

Second Supplement to Memorandum 2006-17

Statute of Limitations for Legal Malpractice

As discussed at pages 14-15 of Memorandum 2006-17, there is a split of authority on whether the tolling provision for continuous representation under Code of Civil Procedure Section 340.6 applies with respect to an attorney's former law firm and former partners. A recent news article discussing the matter is attached as Exhibit pages 1-2. The staff previously suggested the possibility of studying that area. See Memorandum 2006-17, p. 15. Since then, the California Supreme Court has granted review to consider the matter in *Beal Bank SSB v. Arter & Hadden, LLP* (No. S141131). In light of the Court's decision to grant review, the Commission should **conserve its resources and refrain from studying the area.**

Respectfully submitted,

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Legal Malpractice:

Court Must Decide for Whom Statute Tolls

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In January this year, the California Court of Appeal issued a decision that creates the potential for extended malpractice liability for all law firms and partnerships.



Law Practice

In *Beal Bank v. Arter & Hadden*, 135 Cal.App.4th 643 (2006), review granted (April 19, 2006), the 2nd District Court of Appeal interpreted the continuous-

representation provision of Code of Civil Procedure Section 340.6 as tolling the statute of limitations for legal malpractice not just for an attorney who has continued to represent a client in the matter in which the malpractice liability arose, but also against the firm or partnership in which the attorney was working at the time of the alleged malpractice — even though the attorney has left the firm and taken the client with him. The California Supreme Court has granted review of the decision, and the outcome should be of interest to all practitioners in the state.

Code of Civil Procedure Section 340.6 provides that 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 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. However, Section 340.6 (a)(2) states that the statute will be tolled if “[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.”

Before *Beal Bank*, two prior California appellate court cases had considered the question of whether the continuous-representation tolling provision would apply not just to the individual attorney still representing the client, but also to that attorney’s former law firm or partners, with whom he or she had worked while representing the

client. First came *Beane v. Paulsen*, 21 Cal.App.4th 89 (1993), which answered in the affirmative, and five years later came *Crouse v. Brobeck, Phleger & Harrison*, 67 Cal.App.4th 1509 (1998), which answered in the negative.

In *Beane*, the client brought a malpractice action in April 1991 against her attorney and his two former partners. The former partners argued that the statute of limitations established by Code of Civil Procedure Section 340.6 had expired in September 1990, a year after the client learned of her attorney’s negligence; the continuous-representation provision had not tolled the statute because the partners were no longer in a professional corporation with the client’s attorney. The trial court agreed.

The 3rd District Court of Appeal reversed and held that the continuous-representation provision had tolled the statute of limitations as to the former partners. The continuous-representation rule’s purpose was to “avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error[.]” If the statute was not tolled as to the attorney’s former partners, this would place the client 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.” Moreover, the former partners, if sued, would immediately file counterclaims against the client’s attorney, thus disrupting the attorney-client relationship.

The *Beane* court also wrote 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.” In the case before the court, the client’s attorney “made soothing statements” promising ultimate vindication, so the client could not be expected to know that the clock was running on a possible action against her attorney’s former partners. Therefore, the continuous-representation tolling provision had an “all for one and one for all” application when one of several former partners continued to represent the allegedly wronged client.

The 4th District Court of Appeal expressly declined to follow *Beane* when it decided *Crouse*. The plaintiff, Linda Crouse, filed a malpractice action in 1993 against her attorney, his new firm and his former firm Brobeck, Phleger & Harrison. Brobeck moved for summary judgment against Crouse, arguing that the time for Crouse’s claim against Brobeck had expired in October 1991, a year after she

was advised of her attorney’s negligence; because her attorney had left Brobeck in April 1990, the continuous-representation provision should not toll the statute. The trial court granted the motion.

On appeal, Crouse argued that under *Beane*, her attorney’s continued representation of her on the same matter was sufficient to toll the statute as to Brobeck. The *Crouse* court wrote that the factual consideration in *Beane* — the client’s ignorance of her malpractice claim — was absent in Crouse’s case, but more importantly, the court did not agree with *Beane*’s policy reasoning.

First, the *Beane* holding allowed an attorney to waive his former partners' right to invoke the statute of limitations defense, which ran counter to the principle that such a waiver is personal to a defendant. Such a result also was contrary to "ordinary partnership principles" that prevent a party from binding his former partners by acts taken after dissolution of a partnership.

Further, the objective of preserving the client's relationship with the attorney is to give the attorney the chance to correct his negligent error; the "statutory price" paid by the attorney for this benefit is the tolling of the statute. If the statute is tolled as to the attorney's former partners,

they pay the "statutory price" without receiving the benefit of the opportunity to correct the attorney's negligence.

The court admitted that its holding might trigger cross-complaints against the negligent attorney while the attorney was still representing the client, thus damaging their relationship, but the court wrote that "this detriment equitably should be borne by the negligent attorney rather than by his former partners."

The *Beal Bank* court chose to apply the continuous-representation provision to an attorney's former firm not by praising *Beane* but by burying *Crouse*. Plaintiff *Beal Bank* filed a malpractice action against its current attorney and his current firm, plus his former firm and one of its partners. Once again, if the continuous-representation provision did not apply to the current attorney's former firm, then the statute of limitations would bar those claims. The trial court recognized a conflict between *Beane* and *Crouse*, but chose to follow *Crouse* and sustain the former firm's demurrer.

The 2nd District Court of Appeal reviewed the holdings of both *Beane* and *Crouse*, and then set about a point-by-point refutation of *Crouse*'s reasoning. The *Beal Bank* court wrote that by choosing to continue

to represent a client, an attorney does not "waive" the statute of limitations defense; the defense may still be asserted when sufficient time has passed after the continuing representation ends.

Second, the court pointed out a fact specific to the case before it: the negligence occurred while the attorney was with the firm, not after. Therefore, "it cannot be said that the attorney's later acts, including the continued representation, created the liability."

Next the court took on *Crouse*'s concern that if the statute was tolled as to the former firm, the firm would pay a "statutory price" without getting a chance to correct or mitigate the negligent attorney's actions. According to *Beal Bank*, "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."

The court also criticized the *Crouse* decision's justification of the disruption of the attorney-client relationship. Again relying on case-specific facts, the *Beal Bank* court wrote that the bank was suing the attorney's former firm not just for acts for which the firm was

vicariously liable, but for alleged negligence committed by the firm. Therefore equity did not favor forcing only the current attorney to suffer a disruption to his relationship with his client. Moreover, such a disruption would affect not just the attorney but the client as well.

Lastly, the *Beal Bank* court disagreed with the former firm's contention that its holding would "extend ad infinitum the time for filing legal malpractice cases" and render malpractice insurance unobtainable. The court wrote that the limitations period is tolled only while the attorney continues to represent the client in the same specific matter in which the alleged malpractice occurred.

The *Beal Bank* decision, if affirmed by the California Supreme Court, carries serious implications for law firms and partnerships. One could imagine a particular matter lasting many years after the responsible attorney leaves her original firm, extending liability for the firm along with it. *Beal Bank* promises that a statute of limitations defense is not waived, only delayed, but a firm contemplating a former partner who took a client with him may find cold comfort in the idea that on some faraway day, the statute will eventually kick in.

Similarly, though the negligent attorney's later acts during his continued representation may not have "created the liability," as *Beal Bank* put it, the later acts will certainly deprive the former partners of a shield from that liability. Even if, as *Beal Bank* points out, the negligent attorney has a chance to correct or mitigate his error during continued representation, thus sparing his former partners from a lawsuit, what firm would prefer that potential benefit to the more certain benefit of a definite, untolled statute of limitations?

The California Supreme Court could potentially examine all three of these cases and craft a test to determine whether circumstances in an individual case favor application of the continuous-representation provision to a lawyer's former firm or partners. Whether the court will create such a test or endorse the reasoning of *Crouse* or *Beal Bank* remains to be seen, but law firms would be wise to take note of the result.

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