Study J-111 May 23, 2006

First Supplement to Memorandum 2006-17

Statute of Limitations for Legal Malpractice
(Comments of Mark Abelson)

The Commission has received comments from attorney Mark Abelson, who has been representing plaintiffs in legal malpractice cases for twenty-five years. Exhibit pp. 1-4. Mr. Abelson's perspective is quite different from the views expressed in most of the other comments submitted. He gives his opinions on four different points:

(1) The equitable tolling approach originally proposed by the Commission.
(2) The alternative approach in the revised tentative recommendation, in which a statute would expressly authorize a court to stay a legal malpractice case pending resolution of a related underlying proceeding.
(3) The proposal to switch the burden of proof on the time of discovery of legal malpractice.
(4) The proposed deletion of Code of Civil Procedure Section 340.6(b).

His views on each point are presented below, followed by an analysis of how to proceed in light of his comments.

EQUITABLE TOLLING PROVISION

Mr. Abelson says that legal malpractice plaintiffs "oftentimes" find themselves in a situation in which simultaneous litigation is required. Exhibit p. 1. He views this situation as "an overwhelming dilemma." *Id*. In his experience, legal malpractice plaintiffs are "often disheartened" with their experiences with attorneys or the legal system. *Id*. In addition, Mr. Abelson reports that such plaintiffs frequently lack the financial resources to engage in further litigation. *Id*.

According to Mr. Abelson, "the best resolution from the perspective of a potential legal malpractice Plaintiff would have been the equitable tolling provision initially considered by the California Law Revision Commission." *Id*. He says that proposal "would have allowed the potential legal malpractice

Plaintiff the time, resources and energy to be applied to the resolution of the underlying legal matters or issues before having to commence new litigation." *Id*.

Mr. Abelson also believes that the proposed equitable tolling provision would benefit legal malpractice defendants. He states that "many of the potential legal malpractice actions would not need to be filed because resulting appeals or other corrective actions in the underlying case would eliminate the proximate cause or damage component of a potential legal malpractice action." *Id*. at 2. He further explains that "the potential legal malpractice Defendant would be benefited by not having a lawsuit filed against him, not having to incur the time and costs of preparing the defense and/or the tender of the defense to his own insurance carrier, by not bearing the costs of defending or paying his deductible to his carrier, and by not having to report a claim of legal malpractice to his insurance carrier when eventually the underlying matter will not proceed to being an actual claim." *Id*.

Mr. Abelson offers to help develop the equitable tolling approach. He "would be willing to work with members of the legal malpractice defense bar and/or members of the California Law Revision Commission to try to reach an appropriate proposal acceptable to both the plaintiff legal malpractice bar and the defense legal malpractice bar regarding not only the wording but also the applicable circumstances to be applied to an equitable tolling provision." *Id*.

PROPOSED STATUTE AUTHORIZING STAY

Mr. Abelson further believes that "it would be of benefit to have an amendment to CCP § 340.6, stating that either a Plaintiff or a Defendant could apply for a stay of a pending legal malpractice case on the basis that either proximate cause or damage is unascertainable at the time the lawsuit is filed." Exhibit p. 2. He thinks "it would be important to have such an amendment and to have a presumption" that such a motion be granted. *Id*. He does "not perceive any disadvantage to the proposed amendment ...." *Id*. at 3.

He explains that he had difficulty obtaining a stay of a legal malpractice case from a presiding judge of a superior court in the Bay Area. *Id*. at 2. Despite existing case authority for granting a stay, he cautions that "in the future there may be presiding Judges or Judges in charge of their own calendar who without a statutory presumption to grant said motions will deny said motions, either to keep their cases moving on their dockets or because they wish to keep pressure

on litigating counsel and/or parties to settle litigation as the cases get closer to trial and are not being stayed." *Id*.

PROPOSED SWITCH IN BURDEN OF PROOF ON TIME OF DISCOVERY

Mr. Abelson "vigorously oppose[s]" the proposal to make the legal malpractice plaintiff, rather than the attorney defendant, bear the burden of proof regarding when the plaintiff discovered or should have discovered the facts constituting malpractice. Exhibit p. 3. He "do[es] not believe that the law should be structured to give the attorney fiduciaries unnecessary procedural advantages over their clients." *Id*. He thinks "the negative public perception of attorneys would be further reaffirmed" by the proposed reform. *Id*.

In his view, it would be unfair to place the burden on the plaintiff "when it is the attorney who a.) allegedly made an error; b.) has the greater education and familiarity with the law; and c.) is in a much better position to learn of the error." *Id*. He warns that an attorney may know of an error, fail to communicate it to the client, yet might "not face a legal malpractice action" if the client has a burden of establishing the time of discovery of the facts constituting malpractice. *Id*.

PROPOSED DELETION OF SECTION 340.6(B)

Mr. Abelson also "vigorously oppose[s]" the proposal to delete Code of Civil Procedure Section 340.6(b). Exhibit p. 3. That provision states:

> (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

The Commission's proposal to delete this subdivision is based on a critique written by Ronald Mallen, a legal malpractice defense attorney who was involved in drafting Section 340.6. Mr. Mallen says that subdivision (b) is a vestige of a bill draft that did not include a provision tolling the statute of limitations until actual injury occurs. In his view, once such a tolling provision was added, subdivision (b) became unnecessary and should have been deleted. See Mallen, *An Examination of a Statute of Limitations for Lawyers*, 53 Cal. State Bar J. 166, 168 (1978); see also R. Mallen & J. Smith, Legal Malpractice, *Statutes of Limitations* § 22.5, p. 325 & nn. 35-36 (5th ed. 2000); Memorandum 2004-21,

Exhibit p. 31 (comments of Ronald Mallen) (available from the Commission, www.clrc.ca.gov).

When circulated as part of a tentative recommendation, the Commission's proposal to implement Mr. Mallen's suggestion received support from the State Bar Trusts and Estates Section. There was no negative input. See Memorandum 2005-20, p. 18 & Exhibit p. 18 (available from the Commission, www.clrc.ca.gov).

Mr. Abelson reports, however, that in his 25 years of representing legal malpractice plaintiffs, he has not found Section 340.6(b) confusing, nor has he encountered a judge or defense attorney who was confused by the provision. Exhibit p. 3. He considers it "an important and in fact clarifying portion of this limitations statute." *Id*.

He is concerned that elimination of the provision would cause confusion. *Id*. In particular, he asks: "Would its elimination mean that negligent drafting of a testamentary document that does not become effective until five years after its drafting is not actionable because the time for commencement of the legal action exceeds four years and none of the four tolling conditions contained in CCP § 340.6(a) are applicable?" *Id*. Mr. Abelson thinks "a court may find that the legislature intended to do away with the entire tolling of the statute regarding instruments in writing with effective dates [that depend] upon some act or event in the future beyond four years of the drafting" of those instruments. *Id*.

ANALYSIS

Mr. Abelson's comments shed new light on the various reforms proposed by the Commission.

Existence of a Problem Relating to Simultaneous Litigation

First, and perhaps most importantly, Mr. Abelson's comments help to demonstrate that simultaneous litigation of a legal malpractice suit and an underlying proceeding is indeed a real life problem deserving attention. His comments reflect his individual views, not those of an organization, but he is an individual with many years of experience in legal malpractice litigation. His comments reflect his accumulated experience in numerous malpractice cases, not just a single case.

Together with other, similar comments, his input might help overcome the claim that there is no problem relating to simultaneous litigation that needs to be addressed. As yet, however, the only other comments that refer to an actual

negative experience involving simultaneous litigation are from legal malpractice plaintiff Gloria Wolk. See Memorandum 2006-17, Exhibit pp. 10-20 (available from the Commission, www.clrc.ca.gov). Mr. Abelson states that "the attorneys who practice Plaintiff's legal malpractice are not a large enough group to have 'Associations' or 'Organizations' to effectively lobby for or comment upon proposed modifications in current law applicable to the legal malpractice statute of limitations." Exhibit p. 1. It remains to be seen whether the Commission will receive sufficient input like Mr. Abelson's to be able to convincingly demonstrate the existence of a problem requiring legislative attention. **Further comments on this issue would be helpful,** particularly comments from persons or organizations who have not yet commented.

Approach to Simultaneous Litigation

The threshold issue facing the Commission is whether there is sufficient evidence of problems relating to simultaneous litigation to counter the evidence that such problems are nonexistent. If the Commission concludes that there is sufficient evidence of actual problems, the next step would be to decide what approach to take to simultaneous litigation.

Equitable Tolling Provision

Mr. Abelson's positive comments about the previously proposed equitable tolling provision suggest the possibility of turning back to that approach **(Option 2 in Memorandum 2006-17).** There was a lot of criticism of that proposal, however, as described in Memorandum 2006-17 at pages 3 and 10 and Exhibit page 4. Overcoming that criticism would be difficult, and would certainly require revisions of the previous proposal.

If the Commission decides to revisit and try to refine the equitable tolling provision, it should examine the drafting suggestions made by the State Bar Trusts and Estates Section (see Memorandum 2005-20, pp. 6-7 & Exhibit pp. 19-20) and the State Bar Committee on Administration of Justice ("CAJ") (see *id*. at Exhibit pp. 13-17). The Commission should also consider the vagueness concerns raised by Mr. Mallen (see *id*. at 7-8 & Exhibit pp. 2-3), attorney David Gubman (see *id*. at 7 & Exhibit p. 1), the San Diego County Bar Association (see *id*. at 8 & Exhibit p. 5), CAJ (see *id*. at 10-11 & Exhibit pp. 10-12), and attorneys David Evans and Scott Bloom (see Memorandum 2006-17, Exhibit p. 4). The staff will explore these matters in a future memorandum if the Commission decides to go in this direction.

Proposed Statute Authorizing Stay

Alternatively, the Commission could continue to pursue the stay approach proposed in the revised tentative recommendation **(Option 1 in Memorandum 2006-17).** Mr. Abelson's supportive comments are encouraging, but again the opposition is considerable, as detailed at pages 6-10 of Memorandum 2006-17.

If the Commission decides to pursue this alternative, it should look into the drafting suggestions made by CAJ (see *id*. at 9-10 & Exhibit p. 9) and the Association of Defense Counsel of Northern California and Nevada (see *id*. at 8 & Exhibit pp. 6-7). There are also distinctions between the Commission's proposal and the approach described by Mr. Abelson, such as whether to have a presumption in favor of granting a stay. The staff will present these issues in a future memorandum if the Commission decides to go forward with the stay approach.

Abandon the Effort to Address the Simultaneous Litigation Problem

Finally, even if there is solid evidence of problems relating to simultaneous litigation, the Commission should give serious thought to dropping its attempt to address such problems **(Option 3 in Memorandum 2006-17).** The "ain't broke, don't fix it" argument is not the only objection that was raised to its proposed reforms in this area. See Memorandum 2006-17, pp. 3, 6-10 & Exhibit p. 4. It may be futile to develop a proposal that stands a reasonable chance of enactment. Although the Commission has invested resources in this study, it would have to do a lot more work to finalize a proposal and shepherd it through the legislative process, perhaps coming up empty-handed. It might be better for the Commission to spend its resources on other matters.

Memorandum 2006-17 posits several alternative ways of implementing a decision to cease work on simultaneous litigation:

- Finalize and seek enactment of the two proposals the Commission has already developed (i.e., the proposed shift in burden of proof and deletion of Section 340.6(b)) **(Option 3A).**
- Finalize and seek enactment only of the proposal to delete Section 340.6(b) **(Option 3B).**
- Study one or more additional issues before finalizing a proposal **(Option 3C).**

In light of Mr. Abelson's negative comments on the proposed shift in burden of proof and deletion of Section 340.6(b), the staff would like to add another option:

- Stop work on the statute of limitations for legal malpractice **(Option 3D).**

This may be the best option, because every reform the Commission has proposed thus far has encountered resistance from one source or another. It might well be best to just leave Section 340.6 alone, as CAJ has been advocating. See Memorandum 2005-20, Exhibit pp. 8-9; Memorandum 2006-17, Exhibit pp. 8-9. Although the provision may not be perfect, reform may be politically impossible and may entail new problems if enacted, perhaps worse than the existing problems.

Still, it would be more satisfying if the Commission was able to achieve improvements of the provision. New comments might help point the Commission in the right direction, assisting in evaluating the various options. **The Commission continues to encourage input on any aspect of this study.**

Respectfully submitted,

Barbara Gaal
Staff Counsel

FREDERIC CAMPAGNOLI
(1917-2001)
MARK B. ABELSON
FREDERIC A. CAMPAGNOLI

LAW OFFICES OF
CAMPAGNOLI, ABELSON & CAMPAGNOLI
120 MONTGOMERY STREET, SUITE 1100
SAN FRANCISCO, CA 94104

TELEPHONE
(415) 421-1515
FAX (415) 421-2510
EMAIL: Attorneys@caclaw.com

April 26, 2006

VIA FACSIMILE

Barbara Gaal
California Law Revision Commission
400 Middlefield Road, Room D-1
Palo Alto, California 94303

Facsimile: (650) 494-1827

Re:

Dear Ms. Gaal:

Unfortunately the attorneys who practice Plaintiff's legal malpractice are not a large enough group to have "Associations" or "Organizations" to effectively lobby for or comment upon proposed modifications in current law applicable to the legal malpractice statute of limitations.

I should have responded sooner to the various proposals of the California Law Revision Commission, but I hope that my input, albeit tardy, will be heard.

I have been practicing law for thirty years. For the past twenty-five years I have handled Plaintiff legal malpractice cases. I believe that I have credibility with the legal malpractice defense attorneys, and that my views regarding the statute of limitations, based on my experience and thoughts, would be respected by my Co-Plaintiff attorneys, legal malpractice insurers and legal malpractice defense counsel.

In short, I view the simultaneous litigation situation that a Plaintiff oftentimes finds himself to be an overwhelming dilemma. The legal malpractice Plaintiff is often disheartened by his experiences with attorneys and/or the legal system. Oftentimes, the legal malpractice Plaintiff finds himself without the financial resources to engage in continuing lawsuits and/or further legal proceedings.

Certainly, the best resolution from the perspective of a potential legal malpractice Plaintiff would have been the equitable tolling provision initially considered by the California Law Revision Commission. The equitable tolling provision would have allowed the potential legal malpractice Plaintiff the time, resources and energy to be applied to the resolution of the underlying legal matters or issues before having to commence new litigation.

The equitable tolling provision would also have benefited potential legal malpractice Defendants because many of the potential legal malpractice actions would not need to be filed because resulting appeals or other corrective actions in the underlying case would eliminate the proximate cause or damage component of a potential legal malpractice action. Further, the potential legal malpractice Defendant would be benefited by not having a lawsuit filed against him, not having to incur the time and costs of preparing the defense and/or the tender of the defense to his own insurance carrier, by not bearing the costs of defending or paying his deductible to his carrier, and by not having to report a claim of legal malpractice to his insurance carrier when eventually the underlying matter will not proceed to being an actual claim.

I would be willing to work with members of the legal malpractice defense bar and/or members of the California Law Revision Commission to try to reach an appropriate proposal acceptable to both the plaintiff legal malpractice bar and the defense legal malpractice bar regarding not only the wording but also the applicable circumstances to be applied to an equitable tolling provision.

I believe that it would be of benefit to have an amendment to CCP §340.6, stating that either a Plaintiff or a Defendant could apply for a stay of a pending legal malpractice case on the basis that either proximate cause or damage is unascertainable at the time the lawsuit is filed. I believe it would be important to have such an amendment and to have a presumption that said motion should be granted.

Unlike the experience mentioned by the letter from one of the defense counsel associations, I have had experience in which a presiding Judge in one of the Bay Area Superior Courts denied motions to stay actions on the basis that the underlying case may be resolved while the pending legal malpractice case remains on the civil active list and marches towards trial. I have had the experience of a presiding Judge advising me that if proximate cause and/or damage was not then ascertainable at the time the case would be ready to be set for trial, the presiding Judge would then reconsider his disinclination to stay the legal malpractice case.

Even though defense counsel states that there is ample case authority for granting motions to stay, certainly in the future there may be presiding Judges or Judges in charge of their own calendar who without a statutory presumption to grant said motions will deny said motions, either to keep their cases moving on their dockets or because they wish to keep pressure on litigating counsel and/or parties to settle litigation as the cases get closer to trial and are not being stayed.

EX 2

I do not perceive any disadvantage to the proposed amendment for the presumptive granting of a motion to stay that could be filed by or requested by either Plaintiff or Defendant.

I would not opt for option 3A of the options presented by the California Law Revision Commission.

In my twenty-five years experience practicing Plaintiff's legal malpractice litigation I have not found CCP §340.6(b) confusing. I have not experienced a Judge or a defense attorney being confused about said subsection. Rather, I think it is an important and in fact clarifying, portion of this limitations statute.

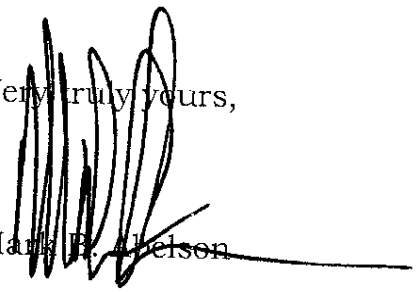
If this subsection is eliminated, I believe that its elimination will cause confusion. Would its elimination mean that negligent drafting of a testamentary document that does not become effective until five years after its drafting is not actionable because the time for commencement of the legal action exceeds four years and none of the four tolling conditions contained in CCP §340.6(a) are applicable? I believe that a court may find that the legislature intended to do away with the entire tolling of the statute regarding instruments in writing with effective dates of which depends upon some act or event in the future beyond four years of the drafting of said written instrument. I vigorously oppose the elimination of this statutory tolling provision.

Finally, I vigorously oppose a proposal to require the Plaintiff, rather than the Defendant attorney to bear the burden of proof regarding when the Plaintiff discovered or through reasonable discovery should have discovered the facts constituting the malpractice. First of all, as is noted in the Law Revision comments, this proposal is very pro attorney. Attorneys are the fiduciaries of their clients. I do not believe that the law should be structured to give the attorney fiduciaries unnecessary procedural advantages over their clients. The negative public perception of attorneys would be further reaffirmed if this limiting Statute of limitations would become even more favorable to the attorneys.

From a practical point of view I think that the burden on the client is an unfair burden when it is the attorney who a.) allegedly made an error; b.) has the greater education and familiarity with the law; and c.) is in a much better position to learn of the error. The attorney may also be in a position of knowing of the error and failing to communicate the error to his client and then not face a legal malpractice action if the client has a burden to prove that through reasonable diligence the client should have discovered the facts constituting malpractice.

Again, I apologize for the tardiness of my comments.

Very truly yours,



Mark B. Abelson

MBA: wew

EX 4