1970 HAROLD I. CHASE
1971 JAMES H. BARSTOW
1972 E.D. BRONSON, JR.
1973 LOUIS A. DE MARS
1974 RICHARD V. BETTINI
1975 JOHN F. VAN DE POEL
1976 ARCHIE ROBINSON
1977 JOHN D. CHINELLO, JR.
1978 GEORGE W. BALL
1979 CLAUDE H. SMARL, JR.
1980 NELSON BARRY
1981 DONALD H. KINCAID
1982 FLOWELL I. CARRUTH
1983 DONALD S. WALTER
1984 PAUL H. CYRIL
1985 DAVID P. FREITAS
1986 ANTHONY J. BARRETT
1987 DAVID B. LYNCH
1988 KEVIN I. DUNNE
1989 PAUL H. COFFEE
1990 CHESTER MORRIS
1991 WILLIAM R. STRICKLAND
1992 MICHAEL J. BRADY
1993 JOHN M. DRAITH
1994 DANIEL E. QUINN
1995 THOMAS F. KEATING, JR.
1996 JULIA A. MOLANDER
1997 DENNIS F. MORIARTY
1998 RAYMOND M. COATES
1999 STEVEN H. GURNEE
2000 JESSE F. RUIZ
2001 SUSAN M. KEENEY
2002 WAYNE H. MAIRE
2003 DENNIS P. HOWELL
2004 W. "RIC" BLUMHARDT
2005 DOUGLAS A. SEARS

February 16, 2006

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

Law Revision Commission
RECEIVED

FEB 15 2006

File: _____

Re: California Law Revision Commission, Revised Tentative
Recommendation for Stay Motion for Legal Malpractice:
Proposed Code of Civil Procedure § 340.7

Dear Ms. Gaal:

This letter is written on behalf of the members of the Association of
Defense Counsel of Northern California and Nevada ("ADC"), an
organization that consists of over 1,000 practicing civil trial and appellate
attorneys in Northern California. Members of our organization take a keen
interest in the subject of legal malpractice for two reasons: first, as with all
lawyers, each of our members is at risk of facing a malpractice lawsuit;
second, many of our lawyers actively defend legal malpractice actions in this
state, and have done so for many years. Based on our collective experience,
we have concerns with the proposed addition of Code of Civil Procedure §
340.7, as explained below.

A. The Proposed Statute is Unnecessary

The ADC recognizes that simultaneous actions, one an underlying
case, and the second, a legal malpractice action poses many of the concerns
articulated in the current recommendation. The proposed legislation though is
not necessary. In our collective experience, the problems identified are almost
always resolved by a private tolling agreement. The financial and litigation
realities impel the parties to reach a tolling agreement in virtually every
situation of this nature. Moreover, the Supreme Court has already recognized
that trial courts already possess the inherent power to stay malpractice actions
pending resolution of the underlying case. Jordache Enterprises, Inv. v.
Brobeck, Phleger & Harrison (1998) 18 Cal.4th 739.

Accordingly, the ADC believes the statute proposed is not necessary
and joins with the position expressed by the California Defense Counsel.

Ms. Gaal
February 16, 2006
Page two

B. Subsection (b) Is Unnecessary, Confusing and Should be Deleted

We also wish to address another concern. While we do not believe this proposed legislation intends to make any change to California's existing law governing the trigger for the statute of limitations in a legal malpractice action, subsection (b) of the proposed legislation appears unnecessary, and poses a potential for confusion in this regard.

The legal malpractice statute is triggered when the plaintiff-client discovers the act or omission and begins to suffer "harm" or "damage". As these terms are defined in case law, it is the **fact** of harm or damage, and **not the amount** of harm or damage that triggers the commencement of the statute. *Adams v. Paul*, 11 Cal 4th 583 [Plaintiff suffered "actual harm" at time attorney negligently failed to file underlying lawsuit]; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739.

Subsection (b) of the proposed statute refers to a court granting the motion for 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." (Emphasis added) The highlighted language is both unnecessary and potentially confusing.

A trial court considering a stay motion should never be concerned with the "existence" of damages because, as noted, some "harm" or "damage" must always exist for a legal malpractice action. Put differently, if a legal malpractice action is filed, the "existence" of damages should never be in question. If no damage exists when the action is filed, the legal malpractice action should be dismissed without prejudice, not stayed.

The ADC also questions why the "amount" of damages should be a factor in deciding the merits of a stay motion. Unless **all** damage has occurred, then the legal malpractice action should be stayed because plaintiff's proof of damages is speculative and uncertain. Judicial economy is not served by allowing a legal malpractice action to proceed to trial when damages in the underlying case are undetermined, speculative or uncertain.

Inclusion of subparagraph (b) therefore is unnecessary to deciding a stay motion and invites consideration of issues regarding damages that should not be factors in deciding a stay motion. Moreover, to the extent such "existence or amount" language might suggest in any way a change in the existing trigger of the statute of limitations in Code of Civil Procedure § 340.6 and cases, the proposed legislation potentially confuses and improperly draws into question well-settled California law in this area.

Ms. Gaal
February 16, 2006
Page three

The ADC respectfully submits there is no present need for this statute. However, if this proposed legislation is ultimately enacted by the Legislature, then subdivision (b) should be deleted because it is unnecessary to the stay issue and invites potential confusion over the trigger of the statute of limitations.

We thank you for the opportunity to comment upon this recommendation.

Very truly yours,

By: 
Peter O. Glassner

POG:psh/jb



THE STATE BAR OF CALIFORNIA

– COMMITTEE ON ADMINISTRATION OF JUSTICE

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2305

TO: The California Law Revision Commission

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

DATE: March 23, 2006

SUBJECT: Statute of Limitations for Legal Malpractice – Revised Tentative Recommendation

The State Bar of California's Committee on Administration of Justice ("CAJ") has reviewed and analyzed the September 2005 Revised Tentative Recommendation of the California Law Revision Commission ("CLRC"), *Statute of Limitations for Legal Malpractice*, and appreciates the opportunity to submit these comments.

The CLRC proposes a new statute that would authorize a court to stay a malpractice action if the court finds a reasonable likelihood that the existence or amount of plaintiff's damages in the malpractice action will depend on the outcome of another proceeding. The stay would remain in effect until the other proceeding is finally concluded, including any appeal, or until the court exercises its discretion to lift the stay. The stay would be discretionary, and the Comment to the statute would provide a list of factors for the court to consider in deciding whether to grant a stay. The purpose of the proposed statute is to mitigate the problems that arise when, due to the statute of limitations, a plaintiff is forced to file and prosecute a legal malpractice against an attorney action while at the same time prosecuting or defending another proceeding in which the attorney's alleged malpractice may have an effect. The proposed statute is an alternative to the CLRC's prior proposal to codify the doctrine of equitable tolling, which the CLRC decided not to pursue.

In response to the CLRC's prior proposal, CAJ agreed that the problems identified by the CLRC exist, but questioned whether any legislative fix is needed. If, however, the CLRC continued to believe that a legislative solution was needed, CAJ proposed consideration of a statutory stay, premised largely on the same grounds as those underlying the CLRC's equitable tolling proposal.

CAJ has discussed the proposal contained in the Revised Tentative Recommendation, and continues to question whether any legislative fix – including a statute authorizing a stay – is needed or appropriate. As CAJ noted in response to the equitable tolling proposal, the plaintiff client and defendant attorney may, under current law, enter into a tolling agreement pending the outcome of the underlying litigation. In the event the parties cannot agree to a tolling, and the

plaintiff client does file a malpractice action, the California Supreme Court has stated clearly that “ ‘trial courts have inherent authority to stay malpractice suits, holding them in abeyance pending resolution of underlying litigation.’ ” *Coscia v. McKenna & Cuneo*, 25 Cal.4th 1194, 1211 (2001) (quoting *Adams v. Paul*, 11 Cal.4th 583, 593 (1995)) (lead opn. of Arabian, J.); accord, *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal.4th 739, 758 (1998). The Revised Tentative Recommendation acknowledges this authority, but notes that a court may be reluctant to exercise the authority, either because it is unaware or uncertain that the power exists, or because it is concerned about controlling its docket. (Revised Tent. Rec., p. 10 & fn. 39). CAJ believes that counsel (or a court) faced with potential simultaneous litigation should have little difficulty finding that recent authority.* Because a court ordinarily would not want to try a malpractice action that may be rendered moot, it appears unlikely that a court would deny a stay simply to move a case along.

CAJ questions whether providing a statutory list of factors for the court to consider in deciding whether to order a stay offers any advantage over simply leaving the decision to the sound discretion of the court. The Revised Tentative Recommendation states that the proposed statute would provide procedural protections, including the requirement of a noticed motion and the requirements that a court denying the motion or lifting a stay state its reasons in writing or on the record. (Revised Tent. Rec., pp. 10-12.) CAJ is concerned, however, that the proposed statute, which makes no mention of a court’s stay on its own motion, may restrict the court’s inherent authority to order a stay with or without those procedural protections. CAJ also questions whether the benefits of the procedural protections are so substantial as to justify enacting a new statute establishing procedures and guidelines in an area ordinarily left to the court’s discretion.

For all of the reasons noted above, CAJ is opposed to the proposed statutory stay. In the event the CLRC decides to pursue that proposal, CAJ suggests that the CLRC consider whether to include the list of factors to consider in the statute itself rather than the Comment, whether the list should be shortened by eliminating factors that seem duplicative and consolidating other factors, and whether the list should include a reference to the burden on the courts and the malpractice defendant of litigating a malpractice action that could be rendered moot. CAJ welcomes the opportunity to comment further on any revised proposal.

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.

* CAJ previously noted that the anecdotal experience of CAJ members is that some trial courts presently issue a stay in the context of ruling on a demurrer, but others reported that the authority to issue a stay in the absence of specific statutory authority is questionable. CAJ believes that the cases do, in fact, provide the court with the authority to stay a malpractice action pending resolution of an underlying action.

COMMENTS OF GLORIA WOLK

Feedback form submitted on <www.clrc.ca.gov>:

From: Gloria Wolk <info@Viatical-Expert.net>
Date: Feb. 20, 2006
Subject: Statute of Limitations for Legal Malpractice

Message: My situation is a perfect example of why this revision is needed. The underlying lawsuit was not concluded and was “in the hands” of another lawyer when the statute of limitations was about to run out for filing suit against the first lawyers. Malpractice attorneys were not interested until the first was done, telling me that how it ended might mitigate the damages of the first lawyers. To preserve the right to sue, I filed the complaint in pro per--days before I would have lost the chance to sue. Now I am trying to get a lawyer but the judge is very annoyed with me for not having one BEFORE filing the complaint.

Additionally, I was not aware that the complaint had to be served within 60 days of filing. One of the lawyers who I contacted about representing me warned me of this. So I had to serve the lawyers I am suing--in pro per. Now I have to handle the law firm hired by the malpractice insurer, while trying to find a lawyer for the legal malpractice (and hope I don't make such a mess that no lawyer will want to take over).

I have such solid evidence--sworn affidavits and other documents--that show the extreme negligence that it would be remiss if the court disallows this suit to go forward because I am in pro per and the clock is ticking. These lawyers must be held accountable. The way things are now, all they need do is make certain that clients who are abused are left so impoverished that they cannot afford a lawsuit that holds them accountable.

GLORIA GRENING WOLK, MSW
25381 Alicia Parkway, #G-336, Laguna Hills, CA 92653-4995
ph 949.249.5444 fax 949.249.2262 info@Viatical-Expert.net

February 22, 2006

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

Re: Statute of Limitations for Legal Malpractice

To the Members of the Commission:

I was startled to discover that you are considering revision of the statute of limitations for legal malpractice—and for reasons that caused and continue to cause me great angst.

I became aware that I had grounds for a legal malpractice lawsuit on or about August 17, 2004. I began to contact attorneys but was told to wait until the underlying lawsuit was concluded, since the resolution might mitigate damages and make such a lawsuit unnecessary.

On August 15, 2005, on the cusp of the statute of limitations, with the underlying lawsuit not yet concluded I filed the complaint in pro per. Since then I have tried in vain to get legal representation. There are a number of reasons for this difficulty. Among them: I need an attorney who is willing and able to offer a contingency fee arrangement; some attorneys who might otherwise accept the case do not have time to jump in immediately.

Time became an extreme issued when one attorney told me that service must be within sixty days of filing the complaint. I had read lawsuits that were not served for two or three years, and was shocked to learn this. I immediately hired a process server and filed an ex parte motion to request additional time for service. Since I was required to notify the defendants, they used the expectation of a process server to avoid service, resulting in additional and burdensome expense to me.

The attorneys hired by their malpractice insurer immediately filed for a transfer of venue to northern California. I protested in vain and now am “under the gun” to pay more than \$1,200 in total fees and costs to comply, while simultaneously trying to find an attorney who is five hundred miles from my residence. I was given less than one month to accomplish this. As time ran out I asked the court for an open extension of time and was given slightly less than one additional month.

I did locate attorneys who may accept representation—but will not have time to review the documents for three weeks. One of these attorneys requires a retainer and hourly fees and expects that if the case goes to trial it will require financing of \$150 thousand. The other two law firms may be more flexible about financing.

The only way that I will be able to finance this is by setting up a Web site through which I will make the documents available to show the strength of the case, and use this to ask for loans payable at interest from people who will be attracted to the Web site through deft marketing. I have been working on the Web site on and off throughout these weeks, while also researching possible lawyers and contacting them, and also trying to earn a living—researching and publishing information of value to the public in the area of my expertise

If the statute of limitations was tolled until the underlying case was concluded, I would not have been forced to file the complaint until August 2006. That would have given me time to start earning a living again, to acquire funds for the lawsuit, and to find a lawyer with some leisure rather than communicating to them in a panic state.

I am attaching to this cover letter the pleading to the court for an extension of time. Several times the judge criticized me for not having an attorney before the complaint was filed. He clearly does not understand how complicated the situation is. That is what prompted me to write to you now—at three thirty in the morning, after doing work. I was touched to find that the Commission understood the hardship the present situation causes, and the potential harm it to victims of negligent lawyers.

Sincerely,

Gloria Grening Wolk MSW

1 GLORIA GRENING WOLK, MSW
2 Plaintiff in Pro Per
3 25381 Alicia Pkwy. #G-336
4 Laguna Hills, CA 92653
5 Ph 949-249-5444
6 Fx 949-249-2262
7 E-mail info@Viatical-Expert.net

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF ORANGE

11 GLORIA GRENING WOLK,
12 Plaintiff,

13 vs.

14 THOMAS A. TRAPANI, LISA HUTTON,
15 RANKIN, SPROAT, ET AL,
16 AND DOES 1-X DOES 1-X,
17 Defendants

Case No.: No. 05cc00179

**NOTICE OF EX PARTE MOTION,
MOTION, AND MEMORANDUM OF
POINTS AND AUTHORITIES FOR
EXTENSION OF TIME (C.C.P. § 243.7)
AND STAY ON PROCEEDINGS**

Date: January 27, 2006
Time: 1:30 a.m.
Dept: CX101
Judge David C. Velasquez

HEARING NOT REQUESTED

22 **1. INTRODUCTION**

23 The Plaintiff in the above-entitled action is willing to obey Court orders if the
24 Court agrees to extend the time to acquire legal counsel local to Alameda County,
25 acquire funds with which to pay sanctions and fees, and execute the transfer of venue
26 to Alameda County.

1 An extension of time is absolutely necessary since, if denied, it will deprive the
2 Plaintiff of any opportunity to access the judicial system for redress of injuries, while
3 protecting the Defendants from being held accountable for numerous acts of
4 professional negligence. In short, this motion must be granted in the interests of justice.

5 **2. BACKGROUND**

6 A. The legal malpractice complaint was filed in pro per in August 2005—days
7 short of the statute of limitations. Although Plaintiff began to seek an attorney when she
8 first became aware that she had grounds for a legal malpractice suit, she was advised
9 to wait until the underlying suit was concluded. Since September 2005 she has spent
10 most of her time trying to enlist an attorney who was in a position to represent her on a
11 contingency fee basis.

12 B. Contingency fee is an absolute necessity. The Plaintiff was stripped of all
13 liquid assets as a result of the Defendants' handling of the underlying lawsuit.

14 C. Three attorneys in Orange County agreed to represent the Plaintiff on a
15 contingency fee basis—if the case remained local.

16 D. To date, despite several dozen contacts, not one attorney in northern
17 California would agree to a contingency fee arrangement. This may be due, in part, to
18 prejudice against the Plaintiff. Lawyers who are colleagues of the Defendants
19 repeatedly told her that undertaking this action would place them in a difficult position
20 since they all “play in the same backyard.” Those few who are willing to represent the
21 Plaintiff require a huge retainer and huge hourly fees.

22 E. Since the Plaintiff no longer can finance basic living expenses—a direct
23 result of the acts of the Defendants—it is impossible for her to follow the Court's advice
24 to pay an attorney.

25 F. The complaint would not have been served without an attorney but for a
26

1 warning from one attorney with whom the Plaintiff discussed the case. He told her that it
2 must be served within sixty days. The Plaintiff had been oblivious to this rule since she
3 spent most of her time attempting to find an attorney, and expected whomever took over
4 the case would amend the complaint, including identifying the Doe defendants, and
5 serve the amended complaint.

6 G. Once served, Defendants filed a motion to transfer venue to northern
7 California.

8 1. The hearing on the motion to transfer venue was held January 5,
9 2006. Defendants argued the general venue rule. Defendants did not mention that there
10 would be any inconvenience or disadvantage to venue in Orange County and, in fact,
11 there is none.

12 2. Plaintiff's opposition was based on well established exceptions to
13 the venue rule including financial hardship, convenience of witnesses, prejudice to the
14 Plaintiff, ability to be represented by counsel, and the interest of justice. Although
15 Defendants made no countershowing that they or their witnesses would be
16 inconvenienced, the Plaintiff failed to persuade the Court.

17 H. On January 17, 2006 the Plaintiff addressed the Court on her Motion for
18 Reconsideration. The Court did not find new evidence or new law, although the Motion
19 attempted to supply information deemed missing or insufficient by the Court at the
20 previous hearing, and the Plaintiff introduced two pieces of evidence not previously
21 available:

22 1. Email from an attorney in northern California notifying the Plaintiff
23 that he was unsuccessful in his effort to find a legal malpractice attorney who is
24 "SLAPP-savvy;" and

25 2. An advertisement placed in the legal newspaper asking for a
26

1 plaintiff's legal malpractice attorney, noting that the underlying lawsuit was related to the
2 1st Amendment.

3 I. At this time the Plaintiff faces an ultimatum from the Court: Either pay the
4 fees, which total more than \$1,200.00, and transfer the case to Alameda County by
5 February 3, 2006, or the case will be dismissed.

6 J. When the Plaintiff told the Court that she was unable to find any attorney
7 in northern California who would accept the case on a contingency fee basis, she was
8 told to pay an attorney.

9 K. This advice ignores the stated facts that the Plaintiff has no reliable
10 income other than Social Security, that her finances and credit were ruined as a result
11 of the negligence of the Defendants, that she plans to relocate to a state where living is
12 cheaper but cannot, at this time, finance relocation.

13 L. If the Court dismisses the lawsuit, it will be for no reason other than the
14 financial hardship imposed by the Defendants' acts.

15 M. If the Court dismisses the lawsuit, it will protect attorneys who violated the
16 Plaintiffs' First Amendment rights, breached their duty, and nullified the anti-SLAPP
17 statute which was intended to protect people like her.

18 N. If the Court dismisses the lawsuit because the Plaintiff is unable to pay the
19 fees ordered and effect a transfer to a venue where she cannot obtain legal counsel,
20 this will show the state, the nation, and the world that justice is for sale. This is not
21 hyperbole. The Plaintiff's Web site and books have enabled people worldwide to avoid
22 being lured into fraudulent investments.

23 **3. ARGUMENT**

24 **A. The court has discretion to dismiss a case.**

25 Dismissal typically is exercised after several years of delay in prosecution. Even
26 when that occurs, dismissal is not automatic. "Although discretion is vested in the trial

1 judge, that discretion is not unfettered. It cannot be exercised arbitrarily, but must be an
2 impartial discretion to be exercised in conformity with the spirit of the law and in a
3 manner to subserve the ends of substantial justice.' [Citation.] (*Longshore v. Pine*
4 (1986) 176 Cal.App.3d 731, 737 [222 Cal.Rptr. 364].)" *Putnam v. Clague* (1992) 3 Cal.
5 App.4th 542; 5 Cal.Rptr.2d 25.

6 Research did not turn up any cases in which a lawsuit was dismissed due to a
7 Plaintiff's inability to finance representation in a distant venue and, in particular, when
8 that problem was the direct result of Defendants' acts.

9 **B. Dismissal would be an abuse of discretion.**

10 "It is the policy of the law, as declared by the courts, that when a plaintiff
11 exercises reasonable diligence in the prosecution of his action, the action should be
12 tried on the merits." *Black v. Supr. Ct.* (1968) 265 Cal.App.2d 501; 71 Cal.Rptr. 344.

13 For that reason any determination to transfer is subject to review for abuse of
14 discretion. *Walker v. Supr. Ct.* (1991) 53 Cal.3d 257. The Code of Civil Procedure
15 section 583.130 appears to govern dismissal when a case has not been resolved on its
16 merits. Typically, this type of dismissal is related to delay in prosecution. This section
17 also includes a number of caveats relevant to the instant motion. "The trial court, before
18 exercising its discretionary power to dismiss, *must* look to all of the factors which impact
19 upon the case so as to avoid effecting a miscarriage of justice." *Dubois v. Corroon &*
20 *Black* (1993) 12 Cal.App.4th 1689, 16 Cal.Rptr.2d 719 (italics added).

21 *Dubois*, citing many other cases, reminds us that "The legislative policy favoring
22 resolution of disputes on the merits will prevail over the policy to promote due diligence,
23 which underlies the dismissal statute."

24 *Dubois* cautions that courts "must consider the totality of the circumstances by
25 'viewing the whole picture.'" [citations] And *Dubois* cites California Rules of Court, rule
26 373(e), which sets out the elements that are included in the "total picture."

1 California Rules of Court, rule 373(e), provides:

2 "In ruling on the motion the court shall consider all matters relevant to a proper
3 determination of the motion, including the court's file on the case and the affidavits
4 and declarations and supporting data submitted by the parties and, where
5 applicable, the availability of the moving party and other essential parties for
6 service of process; the diligence in seeking to effect service of process; the extent
7 to which the parties engaged in any settlement negotiations or discussions; the
8 diligence of the parties in pursuing discovery or other pretrial proceedings,
9 including any extraordinary relief sought by either party, the nature and complexity
10 of the case; the law applicable to the case, including the pendency of other
11 litigation under a common set of facts or determinative of the legal or factual
12 issues in the case; the nature of any extensions of time or other delay attributable
13 to either party; the condition of the court's calendar and the availability of an earlier
14 trial date if the matter was ready for trial; whether the interests of justice are best
15 served by dismissal or trial of the case; and any other fact or circumstance
16 relevant to a fair determination of the issue. The court shall be guided by the
17 policies set forth in section 583.130 of the Code of Civil Procedure."

18 In *Richfield*, plaintiffs were 200 miles from defendants' choice of venue. The
19 Court recognized the difficulties this would pose and, guided by the principle of the
20 furtherance of justice, ruled that "Plaintiff's choice of venue is given weight in order to
21 aid the plaintiff's ability to seek a remedy . . ." *Richfield v. Supr. Ct.* (1994) 22
22 Cal.App.4th 222; 27 Cal.Rptr.2d 161.

23 In denying the Plaintiff's pleas and reasons for venue in Orange County, the
24 Court appears to have ignored the furtherance of justice. Far worse is the threat to
25 dismiss if its orders are not obeyed within the short time. The Plaintiff's failure to enlist
26

1 the services of an attorney in northern California is not an indication that she does not
2 have a good case, as the Court suggested.

3 What it does indicate is that any attorney can escape a malpractice suit if he
4 strips the assets from the victimized client, assuring that there will be no funds to pay for
5 an action that would hold him accountable.

6 The *Dubois* court stated: "Actual consideration of those factors as well as
7 consideration of the plaintiff's conduct is *mandatory* even in a case where the motion to
8 dismiss is sua sponte." (italics added)

9 **C. Extension of Time is Not Novel**

10 The Plaintiff would prefer to proceed expeditiously. She expects the Defendants,
11 including the as yet unnamed Doe defendants, will be eager to settle because she has
12 such damning evidence against them. But it is not possible to proceed at this time, nor
13 is it possible to put a limit on the time because she needs to (a) acquire legal
14 representation; (b) obtain funds to pay the fees ordered by the court; (c) obtain funds to
15 enable her to move to a less expensive locale; and (d) obtain funds to pay an attorney.

16 Efforts to find a lawyer and the various court proceedings consumed most of the
17 Plaintiff's time and energy, making it almost impossible to undertake other tasks and, in
18 particular, to do income-producing work.

19 An open extension of time and a stay on all proceedings is required to
20 accomplish these formidable tasks. If the Plaintiff is required to finance legal
21 representation, organizing a campaign to solicit funds for a sizable retainer will take
22 much longer than if she found an attorney willing to accept representation on a
23 contingency fee basis.

24 Extensions of time are not unusual. Courts routinely grant extensions for service
25 of complaints, answering pleadings, responding to discovery, filing appeals, etc.,
26 sometimes for as long as a year. This situation may be unique since the extension of

1 time will determine whether there is a trial on the merits or another injustice visited, this
2 time, by the courts.

3 An extension of time and stay of further proceedings, which occurs when
4 extensions for service are granted, will not prejudice the Defendants. In fact, it will give
5 them time to review their files, acknowledge their lack of defense, and consider their
6 options.

7 **4. CONCLUSION**

8 The Court is requested to grant an open extension for transferring the case to
9 Alameda County, acquiring legal counsel, and acquiring funds with which to pay
10 sanctions and fees. The Court also is asked to stay all proceedings until these acts are
11 consummated. A stay of further proceedings, which should begin with the case
12 management conference/hearing scheduled for February 3, 2006, will benefit all parties
13 and the Court by saving time and expense until the lawsuit can be tried on its merits.

14 To do otherwise not only will prejudice the Plaintiff but deny her due process
15 rights.

16
17 Signed under penalty of perjury under the laws of the state of California.

18
19 Date: January 26, 2006

Gloria Grening Wolk, MSW
Plaintiff in pro per

20
21
22
23
24
25
26

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BEAL BANK, SSB,

Plaintiff and Appellant,

v.

ARTER & HADDEN, LLP, et al.,

Defendants and Respondents.

B179383

(Los Angeles County
Super. Ct. No. BC308535)

APPEAL from judgments of the Superior Court of Los Angeles County. John P. Shook, Judge. Reversed and remanded.

Leland, Parachini, Steinberg, Matzger & Melnick, Harvey L. Gould; Carroll, Burdick & McDonough, Vicki L. Freimann, Richard Fannan and David M. Rice for Plaintiff and Appellant.

Moscarino & Connolly, John M. Moscarino and Paula C. Greenspan for Defendants and Respondents.

* * * * *

The question presented is whether the limitations period for a legal malpractice action under Code of Civil Procedure¹ section 340.6 is tolled as to an attorney's former law firm and one of its partners while the attorney continues to represent the client in the same subject matter at his new firm. We hold that it is tolled and therefore reverse the judgments of dismissal in favor of the former law firm and its partner following demurrers sustained without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and appellant Beal Bank, SSB (Beal Bank) filed this legal malpractice action against the attorneys who represented Beal Bank in its efforts to collect default interest on certain loans: Steven Gubner, Beal Bank's current attorney; Gubner's two firms in which he was a partner; Gubner's prior law firm, respondent Arter & Hadden, where Gubner was an associate; and respondent Eric Dean, a partner at Arter & Hadden. Each of the defendants demurred. The trial court sustained the demurrers of Arter & Hadden and Dean without leave to amend, finding the claims against them to be time-barred. On appeal, Beal Bank contends that the statute of limitations was tolled as to Arter & Hadden and Dean during the time Gubner continued to represent Beal Bank.²

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

² Beal Bank settled with the Gubner defendants, who are not parties to this appeal.

A. Allegations in the First Amended Complaint³

In 1996, Beal Bank acquired certain loans from another bank, which had been placed into conservatorship by the Federal Deposit Insurance Corporation (FDIC). The loan documents contained “default interest clauses,” which provided that in the event of default, the entire balance of principal and interest would become due and thereafter bear interest at an increased rate over and above the contract rate. The debtors missed payments on some of the loans. By the time Beal Bank acquired the loans, the debtors had negotiated discounted payoffs of the remaining loans with the FDIC, but had failed to make those payments as well. Beal Bank sent notices of acceleration and default to the debtors and recorded notices of default that were based on the increased default interest rate.

In March 1997, Beal Bank retained Arter & Hadden to handle its collection efforts. Dean was the attorney primarily responsible for the representation. Counsel for the debtors repeatedly advised Arter & Hadden, through correspondence and other means, that Beal Bank had no legal or factual basis for attempting to collect the default interest. In the first amended complaint, Beal Bank alleged that Arter & Hadden failed to conduct any legal research on the issue, advise Beal Bank that its position was unlikely to prevail, or inform it of the risks involved in continuing to maintain its position.

In June 1997, the collateral for the outstanding loans was transferred by the debtors to an entity the debtors controlled. On the following day, that entity filed for bankruptcy protection. Gubner, an associate at Arter & Hadden, then began representing Beal Bank in the bankruptcy court. On Beal Bank’s behalf, Arter & Hadden filed a motion for summary judgment in the bankruptcy court, arguing that Beal Bank was

³ On appeal from a judgment of dismissal following a demurrer sustained without leave to amend, we assume the truth of all well-pleaded facts, as well as those that are judicially noticeable, but not contentions, deductions or conclusions of fact or law. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

entitled to recover the default interest rate. The bankruptcy court ruled against Beal Bank and entered its final order on May 28, 1998. Beal Bank appealed the matter to the district court, represented by Arter & Hadden.

On December 31, 1998, Gubner left the employ of Arter & Hadden and formed Gubner & Associates, which later became Ezra, Brutzkus & Gubner. In turn, Gubner's new firms took over representation of Beal Bank. In April 1999, the district court affirmed the bankruptcy court's ruling, and Beal Bank, represented by Ezra, Brutzkus & Gubner, appealed to the Ninth Circuit Court of Appeals. On September 25, 2001, the Ninth Circuit issued its opinion, affirming the rulings of the lower courts.

In the first amended complaint, Beal Bank alleged that none of the defendants ever advised it of the risks associated with its legal position, thereby causing damages as follows: Beal Bank was deprived of an opportunity to settle its disputes with the debtors on favorable terms; Beal Bank was named as a cross-defendant by the debtors in an action filed in state court, which settled on terms causing economic loss to Beal Bank; and Beal Bank incurred unnecessary legal fees in litigating the question of default interest before the bankruptcy court, the district court and the Ninth Circuit. Beal Bank alleged that it has suffered damages totaling more than \$3.5 million.

B. Procedural History

On September 24, 2002, Beal Bank filed an action for professional negligence against Arter & Hadden, Dean, Gubner and Gubner's two law firms. Two days later, Gubner filed a notice of withdrawal as counsel for Beal Bank in the bankruptcy court. In November 2002, Beal Bank and the defendants entered into a written tolling agreement, which provided that the period between September 24, 2002 and December 31, 2003 would not be included in determining the applicability of any statute of limitations. Beal Bank dismissed its complaint without prejudice on November 20, 2002.

On December 30, 2003, Beal Bank commenced the instant action for professional negligence.⁴ Dean and Arter & Hadden separately demurred to the first amended complaint, arguing that Beal Bank suffered an actual injury on May 28, 1998, the date the bankruptcy court entered an adverse ruling against Beal Bank, which commenced the running of the one-year statute of limitations under section 340.6 on Beal Bank's malpractice claim. They argued that the statute of limitations was tolled only until December 31, 1998, when Gubner left Arter & Hadden taking Beal Bank with him as a client and when Arter & Hadden ceased representing Beal Bank. They further argued that the statute of limitations was not tolled as to them by any continuous representation of Beal Bank by Gubner and his new firms, so that the one-year limitations period expired on December 31, 1999, nearly four years prior to the filing of the instant action.

In opposition, Beal Bank argued that the statute of limitations did not commence until the Ninth Circuit's opinion was issued on September 25, 2001 and that by virtue of the parties' tolling agreement, its malpractice action was timely filed.

The trial court recognized that there was a conflict of authority between *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509 (*Crouse*) and *Beane v. Paulsen* (1993) 21 Cal.App.4th 89 (*Beane*) on the application of the continuing-representation tolling provision to an attorney's prior firm. The trial court found *Crouse* to be more persuasive and sustained the demurrers without leave to amend. Judgments of dismissal were entered as to the claims against Dean and Arter & Hadden. This appeal followed.

⁴ The first amended complaint named as defendants Dean, Gubner and Gubner's two law firms. At the time it was filed, Arter & Hadden was in bankruptcy. After the bankruptcy court entered an order for relief from stay of the malpractice litigation, Arter & Hadden was named as a Doe defendant in the first amended complaint.

DISCUSSION

Standard of Review

We review de novo the trial court's sustaining of a demurrer without leave to amend, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We assume the truth of properly pleaded allegations in the complaint and disregard those which are contrary to law or to a fact of which judicial notice may be taken. (*Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554, 559-560.) We give the complaint a reasonable interpretation, reading it as a whole and with all its parts in their context. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558; *People ex rel. Lungren, supra*, at p. 300.) A demurrer on statute of limitations grounds will not lie where the action may be, but is not necessarily, time-barred; it must clearly and affirmatively appear on the face of the complaint that the action is necessarily barred. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 881.)

The Limitations Period Was Tolloed As to Arter & Hadden and Dean

Section 340.6, subdivision (a) provides in relevant part: "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, 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: [¶] . . . [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;"

The parties do not dispute that the Gubner defendants continued to represent Beal Bank in the same subject matter in which the alleged malpractice had occurred or that the one-year limitations period is applicable. The dispute is whether the continuous-representation tolling provision applies to a current attorney's former law firm and one of that firm's partners with whom the current attorney was associated when the alleged malpractice occurred.

Arter & Hadden and Dean contend that the plain language of section 340.6 answers the question. They argue that because the tolling provision refers to the time that "the attorney" continued to represent the client, and does not refer to the law firm or its attorneys with whom the attorney was associated when the alleged malpractice occurred, the tolling provision cannot be applied to anyone but the attorney who continues the representation. We disagree. Mere examination of the statutory language does not end the inquiry, because section 340.6, which establishes the limitations period for "an action against an attorney," has already been applied to actions against both the attorney and the law firm. (See, e.g., *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739; *Gold v. Weissman* (2004) 114 Cal.App.4th 1195.)

We must interpret a statute in accordance with its purpose. (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1064-1065.) The continuing-representation tolling provision has two purposes: (1) to avoid the disruption of an ongoing attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error; and (2) to prevent an attorney from defeating a malpractice claim by continuing to represent the client until the statutory period has expired. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618, citing Sen. Com. on Judiciary, 2d reading analysis of Assem. Bill No. 298 (1977-1978 Reg. Sess.) as amended May 17, 1977.) The two cases which have addressed the application of the tolling provision to former law firms are *Beane* and *Crouse*.

In *Beane*, attorney Vodonick, who was in partnership with two other attorneys, was hired to file a state court action on behalf of a client and to prosecute a related proceeding in bankruptcy court. The bankruptcy action was dismissed for failure to

prosecute. Thereafter, the three partners severed their relationship and Vodonick continued to represent the client. (*Beane, supra*, 21 Cal.App.4th at pp. 93-94.) The client's state court action was eventually dismissed based on the res judicata effect of the bankruptcy court dismissal, and Vodonick continued to represent the client through appeal. (*Id.* at p. 94.) In the subsequent malpractice action against Vodonick and his former partners, the former partners brought a motion for summary judgment, arguing that they were released from any liability for malpractice when they ceased practicing with Vodonick and that the action was time-barred under section 340.6. (*Beane, supra*, at p. 92.) The trial court granted the motion, but the Third District reversed.

The *Beane* court first concluded that dissolution of the partnership did not terminate the vicarious liability of Vodonick's former partners for his malpractice during the existence of the partnership. (*Beane, supra*, 21 Cal.App.4th at pp. 97-98.) The *Beane* court then addressed whether the limitations period was tolled against the former partners based on Vodonick's continuous representation. The court found that if the action was not tolled against the former partners, the client would be placed "in an extremely awkward position, preserving on the one hand her attorney-client relationship with the active tortfeasor, while chasing his former partners to the courthouse on the other. This would undermine the express legislative intent, since the former partners if sued . . . would immediately file cross-claims against Mr. Vodonick, disrupting the attorney-client relationship." (*Id.* at p. 99.) The court also noted that "the fiduciary nature of the relationship between attorney and client will lull the client into inaction even after the client hears about an adverse result" (*id.* at p. 99), and that Vodonick had "made soothing statements" to the client about the likelihood of ultimate vindication. (*Ibid.*) The court concluded that "tolling for reasons of continuous representation has an 'all for one and one for all' application when one (or more) of several former partners continue to represent the allegedly wronged client." (*Ibid.*)

In *Crouse*, Division One of the Fourth District expressly declined to follow *Beane*. (*Crouse, supra*, 67 Cal.App.4th at p.1539.) The client in *Crouse* retained Brobeck, Phleger & Harrison (Brobeck) to advise and assist her in connection with the sale of a

limited partnership interest. Attorney Boatwright, an associate and later a partner at Brobeck, was primarily responsible for representing Crouse in the sale. (*Id.* at p. 1520.) Following the sale, the client received a promissory note, which Boatwright apparently lost. (*Id.* at p. 1521.) Thereafter, Boatwright left Brobeck and became a partner at Page, Polin, Busch & Boatwright (Page). The client subsequently retained Page and Boatwright to represent her in connection with renegotiation of the note. When the note could not be produced at the closing, the obligors' attorney aborted the closing. Boatwright then renegotiated a different note-restructuring agreement on less favorable terms. (*Id.* at p. 1522.) In the subsequent malpractice action against Brobeck, Boatwright and Page, Brobeck sought summary judgment, arguing that there was no basis for tolling the statute of limitations on the client's claim against Brobeck after it ceased representing her. (*Id.* at p. 1523.) The trial court agreed and the dismissal was affirmed on appeal.

After finding that *Beane* was factually distinguishable, the *Crouse* court expressly disagreed with *Beane*'s policy analysis, finding that the *Beane* court had ignored the principles that a defendant cannot waive the statute of limitations defense on behalf of another co-obligor and that a former partner may not bind other former partners after the partnership is dissolved. (*Crouse, supra*, 67 Cal.App.4th at pp. 1538-1539.) The *Crouse* court further relied on principles of fairness, noting that if a negligent attorney's election to continue the client representation is enforced against his former partners, "those former partners pay the statutory price of the tolling of the statute of limitations without any voice in the election *and* without obtaining the statutory benefit of participating in eliminating or minimizing their liability of damages from the negligence." (*Id.* at p. 1539.) Finally, while the *Crouse* court agreed that requiring the injured client to promptly sue the former partners may trigger cross-complaints against the negligent attorney and thereby impede that attorney's ability to remedy or mitigate the damages caused by his error, "this detriment equitably should be borne by the negligent attorney rather than by his former partners." (*Ibid.*)

We are not persuaded by the *Crouse* court's reasoning. With respect to waiver of the statute of limitations, we note that the statute of limitations is an affirmative defense that is forfeited by the defendant if not appropriately invoked. (*Adams v. Paul* (1995) 11 Cal.4th 583, 597.) But an attorney does not waive the statute of limitations defense by continuing to represent the client. The continuous representation only tolls commencement of the limitations period. The statute of limitations defense is still viable and can be asserted by both the attorney and the law firm if the client does not timely sue after the attorney's continuing representation has ended. The cases cited in *Crouse* for the proposition that a co-obligor cannot waive the statute of limitations defense on behalf of another co-obligor involved written acknowledgments reviving debts that were already barred by the statute of limitations. The cases held that such acknowledgments cannot bind co-obligors who were not signatories and the nonsignatory co-obligors therefore could not be held to have waived the statute of limitations defense. (*Steiner v. Croonquist* (1951) 108 Cal.App.2d Supp. 895, 898-899; *Bemer v. Bemer* (1957) 152 Cal.App.2d 766, 772-773.) The cases did not involve tolling of the limitations period as to an existing claim, as pled here.

Nor does the principle that a partner cannot bind his former partners by actions taken after dissolution of the partnership have application here. First, we note that Gubner was an associate and never a partner at Arter & Hadden. Moreover, even if he had been a partner, the malpractice alleged here occurred while he was at Arter & Hadden, not after he left. Because the malpractice liability arose while the attorney was associated with the former partners, it cannot be said that the attorney's later acts, including the continued representation, created the liability. The cases cited in *Crouse* do not alter this outcome. (*Sears v. Starbird* (1889) 78 Cal. 225, 229 [stating that "after the dissolution of the partnership one partner cannot revive a debt barred by the statute, but during the pendency of the partnership each partner is an agent for all in making an acknowledgment under the statute of limitations"]; *Blackmon v. Hale* (1970) 1 Cal.3d 548, 560 [holding that an attorney who withdrew from a firm before his former partner's tortious act was not liable as a partner]; *Williams v. Ely* (1996) 423 Mass. 467, 478-479

[668 N.E.2d 799, 807-808] [holding that attorneys who withdrew from a firm before their former partner executed a tolling agreement were not bound by the tolling agreement].)

The *Crouse* court was also concerned that it would be unfair to toll the statute of limitations as to the negligent attorney's former law firm because the firm would not obtain the statutory benefit of being able to participate in the negligent attorney's steps to correct or mitigate the error. (*Crouse, supra*, 67 Cal.App.4th at p. 1539.) However, the effects of the tolling provision cut both ways. If the attorney who continues the representation ultimately corrects or mitigates the error, the former law firm benefits by not being sued or by having its potential liability reduced.

Finally, the *Crouse* court acknowledged that if the tolling provision did not apply to former attorneys and the client was forced to promptly sue, those attorneys would likely file cross-complaints against the attorney who was continuing the representation and thereby impede that attorney's ability to remedy or mitigate the damages caused by his error. But the *Crouse* court concluded that such detriment equitably should be borne by the negligent attorney rather than by the former firm. (*Crouse, supra*, 67 Cal.App.4th at p. 1539.) In this vein, the *Crouse* court viewed the former attorneys as the more innocent parties. But here, Beal Bank is not seeking to hold Arter & Hadden and Dean liable solely on the theory that they are vicariously liable for actions taken by Gubner while he was employed by the firm. Rather, Beal Bank is seeking to hold all defendants directly liable for their own allegedly negligent acts. Under these circumstances, it would be inequitable to force the Gubner defendants alone "to pay the statutory price" for the continued representation. Moreover, the detriment caused by the disruption to the ongoing attorney-client relationship affects not only the attorney, but the client as well. The purpose of the continuing-representation tolling provision is to benefit the client's interest by preserving undisturbed the client's relationship with its attorney so that the attorney can try to undo the damage he has done to the client.

Arter & Hadden and Dean argue that applying the tolling provision to former attorneys would extend ad infinitum the time for filing legal malpractice cases, "thereby causing an enormous increase in malpractice insurance, rendering policies virtually

unobtainable for many lawyers.” We agree that this is a serious concern. But it is not one that can be resolved on the record before us. Nor do we agree that the time for filing legal malpractice cases would be extended indefinitely. The limitations period is tolled only while the attorney continues to represent the client in the same specific subject matter in which the alleged malpractice occurred.

We therefore hold that the limitations period for a legal malpractice action under section 340.6 is tolled as to the attorney and the attorney’s former law firm and its attorneys while the attorney continues to represent the client in the same specific subject matter in which the alleged malpractice occurred.

In this case, we find that the action was timely filed. The first amended complaint alleges that the Gubner defendants continued to represent Beal Bank in the collection matters until September 26, 2002, when Gubner filed a notice of withdrawal in the bankruptcy court. We note from other allegations in the first amended complaint that this occurred two days after Beal Bank filed its original complaint for professional malpractice. The original complaint was dismissed after the parties entered into a tolling agreement, which tolled the action until December 31, 2003. Beal Bank timely filed the instant action on December 30, 2003. Thus, we conclude that the trial court erred in sustaining the demurrers of Arter & Hadden and Dean on the grounds that the action against them was time-barred.⁵

⁵ “‘Ordinarily, an attorney’s representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.’ (2 *Mallen & Smith, Legal Malpractice* [3d ed. 1989] Statutes of Limitations, *supra*, § 18.12, p. 120.) ‘The rule is that, for purposes of the statute of limitations, the attorney’s representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.’” (*Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1497.) “Continuity of representation ultimately depends, not on the client’s subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship.” (*Id.* at p. 1498.)

Here, the first amended complaint contains no allegations of actions taken by the Gubner defendants on behalf of Beal Bank prior to their formal withdrawal as counsel,

DISPOSITION

The judgments of dismissal in favor of Arter & Hadden and Dean are reversed, and the matter is remanded with directions to the trial court to vacate its orders sustaining their demurrers without leave to amend. Beal Bank to recover its costs on appeal.

CERTIFIED FOR PUBLICATION.

_____, J.
DOI TODD

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST

other than pursuing the appeal to the Ninth Circuit. It is reasonable to infer that they continued to represent Beal Bank on appeal until the Ninth Circuit issued its opinion on September 25, 2001. The parties' tolling agreement tolled the action from September 24, 2002 until December 31, 2003. Thus, even if we were to disregard Beal Bank's allegation that the Gubner defendants represented it until their formal withdrawal as being contrary to law, we would nevertheless find the action to be timely.

LINDA F. CROUSE et al., Plaintiffs and Appellants,
v.
BROBECK, PHLEGER & HARRISON, Defendant, Cross-defendant and Respondent; DAVID
C. BOATWRIGHT, Defendant, Cross-complainant and Appellant;
PAGE, POLIN, BUSCH & BOATWRIGHT, Cross-complainant and Appellant.
LINDA F. CROUSE et al., Plaintiffs and Appellants,
v.
PAGE, POLIN, BUSCH & BOATWRIGHT et al., Defendants and Respondents.
No. D025143., No. D026136.

Court of Appeal, Fourth District, Division 1, California.

Nov. 25, 1998.

SUMMARY

A client brought a malpractice action against her attorney, the law firm of which the attorney was originally a partner, and a second firm where the attorney subsequently became a partner. The client had retained the attorney in 1987 to assist her in the sale of her limited partnership. In the sale, the client was to receive a promissory note, but the attorney did not deliver the note to her. The attorney left the first firm in 1989 and joined the second firm in April 1990, continuing to represent the client. Later in 1990, the obligors on the note sought to renegotiate its terms. The parties reached an agreement to restructure the note, but when the attorney was unable to find the note and to surrender it, the obligors refused to close the deal, believing that the original note would still be negotiable. In October 1990, a different restructuring of the note was closed. Also in October 1990, separate counsel advised the client of a malpractice claim, and in December 1993, the client, the attorney, and the two firms entered into an agreement tolling the statute of limitations. The client filed her action in August 1994, and defendants cross-complained against each other for indemnity and other claims. The trial court granted summary judgments in favor of the attorney and both firms against the client. The court subsequently entered judgment in favor of the first firm on its cross-complaint after granting its motions for summary adjudication and summary judgment against the attorney and the second firm. (Superior Court of San Diego County, No. 680246, J. Richard Haden, Judge.)

The Court of Appeal reversed the summary judgment in favor of the attorney and the second firm against the client, affirmed the summary judgment in favor of the first firm against the client, affirmed the order granting summary adjudication in favor of the first firm on the attorney's cause of action for breach of fiduciary duty, reversed the summary judgment in favor of the first firm on the second firm's cause of action for equitable indemnity and the orders granting summary adjudication in favor of the first firm on the attorney's causes of action for equitable indemnity, breach of implied contractual duty, and statutory indemnity, and remanded for further proceedings. The court held that the client's action against the attorney for malpractice while the attorney was with the first firm was not time-barred, since the statute of limitations was tolled by operation of [Code Civ. Proc., § 340.6](#), subd. (a)(2) (continuous representation of client). The court also held that the trial court erred in granting summary judgment for the attorney and the second firm, since the client adequately alleged negligence occurring while the attorney was with the second firm. The court further held that [Code Civ. Proc., § 340.6](#), subd. (a)(2), did not operate to toll the statute of limitations against the first firm, and thus the client's action against that firm was time-barred. The court held that although the client's action against the first firm was time-barred, the attorney's and second firm's cross-complaints against the first firm were not time-barred. Further, the court held that the attorney and the second firm were entitled to seek indemnity from the first firm for malpractice occurring after the attorney joined the second firm, that the attorney was entitled to seek indemnity from the first firm for malpractice occurring while he was with the first firm, that the attorney was entitled to pursue a claim of breach of an implied contract against the first firm, and that the attorney was not entitled to pursue a claim of breach of fiduciary duty against the first firm. (Opinion by McDonald, J., with Kremer, P. J., and McIntyre, J., concurring.)

COUNSEL

Casey, Gerry, Reed & Schenk and T. Michael Reed for Plaintiffs and Appellants.

Post, Kirby, Noonan & Sweat, David J. Noonan and Charles T. Hoge for Defendant, Cross-defendant and Respondent.

Donald P. Tremblay, J. Daniel Holsenback and Jonathan R. Flora, for Defendant, Cross-complainant and Appellant.

Haight, Brown & Bonesteel, Roy G. Weatherup, Jay T. Thompson and Jon M. Kasimov for Cross-complainant and Appellant and for Defendants and Respondents.

McDONALD, J.

In these consolidated appeals we examine the application of the legal malpractice statute of limitations continuing-representation tolling provision to a legal malpractice action against a law firm, a former partner of the law firm who represented the client while a partner of the law firm and after becoming a partner in a new firm, and the new firm. We also consider (1) the application of the statute of limitations to cross-complaints for equitable indemnity filed by the attorney and his new firm against his former firm, (2) the limitations on equitable indemnity rights of the attorney and his new firm against the former firm and (3) the doctrines of implied contractual duty, fiduciary duty and statutory duty owed by a law firm to its members.

Appellants Linda F. Crouse and Linda F. Crouse Trust (together Crouse) filed this legal malpractice action against David Boatwright (Boatwright), an attorney who had represented her in a business transaction, and the two law firms in which Boatwright practiced during the times of the alleged acts of malpractice. Prior to 1990 Boatwright was an associate and partner in Brobeck, Phleger & Harrison (BPH). Between March 1990 and mid-October 1993 Boatwright was a partner in Page, Polin, Busch & Boatwright (Page).

BPH cross-complained for indemnity against Boatwright, and Page and Boatwright cross-complained for indemnity against BPH. Boatwright's cross-complaint against BPH also pleaded claims for breach of implied contract and breach of fiduciary and statutory duties.

The trial court granted BPH's motion for summary judgment on Crouse's complaint against BPH, finding that Crouse's action for BPH's malpractice prior to 1990 was time-barred by the statute of limitations. The trial court also granted BPH's motions for summary judgment on Boatwright's and Page's cross-complaints against BPH. BPH dismissed its cross-complaint against Boatwright.

The trial court granted Boatwright's and Page's motions for summary judgment on Crouse's complaint against Boatwright and Page, finding that Crouse's actions for Boatwright's malpractice prior to and after 1990 and Page's malpractice after 1990 were time-barred by the statute of limitations.

In these appeals Crouse argues the summary judgments in favor of BPH, Boatwright and Page on her complaint were error; Boatwright and Page argue the summary judgments in favor of BPH on their cross-complaints were error.

I. Facts

(1) On appeal from summary judgments, we view the facts and inferences reasonably drawn from those facts most favorably to the respective appellants.

A. The Sale of Crouse's Partnership Interest

During the 1980's Crouse was a limited partner in a limited partnership known as Med-Trans. In 1987 Crouse retained BPH to advise and assist her in the sale of her limited partnership interest in Med-Trans to its general partners. Boatwright was the BPH attorney principally responsible for representing Crouse in the sale. At the end of December 1988 Crouse's sale of her limited partnership interest closed and in consideration she received a promissory note for \$7,250,000 (the note), which was all due and payable in September 1990. Boatwright did not deliver the note to Crouse at the sale closing and did not take action to assure that the note would be held in a secure location.

B. Boatwright Changes Firms

Boatwright left BPH in August 1989. In March 1990 he became a partner in Page. BPH continued to represent Crouse with respect to the Med-Trans sale and the note until March 1990.

C. The Aborted Restructuring

In early 1990 Crouse learned the obligors on the note wished to renegotiate the terms of the note. Crouse consulted Boatwright in the spring of 1990 about negotiating a restructuring of the terms of the note, and then retained Page and Boatwright to represent her in those negotiations. BPH, at Crouse's request,

transferred her Med-Trans file to Page in April 1990.

Crouse told Boatwright during an April 1990 meeting that she did not have the note. The Crouse file transferred from BPH to Page in April did not include the note. In May Crouse again told Boatwright she could not find the note, and Boatwright told her to "[p]ut it on the back burner."

During the spring and summer of 1990, Boatwright and Page negotiated a restructuring of the terms of the note. Under the restructured note, Crouse was to receive in exchange for the note \$6,250,000 in cash and a new \$1 million note payable 18 months after the note-restructuring closing scheduled for September 25, 1990.

During the six months prior to the scheduled closing of the note restructuring, Boatwright took no steps to locate the note. On the date scheduled for closing, Boatwright was aware he did not have the note. He had not contacted BPH about the missing note. He had not assessed the legal significance on the closing, or evaluated the alternatives that might be available to Crouse, if the note could not be found and delivered to the note obligors.

At the closing, Ms. Eisner, the attorney for the note obligors, demanded surrender of the note. Because Crouse was unable to produce the note, Eisner aborted the closing. Eisner believed that the note was negotiable and unless the note obligors obtained possession of the note in exchange for the \$6,250,000 cash payment and the new \$1 million note, a holder in due course of the note would be entitled to demand payment of the note from the note obligors at a later date.

D. The Final Restructuring

A few days after the aborted closing, Boatwright negotiated a different note-restructuring agreement pursuant to which Crouse was to receive \$5 million in cash to be held in escrow for one year, and a new \$2.5 million note (the new note). This restructuring agreement closed October 12, 1990, without surrender of the note to the note obligors.

E. Crouse Learns of Malpractice Claim

By mid-October 1990 Crouse had been advised by independent attorneys that the loss of the note was negligence and that Page and Boatwright had been negligent during the spring and summer of 1990 in connection with the restructuring of the terms of the note by not searching for the note, not explaining to Crouse the significance of producing the note, and not making alternative arrangements in lieu of producing the note, at the closing of the note-restructuring transaction.

F. Boatwright's Continued Involvement With Crouse

Boatwright and Page continued to represent Crouse until July 1993 in collecting the escrowed proceeds from the restructured-note transaction and amounts due under the new note, including negotiating a discounted payoff of the new note.

II. Procedural History

Although Crouse's action for legal malpractice against BPH, Boatwright and Page was filed in August 1994, the relevant date of filing the action for statute of limitations purposes is December 1993 in accordance with a statute of limitations tolling agreement entered into by Crouse, BPH, Boatwright and Page. Page and Boatwright cross-complained against BPH for equitable indemnity. Boatwright's cross-complaint against BPH also alleged that BPH owed Boatwright certain implied contractual, fiduciary and statutory duties as a former partner, and that BPH had breached those duties.

BPH moved for summary judgment against Crouse, arguing that the statutes of limitation on her claim against BPH for negligence in losing the note began running in October 1990. BPH argued that because it had ceased representing Crouse by April 1990, there was no basis for tolling the statute of limitations on her claim against BPH and her claim was therefore barred by the one-year statute of limitations, which expired in October 1991, more than two years before the effective date of Crouse's action against BPH. The trial court granted the motion, reasoning there was no tolling against BPH because BPH had ceased representing Crouse by April 1990. The trial court granted Boatwright's motion to join in BPH's motion for summary judgment for the time period in which Boatwright was a partner at BPH.

Page and Boatwright then moved for summary judgment or judgment on the pleadings against Crouse, asserting that (1) claims against Boatwright based on negligence while at BPH were time-barred under the prior ruling for summary judgment in favor of BPH and Boatwright, and (2) Crouse's complaint did not allege and Crouse had no evidence that Boatwright and Page had been negligent during their representation

of Crouse after April 1990. Crouse opposed the motions and submitted evidence that she had notified Boatwright in the spring of 1990 that the note was missing but Boatwright did nothing to find the note prior to the aborted closing on September 25, 1990. She also filed a declaration from an expert, originally retained by BPH, who opined the note was not a negotiable instrument and Boatwright should have recognized that it was not a negotiable instrument and determined that it was therefore unnecessary to surrender the note to close the original note-restructuring transaction. The court sustained evidentiary objections to the expert's declaration and granted Boatwright's and Page's motions. Although Boatwright and Page raise several arguments in support of the judgment, the principal issue is whether Crouse's action was barred by the statute of limitations applicable to attorney malpractice actions. Unless tolled, the statutes of limitation on Crouse's cause of action started running in October 1990 and the effective date of her action is December 1993. The timeliness of her action depends on the applicability of the tolling provision of [Code of Civil Procedure \[FN1\] section 340.6](#), subdivision (a)(2), which tolls the statute of limitations while the attorney "continues to represent the [client] regarding the specific subject matter in which the alleged wrongful act or omission occurred."

FN1 All further statutory references are to the Code of Civil Procedure unless otherwise specified.

BPH also sought and obtained summary judgment on the cross-complaints of Boatwright and Page by serial motions for summary adjudication. BPH first sought summary adjudication on the causes of action for breach of implied contract and breach of fiduciary duty asserted against BPH by Boatwright's cross-complaint. The court granted that motion. BPH then sought summary adjudication on the equitable indemnity causes of action asserted against BPH by Boatwright and Page, and summary adjudication on Boatwright's remaining cause of action against BPH for breach of statutory duty. The court granted these motions and entered judgments in favor of BPH on the cross-complaints.

....

V
Crouse's Claim Against BPH
Analysis

It is undisputed that (1) after April 1990 BPH performed no legal services for Crouse in connection with the Med-Trans matter, and Boatwright and Page represented Crouse on that matter; (2) Crouse's cause of action against BPH for negligently misplacing the note arose in October 1990, and her action against BPH effectively commenced in December 1993; and (3) the one-year statute of limitations bars Crouse's action against BPH unless the statute was tolled by the continuing-representation tolling provision of [section 340.6](#), subdivision (a)(2). (12a) Crouse's argument on appeal for application of the continuing-representation tolling provision is that, under [Beane v. Paulsen \(1993\) 21 Cal.App.4th 89 \[26 Cal.Rptr.2d 486\]](#), Boatwright's continued representation of Crouse tolled the statute of limitations on Crouse's claim against BPH.

(13) The tolling provision of [section 340.6](#), subdivision (a)(2) applies to both the one-year and the four-year time limitations. (*O'Neill v. Tichy, supra*, [19 Cal.App.4th 114, 119-121.](#)) The continuing-representation tolling provision has two purposes: to prevent the attorney from defeating a malpractice action by continuing to represent the client until the statute of limitations has run; and to avoid forcing the client to file a lawsuit that would disrupt the ongoing attorney-client relationship and thereby prevent the negligent attorney from attempting to correct or minimize the error. ([Laird v. Blacker \(1992\) 2 Cal.4th 606, 618 \[7 Cal.Rptr.2d 550, 828 P.2d 691\].](#))

(12b) The continuing-representation tolling provision has been applied with little difficulty where the attorney who continues to represent the plaintiff is the same attorney claiming the bar of the statute of limitations. (See, e.g., [Kulesa v. Castleberry \(1996\) 47 Cal.App.4th 103 \[54 Cal.Rptr.2d 669\]](#); [Worthington v. Rusconi, supra](#), [29 Cal.App.4th 1488.](#)) However, where the attorney who continues to represent the plaintiff is not the same attorney claiming the bar of the statute of limitations, the courts with one exception have declined to apply the continuing-representation tolling provision. (See, e.g., [Foxborough v. Van Atta, supra](#), [26 Cal.App.4th 217.](#))

[Beane v. Paulsen, supra](#), [21 Cal.App.4th 89](#) is the only case of which we are aware that applied the continuing-representation tolling provision of [section 340.6](#), subdivision (a)(2) to a claim against an attorney who did not continue representing the plaintiff. In *Beane*, Attorney Vodonick, who was in partnership with two other attorneys, was hired in 1987 to file a state court action on behalf of the client (Tucker) and to prosecute a related proceeding in bankruptcy court. In 1987 the bankruptcy action was

dismissed because it was not prosecuted. In 1988 Vodonick's two partners withdrew from their partnership with Vodonick to form their own partnership. Vodonick continued representing Tucker, and in 1989 her state court action was dismissed based on the res judicata effect of the bankruptcy court dismissal. In September 1989 Tucker learned of this adverse result. However, Vodonick continued representing her on appeal until January 1991. (*Id.* at pp. 93-95.)

In the subsequent malpractice suit filed in April 1991 by Tucker against Vodonick and his former partners, the former partners sought summary judgment, arguing they eliminated any vicarious liability for Vodonick's malpractice by dissolving the partnership in 1988 and Tucker's claim against them was time-barred by [section 340.6](#). The *Beane* court concluded the vicarious liability of Vodonick's former partners for Vodonick's malpractice occurring while they were partners survived dissolution of the partnership. ([21 Cal.App.4th at p. 97.](#))

The *Beane* court then addressed whether the action against Vodonick's former partners was barred by the statute of limitations. The *Beane* court first concluded that, because Vodonick continued to represent Tucker until January 1991, the statute of limitations was tolled as to Vodonick until that date and her April 1991 complaint against Vodonick was timely. The *Beane* court then stated at [21 Cal.App.4th pages 98-99](#): "But what of the [former partners], whose liability is essentially vicarious (or at best passive, in the sense they failed to supervise their partner's handling of the case of their firm's client)? In the trial court's view, the statute of limitations began to run as to *them* on the date of Mrs. Tucker's discovery of the fact of her actual injury in 1989. We cannot agree. This would place Mrs. Tucker in an extremely awkward position, preserving on the one hand her attorney-client relationship with the active tortfeasor, while chasing his former partners to the courthouse on the other. This would undermine the express legislative intent, since the former partners if sued by September 1990 would immediately file cross-claims against Mr. Vodonick, disrupting the attorney-client relationship. Moreover, as past cases have recognized, the fiduciary nature of the relationship between attorney and client will lull the client into inaction even after the client hears about an adverse result. (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1165-1166 [217 Cal.Rptr. 89].) Indeed, in the very letter informing Mrs. Tucker of the adverse consequences in her federal and state actions, Mr. Vodonick made soothing statements about the likelihood of ultimate vindication ..., and as late as November 1990 stated, 'we still ha [ve] not heard anything from the appellate court We deeply want to continue to work for you and believe that you have an excellent case.' How, under these circumstances, Mrs. Tucker was thus to realize she must sue the former partners of this siren is not explained, and we believe it is irreconcilable with her maintenance of the fiduciary relationship with the defendants' former partner. Consequently, tolling for reasons of continuous representation has an 'all for one and one for all' application when one (or more) of several former partners continue to represent the allegedly wronged client."

Beane based its "all for one and one for all" conclusion on two considerations, one factual and the other policy-related. The factual consideration was that, because of Vodonick's ongoing fiduciary relationship with Tucker and his "soothing statements about the likelihood of ultimate vindication" (*Beane v. Paulsen, supra*, [21 Cal.App.4th at p. 99](#)), Tucker could not be expected to realize she had a claim for malpractice and could be excused for not filing an action against Vodonick's former partners. The policy-based consideration was the recognition that Tucker's right to collect from Vodonick's former partners was based on partnership principles of vicarious liability and that the former partners could seek indemnity from the active tortfeasor Vodonick. A suit by the former partners against Vodonick for indemnity would disrupt Vodonick's fiduciary relationship with Tucker. *Beane*, citing the statutory policy of preserving the ongoing relationship with the active tortfeasor, concluded the interest in preserving Tucker's relationship with Vodonick takes precedence over the former partners' interest in being free from stale claims.

We conclude *Beane* should not be applied here. *Beane*'s factual basis-ignorance of the claim because of misleading statements by a fiduciary-is absent here. More importantly, we believe that *Beane*'s emphasis on preserving Tucker's ongoing relationship with Vodonick does not sufficiently recognize the purpose of the continuing-representation tolling of the statute of limitations, and overlooks fundamental tenets of partnership law and the law applicable to waivers of statutes of limitation.

Beane's factual concern was that the ongoing relationship with Vodonick lulled Tucker into inaction because her justifiable reliance on Vodonick's assurances he would restore her lost rights could have created ignorance of her malpractice claim. [FN5] Unlike Tucker's relationship with Vodonick, Crouse's ongoing relationship with Boatwright did not cause her to be ignorant of the malpractice; she consulted independent counsel, who confirmed she had a claim for malpractice. Moreover, Crouse knew by October 1990 that Boatwright could not restore her lost rights because the originally contemplated note-restructuring was irretrievably lost when the agreement resulting in the new note was concluded. The factual basis of *Beane*'s

ruling is not present here.

FN5 Although *Beane* did not use the nomenclature of "ignorance of the claim," its citation to and reliance on [Day v. Rosenthal \(1985\) 170 Cal.App.3d 1125 \[217 Cal.Rptr. 89\]](#) to support its "reliance on fiduciary" analysis convinces us the thrust of this portion of the analysis was based on ignorance of the claim. *Day* specifically concluded that even though a client may become aware of an adverse ruling, the statute of limitations only begins running when the client knows or should know of the essential facts giving rise to a claim for malpractice. *Day* reasoned that when an attorney has an ongoing relationship and assures his client of her ultimate vindication, the fiduciary nature of the relationship permits a client to rely on that advice, and the client's ignorance of the malpractice will be excused. (*Id.* at pp. 1164-1166.)

More importantly, we disagree with *Beane's* policy analysis. Ordinarily, the right to interpose the statute of limitations as a defense is a privilege personal to the defendant, which he may elect to invoke, and his defense may not be waived without his consent by the conduct or agreements of others with whom he was co-obligated. ([Steiner v. Croonquist \(1951\) 108 Cal.App.2d Supp. 895, 898-899 \[238 P.2d 690\]](#) [where debt owed by co-obligors, a waiver of statute of limitations by one co-obligor does not waive defense by other co-obligor]; [Bemer v. Bemer \(1957\) 152 Cal.App.2d 766, 772-773 \[314 P.2d 114\]](#) [husband's waiver of statute of limitations defense does not deprive wife of defense where couple was separated and creditor was aware of separation and wife neither signed waiver nor authorized husband to waive on her behalf].) This principle is ignored by *Beane's* holding that the former partners' right to invoke the statute of limitations defense was waived by the acts of Vodonick even though ordinary partnership principles prevent Vodonick from binding his former partners by agreements entered into or actions taken after dissolution of the partnership. ([Sears v. Starbird \(1889\) 78 Cal. 225, 229 \[20 P. 547\]](#); [Blackmon v. Hale \(1970\) 1 Cal.3d 548, 560 \[83 Cal.Rptr. 194, 463 P.2d 418\]](#); [Williams v. Ely \(1996\) 423 Mass. 467 \[668 N.E.2d 799\]](#).)

Beane departs from a principle of statutes of limitation waiver that a defendant is not bound by a co-obligor's waiver and from a standard principle of partnership law that a former partner may not bind former partners after dissolution. *Beane's* justification for enforcing against the former partners an unconsented-to waiver of the statute of limitations was the necessity to fulfill its perceived purpose of the continuing-representation tolling provision: to benefit the client's interest by preserving undisturbed the client's relationship with his attorney. However, the objective of preserving the client's relationship with the attorney is to give the negligent attorney an opportunity to correct or mitigate his error by continuing to represent the client and avoiding the necessity for an immediate lawsuit. (See Mallen, *Panacea or Pandora's Box? A Statute of Limitations for Lawyers* (1977) 52 State Bar J. 22, 26.) The statutory price for the attorney's availing himself of the continuing-representation benefit is the tolling of the statute of limitations on a malpractice claim against him. The attorney may decline continued representation to preserve the defense, or he may waive the defense by continuing to represent the client.

If, as *Beane* held, the negligent attorney's election to continue the client representation is enforced against his former partners, those former partners pay the statutory price of the tolling of the statute of limitations without any voice in the election *and* without obtaining the statutory benefit of participating in eliminating or minimizing their liability for damages from the negligence. The attorney's election should bind only the attorney himself and those for whom he is authorized to act. His election should not bind parties for whom he is not authorized to act.

We agree with *Beane* that requiring the injured client promptly to sue the former partners may well trigger cross-complaints against the negligent attorney and thereby impede the negligent attorney's ability to remedy or mitigate the damages caused by his error. Although impeding the negligent attorney's opportunity to remedy or mitigate his error is detrimental to him, we believe that this detriment equitably should be borne by the negligent attorney rather than by his former partners. If the attorney who continues to represent the client has liability only vicariously as a former partner of the firm rather than for his own negligence, then *Beane's* concern about disruption of the attorney-client relationship resulting from the client's suit against the former partners and a cross-complaint by former partners against the nonnegligent attorney would not seem applicable. In that situation the filing of a cross-complaint would be unlikely, and if filed we do not see how the attorney-client relationship would be disrupted or how attempted remediation or mitigation of the client's injury would be impeded.

We decline to follow *Beane* and conclude that under the facts of this case the continuing-representation tolling provision of [section 340.6](#), subdivision (a)(2) does not apply to Crouse's claim against BPH. The trial court properly granted BPH's motion for summary judgment against Crouse.

....

Disposition

The summary judgment in favor of Boatwright and Page against Crouse is reversed. Crouse is entitled to costs on appeal in appeal No. D026136. The summary judgment in favor of BPH against Crouse is affirmed. The order granting summary adjudication in favor of BPH on Boatwright's cause of action against BPH for breach of fiduciary duty is affirmed. The summary judgment in favor of BPH on Page's cause of action for equitable indemnity and the orders granting summary adjudication in favor of BPH on Boatwright's causes of action for equitable indemnity, breach of implied contractual duty and statutory indemnity are reversed, and those causes of action are remanded for further proceedings consistent with this opinion. BPH shall recover costs on appeal against Crouse in appeal No. D025143, and Boatwright and Page shall recover costs on appeal against BPH in appeal No. D025143.

Kremer, P. J., and McIntyre, J., concurred.

A petition for a rehearing was denied December 23, 1998, and the petition of respondent Brobeck, Phleger & Harrison for review by the Supreme Court was denied February 17, 1999.