#J-111

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Statute of Limitations for Legal Malpractice

November 2004

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **March 31, 2005.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

Disputes over the proper interpretation of the statute of limitations for legal malpractice (Code Civ. Proc. § 340.6) are common. To reduce the number of disputes and improve the functioning of the statute, the Law Revision Commission proposes to:

- Add a new tolling provision, 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.
- 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.
- Delete an unnecessary and confusing 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."

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

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STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE

The statute of limitations for legal malpractice — Code of Civil Procedure Section 340.6[1] — has been the focus of numerous, costly disputes. To reduce the number of disputes and improve the functioning of the provision, the Law Revision Commission proposes to:

- Add a new tolling provision to the statute, 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.
- Reallocate the burden of proof regarding when the plaintiff discovered, or through the use of reasonable diligence should have discovered, the facts constituting the malpractice.
- Delete an unnecessary and confusing 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."[2]

STATUTORY REQUIREMENTS

Section 340.6 was enacted in 1977.[3] It establishes alternate one-year and four-year limitations periods for legal malpractice:[4]

> 340.6. (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, or whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
>
> (1) The plaintiff has not sustained actual injury;
>
> (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

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

2. The Commission conducted this study pursuant to 2003 Cal. Stat. res. ch. 92. See also 1999 Cal. Stat. res. ch. 81; Gov't Code § 8293, as amended by 2004 Cal. Stat. ch. 192, § 33 (effective Jan. 1, 2005).

3. 1977 Cal. Stat. ch. 863, § 1. Before this legislation became operative on January 1, 1978, there was no limitation provision specifically directed to legal malpractice. Instead, a legal malpractice case was typically governed by the general provision for torts affecting intangible property (Section 339). See, e.g., Budd v. Nixen, 6 Cal. 3d 195, 199, 491 P.2d 433, 98 Cal. Rptr. 849 (1971); Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 187, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

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

> (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
>
> (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.
>
> (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

The provision codifies the discovery doctrine, under which the limitations period does not begin to run until the client "discovers, or through the use of reasonable diligence should have discovered" the attorney's malpractice.[5] The client must commence the malpractice case within one year from the date of actual or constructive discovery. To preclude endless potential exposure, however, the statute also requires the client to bring the case within four years from the date of the wrongful act or omission.[6]

The alternate limitations periods (one-year-from-discovery and four-years-from-occurrence) are tolled[7] so long as the allegedly negligent attorney continues to represent the client "regarding the specific subject matter in which the alleged

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

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

7. The concept of tolling is distinct from the concept of delayed accrual. A rule of delayed accrual postpones the accrual of a cause of action until a specified event occurs (e.g., until discovery of the facts constituting malpractice). Once the cause of action accrues, the statute of limitations begins to run. A tolling provision may suspend (temporarily stop) the running of the statute of limitations after a cause of action has accrued. See Cuadra v. Millan, 17 Cal. 4th 855, 864-65 & n.11, 952 P.2d 704, 72 Cal. Rptr. 2d 687 (1998).

wrongful act or omission occurred."[8] Even after the client replaces the attorney, the limitations periods are tolled until the client sustains actual injury.[9]

ACTUAL INJURY AND SIMULTANEOUS LITIGATION

The concepts of actual injury and simultaneous litigation are distinct but interrelated. Some background on these concepts will help explain the Commission's proposal to add a new tolling provision to the statute of limitations for legal malpractice.

Actual Injury

The tolling provision for actual injury stems from the elementary principle of tort law that damages are an essential element of a cause of action for negligence. Until an attorney's negligence harms a client, the client cannot state a cause of action.[10] It would be unfair to start the running of the limitations period before the client is able to bring suit.

Much litigation has focused on what constitutes actual injury within the meaning of the statute. It is clear that the mere fact of sustaining injury constitutes actual injury and is sufficient to end the tolling period.[11] It is not necessary that the injury

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8. Section 340.6(a)(2); see, e.g., Crouse v. Brobeck, Phleger & Harrison, 67 Cal. App. 4th 1509, 1535, 80 Cal. Rptr. 2d 94 (1998) ("The tolling provision of section 340.6, subdivision (a)(2) applies to both the one-year and the four-year time limitations."). See also Gold v. Weissman, 114 Cal. App. 4th 1195, 8 Cal. Rptr. 3d 480 (2004); Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort, 91 Cal. App. 4th 875, 110 Cal. Rptr. 2d 877 (2001); Kulesa v. Castleberry, 47 Cal. App. 4th 103, 54 Cal. Rptr. 2d 669 (1996); Worthington v. Rusconi, 29 Cal. App. 4th 1488, 35 Cal. Rptr. 2d 169 (1994).

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

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

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

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

exceed a threshold amount[12] or that the total amount of injury from the malpractice be calculable.[13] The critical inquiry is whether the plaintiff has been harmed by the malpractice and thus can claim damages.

Difficulties arise, however, in determining whether the fact of injury is sufficiently well-established to constitute actual injury. Consider, for instance, an attorney's failure to timely file a claim on behalf of a client. It could be argued that actual injury occurs when the attorney misses the statute of limitations, diminishing the value of the client's claim. It could also be argued that actual injury does not occur until the client learns of the problem and incurs fees seeking advice about it. Alternatively, one could say that actual injury occurs even later — when the client's adversary asserts the statute of limitations as a defense, when the trial court enters judgment against the client based on the statute of limitations, or when the client loses on appeal and has no further right of review.[14]

The California Supreme Court has repeatedly considered what constitutes actual injury within the meaning of Section 340.6.[15] At first, the Court took the position that actual injury occurs when a proceeding that is the basis for a malpractice case ("an underlying proceeding") is terminated in the trial court or other initial tribunal. For example, the Court ruled that if an attorney files a lawsuit for a client but fails to prosecute it, actual injury occurs when the trial court dismisses the

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

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

14. This type of issue can arise not only when an attorney commits malpractice in conducting litigation, but also when an attorney mishandles a business transaction in a manner that could lead to or adversely affect the outcome of pending or future litigation. For example, if an attorney negligently fails to obtain a borrower's signature on a security agreement for a promissory note, it is debatable whether actual injury occurs at that time, or not until the borrower fails to pay on the promissory note and the lender is unable to enforce the security agreement due to the lack of the borrower's signature. It is hard to identify the point at which it becomes sufficiently clear that the lender cannot enforce the security agreement and this circumstance has resulted in injury to the lender.

15. See Coscia v. McKenna & Cuneo, 25 Cal. 4th 1194, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001); *Jordache*, 18 Cal. 4th 739; *Adams*, 11 Cal. 4th 581; ITT Small Business Finance Corp. v. Niles, 9 Cal. 4th 245, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994); *Laird*, 2 Cal. 4th 606. Numerous court of appeal decisions also focus on what constitutes actual injury within the meaning of Section 340.6. See, e.g., Village Nurseries, L.P. v. Greenbaum, 101 Cal. App. 4th 26, 123 Cal. Rptr. 2d 555 (2002); *Sindell*, 54 Cal. App. 4th 1457; Moss v. Stockdale, Peckham & Werner, 47 Cal. App. 4th 494, 54 Cal. Rptr. 2d 805 (1996); Marshall v. Gibson, Dunn & Crutcher, 37 Cal. App. 4th 1397, 44 Cal. Rptr. 2d 339 (1995).

For a decision addressing the issue of actual injury in the context of accounting malpractice, see Int'l Engine Parts v. Fedderson & Co., 9 Cal. 4th 606, 608, 888 P.2d 1279, 38 Cal. Rptr. 2d 150 (1995) (actual injury with regard to accountant's negligent preparation of tax return occurs when tax deficiency is assessed).

lawsuit for lack of prosecution.[16] The Court rejected the notion that actual injury does not occur until an appeal from the dismissal is resolved.[17] Similarly, the Court concluded that if an attorney prepares inadequate loan documentation, actual injury occurs when a legal proceeding concerning the loan documentation settles on terms unfavorable to the client.[18] The Court was unconvinced that actual injury occurs earlier, when the client first incurs legal fees in the underlying proceeding.[19]

In more recent cases, the Court has taken a different approach in determining when actual injury occurred. Instead of focusing on termination of the underlying proceeding, it has emphasized the need for particularized assessment of the facts and circumstances of each case. For example, the Court remanded a malpractice case that was based on an attorney's failure to file a client's claim within the applicable statute of limitations. A plurality explained that the lower court should determine "the point at which the fact of damage became palpable and definite even if the amount remained uncertain, taking into consideration all relevant circumstances."[20] Similarly, in a malpractice case based on a law firm's failure to advise its client regarding insurance coverage, the Court determined that the client sustained actual injury *before* settlement of the insurance coverage litigation, because it incurred extra expenses in that litigation due to the malpractice.[21] The Court rejected the concept of focusing on termination of the underlying

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16. See *Laird*, 2 Cal. 4th at 608 ("[T]he limitations period of section 340.6 commences when a client *suffers an adverse judgment or order of dismissal in the underlying action* on which the malpractice action is based.") (emphasis in original).

17. *Id*. at 614-15. Justice Mosk took the position that actual injury does not occur and the limitations period does not begin to run until the appeal is resolved. *Id*. at 621-28 (Mosk, J., dissenting). He reiterated that view in *ITT*, 9 Cal. 4th at 258 (Mosk, J., concurring).

18. See *ITT*, 9 Cal. 4th at 258 ("[I]n transactional legal malpractice cases, when the adequacy of the documentation is the subject of dispute, an action for attorney malpractice accrues *on entry of adverse judgment, settlement, or dismissal of the underlying action*.") (emphasis added).

19. See *id*. at 248, 251. Justice Kennard took the position that actual injury may occur well before an underlying action is resolved by an adverse judgment or settlement. See *id*. at 260 (Kennard, J., dissenting).

20. *Adams*, 11 Cal. 4th at 593. Justice Kennard concurred, emphasizing some points and stating certain qualifications. *Id*. at 601-04 (Kennard, J., concurring). Three justices dissented, adhering to the notion that actual injury does not occur until the underlying action is resolved, at least by the trial court. *Id*. at 604-09 (Lucas, C.J., dissenting).

21. Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 743-44, 764-65, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998). The Court endorsed four principles: "(1) determining actual injury is predominately a factual inquiry; (2) actual injury may occur without any prior adjudication, judgment, or settlement; (3) nominal damages, speculative harm, and the mere threat of future harm are not actual injury; and (4) the relevant consideration is the fact of damage, not the amount." *Id*. at 743.

In adopting this approach, the Court relied heavily on an analysis of the legislative history. *Id*. at 748-51. The Court also discussed some policy considerations, but it declined to balance the competing interests because that is a legislative and not a judicial function. *See id*. at 756 ("[S]ection 340.6 reflects the balance the Legislature struck between a plaintiff's interest in pursuing a meritorious claim and the public policy interests in prompt assertion of known claims. The courts may not shift that balance by devising expedients that extend or toll the limitations period."); see also *id.* at 757 ("Whatever the merits of these policies in other settings, the legislative scheme embodied in section 340.6 allocates their relative weight in legal malpractice actions.").

proceeding.[22] Likewise, in a case alleging malpractice by counsel for a criminal defendant, the Court made clear that a criminal defendant could sustain actual injury from malpractice *before* obtaining postconviction exoneration.[23]

Simultaneous Litigation

Because actual injury under Section 340.6 can occur before the trial court or other initial tribunal resolves an underlying proceeding, it may be necessary to commence a malpractice case while the underlying proceeding is still pending in the initial tribunal.

Early assertion of the malpractice claim serves the chief purposes of a statute of limitation. It helps to ensure that the claim is litigated when evidence is accessible, memories are fresh, and witnesses are available.[24] It also promotes the interest in repose, the need for a measure of certainty and stability in conducting one's affairs.[25] The attorney is promptly alerted to the claim and thus can take it into account in making decisions, instead of being surprised by it long after the alleged malpractice incident.[26]

But simultaneous litigation of a malpractice case and an underlying proceeding also entails serious problems. These include (1) the burden of simultaneously

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22. *Id.* at 764. The Court expressly overruled *ITT*, commenting that the "broad, categorical rule" advanced in that decision "cannot be reconciled with the particularized factual inquiry required to determine actual injury under section 340.6 …." *Id*. at 763. The Court also interpreted *Laird* to mean merely that actual harm occurs *no later than* termination of the underlying action at the trial level. See *id.* at 762.

Chief Justice George and Justice Mosk dissented, reiterating their preference for a bright line approach to actual injury. See *id.* at 766-67 (George, C.J., dissenting); *id*. at 767-69 (Mosk, J., dissenting).

23. Coscia v. McKenna & Cuneo, 25 Cal. 4th 1194, 1210, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001). The Court "decline[d] to adopt the legal fiction that an innocent person convicted of a crime suffer[s] no actual injury until he or she [is] exonerated through postconviction relief." *Id*.

The Court acknowledged that this approach means the statute of limitations for a criminal malpractice claim can expire before the client obtains postconviction exoneration, a necessary element of such a claim. *Id*. The Court explained that (1) to preserve the claim, the client must timely file the malpractice case, even though the client cannot yet show postconviction exoneration, and (2) the court in which the malpractice case is filed should stay the case while the client "timely and diligently pursues postconviction remedies." *Id*. at 1210-11.

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

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

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

litigating multiple cases, (2) the possibility of inconsistent positions or results, (3) the potential for undue harm from waiver of privileges in pursuing the malpractice case, and (4) adverse impacts on judicial economy, litigation expenses, and the cost of malpractice insurance.

Burden of Simultaneously Pursuing Multiple Cases

Conducting simultaneous litigation is a significant burden on clients.[27] Prosecuting or defending a lawsuit is expensive, time-consuming, and emotionally draining. For some clients, the burden of simultaneously litigating a malpractice case and an underlying proceeding may be prohibitive.[28]

Inconsistent Positions

Simultaneous litigation of a malpractice case and an underlying proceeding may force a client to simultaneously take inconsistent positions. Suppose, for instance, that it is debatable whether an attorney timely filed a proceeding on behalf of a client.[29] If the client sues the attorney for malpractice before resolution of the underlying proceeding, the client may have to (1) show the attorney's timeliness in the underlying proceeding, while at the same time (2) prove the attorney's untimeliness in the malpractice case.[30] The result may be inconsistent verdicts or application of collateral estoppel in a manner harmful to the client.[31] In addition,

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

28. Ochoa & Wistrich, *supra* note 24, at 21-22. As a court explained in a similar context:

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

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

29. This could occur, for example, if there is a dispute over application of Code of Civil Procedure Section 351, which tolls limitations periods when the defendant is out of state.

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

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

31. *Sirott*, 6 Cal. App. 4th at 934 (Johnson, J., dissenting); Ochoa & Wistrich, *supra* note 24, at 20-21.

respect for the legal system is undermined when a litigant is compelled to take inconsistent positions before different decisionmakers.[32]

Waiver of Lawyer-Client or Work Product Privilege

Simultaneous litigation of a malpractice case and an underlying proceeding may result in an unduly prejudicial waiver of the lawyer-client or work product privilege.[33] To establish malpractice, the client may need to disclose the attorney's work product or confidential communications with the attorney. But such a disclosure may waive the work product or lawyer-client privilege, giving the opposing party in the underlying proceeding access to information that would otherwise be privileged. This may prejudice the client's case.[34] A carefully drafted protective order may mitigate the problem,[35] but obtaining an effective protective order is neither inexpensive nor certain, so a danger of prejudice remains.

Judicial Economy, Litigation Expenses, and Malpractice Premiums

Often, resolution of an underlying proceeding may render a malpractice case unnecessary.[36] For example, when an attorney misses the statute of limitations, the other side may never realize that the lawsuit was untimely.[37]

Forcing a client to file a malpractice claim without awaiting the outcome of an underlying proceeding may thus waste judicial resources.[38] By clogging court

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

33. Ochoa & Wistrich, *supra* note 24, at 21.

34. *Id*.

35. See Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 758, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998).

36. Ochoa & Wistrich, *supra* note 24, at 22-23; see ITT Small Business Finance Corp. v. Niles, 9 Cal. 4th 245, 257, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994) (had client prevailed in adversary proceeding, malpractice action would have been unnecessary).

37. As one court explained,

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

Pleasant v. Celli, 18 Cal. App. 4th 841, 850, 22 Cal. Rptr. 2d 663 (1993) (emphasis in original).

If the underlying suit is settled, rather than decided on the merits, the impact of the attorney's error may not be totally clear. *Jordache*, 18 Cal. 4th at 754-55. Many different factors can influence the decision to settle a suit. *Id*. Nonetheless, the amount of a settlement likely will shed some light on the impact of the malpractice. For instance, if a client receives a large settlement in a suit that the attorney filed late, the late filing probably did not adversely affect the client's recovery.

38. See, e.g., *Jordache*, 18 Cal. 4th at 769 (Mosk, J., dissenting); Adams v. Paul, 11 Cal. 4th 581, 605, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995) (Lucas, C.J., dissenting); Laird v. Blacker, 2 Cal. 4th 606, 626, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992) (Mosk, J., dissenting); Sirott v. Latts, 6 Cal. App. 4th 923, 934-35, 8 Cal. Rptr. 2d 206 (1992) (Johnson, J., dissenting).

dockets, it can also impede access to justice.[39] Perhaps most significantly, if a client must file a malpractice claim while an underlying proceeding is pending, clients, attorneys, and witnesses may be subjected to the financial and emotional stress of litigation that ultimately proves unnecessary.

Further, the number of malpractice claims will be higher than it would be if the client could refrain from suing counsel until the result of the underlying proceeding was clear.[40] This may drive up malpractice insurance premiums, which in turn may increase legal fees.

Staying the malpractice case pending resolution of the underlying proceeding may alleviate these concerns to some extent.[41] This is not a complete solution, however, because obtaining a stay consumes judicial resources. It may also be costly to the litigants and the court may be reluctant to grant a stay due to pressure to control its docket.[42]

Uncertainty in Application

A further problem under the current interpretation of the tolling provision for actual injury is uncertainty in applying the statute of limitations for legal malpractice.

Legal malpractice cases involve a wide variety of fact situations, making it difficult to fashion a categorical rule that adequately accounts for all of the differing circumstances.[43] Because determination of actual injury under current law requires a particularized assessment of the facts and circumstances of each case, a court has flexibility to equitably determine how the limitations period applies in the specific case before it.[44]

But the statute as so interpreted fails to provide clear, consistent, guidance as to the running of the limitations period.[45] Ideally, a statute of limitations should state a clear, easy-to-follow rule. Parties should not have to engage in guesswork regarding how the provision applies to their particular facts. It is unproductive for

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

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

41. See, e.g., *Jordache*, 18 Cal. 4th at 758.

42. Ochoa & Wistrich, *supra* note 24, at 65-66; see also Murphy v. Campbell, 41 Tex. Sup. Ct. J. 193, 964 S.W.2d 265, 275 (1997) (Spector, J., dissenting) (option of stay is overly burdensome on clients); *id*. at 276 (Abbott, J., dissenting) ("While the Court states that taxpayers can file a malpractice action and then abate the action until the tax suit is resolved, such a hurry-up-and-wait approach is contrary to our efforts to expedite the litigation process.").

43. *Jordache*, 18 Cal. 4th at 764; *Adams*, 11 Cal. 4th at 588-89; Foxborough v. Van Atta, 26 Cal. App. 4th 217, 225-26, 31 Cal. Rptr. 2d 525 (1994).

44. *Jordache*, 18 Cal. 4th at 764.

45. *Id*. at 767 (George, C.J., dissenting); *id.* at 769 (Mosk, J., dissenting).

parties to incur substantial sums debating about whether a malpractice suit was timely, rather than addressing the merits of the suit.[46] It is also burdensome on the courts and therefore on the general public to have to resolve such disputes. A bright line approach, such as a rule focusing on termination of an underlying proceeding, may not yield the perfect result in all situations. Occasional inequity may be less of a harm, however, than uncertainty in all cases and likely inconsistency in application.[47]

A Proposed New Tolling Provision

The Law Revision Commission proposes to directly address the problems created by simultaneously litigating a malpractice case and an underlying proceeding. This would be achieved by adding a new tolling provision to Section 340.6.[48]

The proposed tolling provision would apply when an attorney's liability for malpractice may depend on the outcome of a pending or reasonably foreseeable civil or criminal action, administrative adjudication, arbitration, tax audit, or other proceeding affecting the client's rights or obligations. The provision would toll the malpractice limitations periods until the underlying proceeding is resolved.

Requirements for Application of the Proposed Tolling Provision

The Commission recognizes that under the proposed tolling provision considerable time might elapse between an alleged malpractice incident and filing

46. Finlayson v. Sanbrook, 10 Cal. App. 4th 1436, 1442, 13 Cal. Rptr. 2d 406 (1992).

47. Int'l Engine Parts, Inc. v. Fedderson & Co., 9 Cal. 4th 606, 621-22, 888 P.2d 1279, 38 Cal. Rptr. 2d 150 (1995).

48. The Commission considered the alternative of statutorily redefining actual injury. For example, Section 340.6 could be amended to make clear that when an attorney's liability for legal malpractice potentially depends on the outcome of an underlying lawsuit or other proceeding, actual injury does not occur until that proceeding is resolved by the trial court or other initial tribunal.

In some cases, however, such an approach may put the court in an awkward position. Although there are sound policy justifications for not requiring the client to sue for malpractice until the underlying proceeding is resolved, as a matter of semantics it is difficult to explain that actual injury has not yet occurred when a client has already spent large sums or even been incarcerated as an apparent consequence of an attorney's actions. These semantic difficulties might also impede recovery for losses incurred before the underlying proceeding is resolved. See Coscia v. McKenna & Cuneo, 25 Cal. 4th 1194, 1210, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001) ("[W]e decline to adopt the legal fiction that an innocent person convicted of a crime suffered no actual injury until he or she was exonerated through postconviction relief."); *Int'l Engine Parts*, 9 Cal. 4th at 626-27 (Kennard, J., dissenting) (IRS audit triggered by accountant's negligent preparation of tax returns may result in no assessment of deficiency, yet client may incur massive expenses and permanent loss of tax benefits, making it incorrect to say issue of actual harm is contingent on outcome of audit); ITT Small Business Finance Corp. v. Niles, 9 Cal. 4th 245, 259, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994) (Kennard, J., dissenting) ("[I]t defies common sense to hold ... that a client has not sustained 'actual injury' even though the client has paid thousands, perhaps hundreds of thousands, of dollars because the attorney's malpractice has compelled the client to prosecute or defend third party litigation."); Fantazia v. County of Stanislaus, 41 Cal. App. 4th 1444, 1452, 49 Cal. Rptr. 2d 182 (1996) ("[T]he limitations period of section 340.6 commenced to run at the latest on the date when appellant's sentence to prison in the underlying case was executed.").

of a malpractice claim. It is important to be sensitive to the interests in preventing deterioration of evidence[49] and affording repose.[50]

To accommodate those interests, the Commission recommends that the proposed tolling provision be subject to three requirements drawn from the doctrine of equitable tolling,[51] which courts have developed in other contexts involving issues of simultaneous litigation.[52] In particular, tolling under the proposed provision would occur only if the following requirements are met:

(1) The client gives the attorney reasonable notice of the potential malpractice case.

(2) The attorney is not unreasonably prejudiced in gathering evidence to defend that case.

(3) The client acts reasonably and in good faith.[53]

Because tolling would be conditioned on timely notice and lack of prejudice to the attorney, both the attorney and the client would be assured of an opportunity to gather and preserve evidence relating to the malpractice claim while it is fresh.[54]

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49. See *supra* note 24 and accompanying text.

50. See *supra* notes 25-26 and accompanying text.

51. For a detailed discussion of the advantages of equitable tolling in the context of legal malpractice, see Ochoa & Wistrich, *supra* note 24 (especially pp. 53-54, 59, 79).

The courts have not applied the doctrine of equitable tolling in the context of legal malpractice, because Section 340.6 states that "in no event" shall the time for commencing a legal malpractice claim be more than four years except under the circumstances enumerated in the statute. Gordon v. Law Offices of Aguirre & Meyer, 70 Cal. App. 4th 972, 974, 83 Cal. Rptr. 2d 119 (1999) ("[W]e hold that section 340.6 is not subject to equitable tolling; rather, the Legislature intended the statute's explicit tolling provisions to be exclusive."); see also People ex rel. Dep't of Corporations v. SpeeDee Oil Change Systems, Inc., 95 Cal. App. 4th 709, 725, 116 Cal. Rptr. 2d 497 (2002); Leasequip, Inc. v. Dapeer, 103 Cal. App. 4th 394, 406, 126 Cal. Rptr. 2d 782 (2002).

52. See, e.g., Lambert v. Commonwealth Land Title Ins. Co., 53 Cal. 3d 1072, 1078, 811 P.2d 737, 282 Cal. Rptr. 445 (1991) (claim against title insurer accrues when insurer refuses to defend title, but limitations period is tolled until underlying title action is resolved); Prudential-LMI Commercial Ins. v. Superior Court, 51 Cal. 3d 674, 687-93, 798 P.2d 1230, 274 Cal. Rptr. 387 (1990) (period to sue on casualty policy begins at time of loss but is tolled from timely notice of loss until insurer denies claim); Addison v. State, 21 Cal. 3d 313, 317, 578 P.2d 941, 146 Cal. Rptr. 224 (1978) (deadline for state court suit against public agency was tolled during pendency of related federal suit); Elkins v. Derby, 12 Cal. 3d 410, 417, 525 P.2d 81, 115 Cal. Rptr. 641 (1974) (limitations period for personal injury case was tolled while plaintiff pursued workers' compensation remedy in good faith); Bollinger v. National Fire Ins. Co., 25 Cal. 2d 399, 411, 154 P.2d 399 (1944) (period to sue on fire insurance policy was tolled during pendency of timely prior case).

53. See proposed Section 340.6(c)(5) *infra*. For a leading example of an equitable tolling case imposing similar requirements, see *Addison*, 21 Cal. 3d at 319. See also McMahon v. Albany Unified School Dist., 104 Cal. App. 4th 1275, 1292-93, 129 Cal. Rptr. 2d 184 (2003), *review denied* (March 19, 2003), *cert. denied*, __ U.S. __, 124 S.Ct. 155 (2003); Waterman Convalescent Hosp., Inc. v. State Dep't of Health Services, 101 Cal. App. 4th 1433, 1441, 125 Cal. Rptr. 2d 168 (2002); Mitchell v. Frank R. Howard Memorial Hosp., 6 Cal. App. 4th 1396, 1406-08, 8 Cal. Rptr. 2d 521 (1992); Ochoa & Wistrich, *supra* note 24, at 51-53.

54. Ochoa & Wistrich, *supra* note 24, at 23; Bauman, *The Statute of Limitations for Legal Malpractice in Texas*, 44 Baylor L. Rev. 425, 452 (1992); see also Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 760, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998); Worton v. Worton, 234 Cal. App. 3d 1638, 286 Cal. Rptr. 410 (1991).

The notice requirement would also serve the interest in repose by enabling the attorney to take the possible claim into account in developing business and personal plans.

Impact of an Appeal on Application of the Proposed Tolling Provision

The Commission makes no recommendation on whether tolling pursuant to the proposed provision should continue until the underlying proceeding is fully resolved, including completion of any appeal or other review process, or should end when the trial court or other initial tribunal renders its decision. The Commission specifically solicits comment on which of the following approaches is preferable:

Alternative A: Tolling Until Underlying Proceeding Final. Tolling under the proposed law would continue during the pendency of an appeal in the underlying proceeding or other review process. Until the underlying proceeding is fully and finally resolved, it remains uncertain whether malpractice litigation will be necessary. Requiring a client to file a malpractice case while uncertainty exists would not promote judicial economy.[55] It might also entail the other problems associated with simultaneous litigation.[56] The better approach is to allow a client to wait until the outcome of the underlying proceeding is certain before deciding whether to sue for malpractice.[57] This delay will not lead to serious difficulties of proof, because the proposed law would require the client to give the attorney reasonable notice of the possible malpractice claim, the attorney must not have been prejudiced in gathering evidence to defend that claim, and legal malpractice is often memorialized in a pleading, transcript, or other written record.[58]

Alternative B: Tolling Until Initial Decision in Underlying Proceeding. Tolling under the proposed law would not continue during the pendency of an appeal or other review process in the underlying proceeding.[59] It is true that the outcome of

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55. Laird v. Blacker, 2 Cal. 4th 606, 626, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992) (Mosk, J., dissenting) ("The status of the malpractice claim is uncertain until the appeal in the underlying case is resolved, because if it is ultimately decided in the client's favor the malpractice suit may well become moot for lack of damages.").

56. See "Simultaneous Litigation" *supra*.

57. *Laird*, 2 Cal. 4th at 621-28 (Mosk, J., dissenting).

58. *Id*. at 627 (Mosk, J., dissenting); see also Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 193 n.33, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

59. A majority of the jurisdictions that have considered this point have similarly concluded that tolling should end when the trial court or other initial tribunal renders its decision, regardless of whether an appeal is taken. Dvorak, *Idaho's Statute of Limitations and Accrual of Legal Malpractice Causes of Action: Sorry, But Your Case Was Over Before It Began*, 31 Idaho L. Rev. 231, 255 (1994); see, e.g., *Laird*, 2 Cal. 4th at 609 (appeal); Pompilio v. Kosmo, Cho & Brown, 39 Cal. App. 4th 1324, 46 Cal. Rptr. 2d 409 (1995) (attempt to set aside settlement agreement); Safine v. Sinnott, 15 Cal. App. 4th 614,, 19 Cal. Rptr. 2d 601 (1993) (attempt to obtain corrected judgment in trial court); see also Beesley v. Van Doren, 873 P.2d 1280 (Alaska 1994); Brunacini v. Kavanagh, 117 N.M. 122, 869 P.2d 821 (N.M. 1994); but see Int'l Engine Parts, Inc. v. Fedderson & Co., 9 Cal. 4th 606, 623, 888 P.2d 1279, 38 Cal. Rptr. 2d 150 (1995) (Mosk, J., concurring) (tolling should not be deemed to occur until taxpayer has exhausted administrative and judicial remedies); *Laird*, 2 Cal. 4th at 559-64 (Mosk, J., dissenting) (tolling should continue through appeal);

the underlying proceeding remains to some extent uncertain pending determination of an appeal.[60] The appeal process can be lengthy, however, so a malpractice claim may be very stale by the time the appeal is finally resolved.[61] Although each side can take steps to preserve evidence relating to the alleged malpractice pending resolution of the appeal, this may not fully safeguard against deterioration of the evidence. Because most decisions are affirmed,[62] this risk outweighs the benefits of awaiting the appellate outcome. In addition, if the circumstances warrant, the court or other tribunal can stay the malpractice case pending the outcome of the appeal or other effort to reverse the initial determination. Alternatively, the potential parties can enter into a tolling agreement, making it unnecessary to file the malpractice case until the appeal is resolved.[63]

Advantages of the Proposed Tolling Provision

The proposed tolling provision would provide a bright-line rule keyed to termination of the underlying proceeding, rather than an ill-defined earlier point in the litigation. Application of the statute of limitations for legal malpractice would not be as flexible as it is now.[64] By giving assurance that a malpractice claim need not be filed until the underlying proceeding is terminated, the proposed provision would promote certainty and consistency in applying the statute.[65] That would reduce the number of disputes over its application, conserving judicial resources and decreasing litigation expenses.[66]

Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 60 U.S.L.W. 2435 (Tex. 1991) (same); Semenza v. Nevada Medical Liability Ins. Co., 765 P.2d 184 (Nev. 1988) (same); Amfac Distribution Corp. v. Miller, 673 P.2d 792 (Ariz. 1983) (same). In Murphy v. Campbell, 41 Tex. Sup. Ct. J. 193, 964 S.W.2d 265 (1997), the Texas Supreme Court appears to have limited tolling during the appellate process to situations in which the allegedly negligent attorney continues to represent the client in the appeal.

60. *Int'l Engine Parts*, 9 Cal. 4th at 622-23 (Mosk, J., concurring).

61. Ochoa & Wistrich, *supra* note 24, at 23; see also *Laird*, 2 Cal. 4th at 618 (tolling pending appeal would undermine legislative goal of resolving cases while evidence is fresh, witnesses are available, and memories have not faded).

62. *Laird*, 2 Cal. 4th at 617; Ochoa & Wistrich, *supra* note 24, at 24.

63. According to legal malpractice expert Ronald Mallen,

> most lawyers are willing to stipulate to toll a statute of limitations on the hope that the existence or extent of an injury will be minimized or eliminated by subsequent revelation. Lawyers usually prefer that alternative to being named in a lawsuit that must be defended at cost to themselves or their insurers.

Mallen, *Limitations and the Need for "Damages" in Legal Malpractice Actions*, 60 Def. Couns. J. 234, 248 (1993).

64. See "Uncertainty in Application" *supra.*

65. *Id.*

66. In most cases, it would be clear that tolling continued until the underlying proceeding was resolved, making it unnecessary to decide the time of actual injury. In some cases, the proposed provision would not apply (e.g., when there is no underlying proceeding or when the requirements for application of the proposed tolling provision are not met). In those circumstances, it might still be important to determine the time of actual injury in assessing whether the statute has run.

Because a client could wait until the underlying proceeding was resolved before filing a malpractice claim, there would be fewer malpractice claims, which should lower the cost of malpractice insurance and perhaps legal fees.[67] The decrease in malpractice claims would further conserve judicial resources and spare parties the expense and stress of unnecessary litigation.[68]

In addition, a client would no longer be forced to bear the potentially prohibitive burden of simultaneously litigating multiple cases.[69] Further, a client would not have to run the risk of simultaneously taking inconsistent positions, nor would the judicial system be subject to the danger of inconsistent decisions.[70] Tolling of the statute of limitations on a malpractice claim during the pendency of an underlying proceeding would also eliminate the possibility that a client will be unduly prejudiced in the underlying proceeding by waiver of a privilege in the malpractice case.[71] For important policy reasons, as well as other practical advantages,[72] the proposed tolling provision would significantly improve California law.

BURDEN OF PROVING TIME OF DISCOVERY

Under Section 340.6, one of the alternate limitations periods is "one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission...." The statute does not specify which party bears the burden of proof on the time of actual or constructive discovery of the facts constituting the alleged malpractice.[73] The

67. See "Judicial Economy, Litigation Expenses, and Malpractice Premiums" *supra*.

68. *Id.*

69. See "Burden of Simultaneously Pursuing Multiple Cases" *supra*.

70. See "Inconsistent Positions" *supra*.

71. See "Waiver of Lawyer-Client or Work Product Privilege" *supra*.

72. In *Coscia v. McKenna & Cuneo*, 25 Cal. 4th 1194, 1206-11, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001), the Court acknowledged the practical problem that the statute of limitations for a criminal malpractice claim may expire before the client obtains postconviction exoneration, a necessary element of the malpractice claim. The Court suggested a means of addressing that problem, which may not be wholly satisfactory. See *supra* note 23; see also *supra* notes 41-42 and accompanying text.

If the proposed new tolling provision was adopted, however, the problem would rarely arise. So long as the potential plaintiff satisfied the requirements for application of the proposed tolling provision, it would no longer be necessary to file a criminal malpractice claim before obtaining postconviction exoneration.

73. The Evidence Code distinguishes between the burden of proof and the burden of producing evidence. The burden of proof means a party's obligation to convince the trier of fact as to the existence or nonexistence of the fact. Evid. Code § 115; see also Evid. Code § 500 Comment. For example, in a criminal case the prosecution must prove each element of the crime beyond a reasonable doubt. The burden of proof never shifts during trial.

The burden of producing evidence means a party's obligation to introduce evidence sufficient to avoid a ruling against that party on the matter in question. Evid. Code § 110. At the start of a trial, this burden will coincide with the burden of proof. Evid. Code § 500 Comment. But the burden of producing evidence may shift during trial. For example, if the party with the initial burden of producing evidence establishes a fact giving rise to a presumption in favor of that party on the issue, the burden of producing evidence shifts to the other party. *Id.*

California Supreme Court has interpreted the statute to place that burden on the defendant attorney. As a matter of policy, the Law Revision Commission proposes to reallocate that burden to the client.

Existing Law on the Burden of Proving the Time of Discovery Under Section 340.6

Samuels v. Mix[74] is the key decision on the burden of proving the time of discovery of legal malpractice. In *Samuels*, the California Supreme Court held that for purposes of applying the one-year limitations period of Section 340.6, *the defendant attorney* bears the burden of proving when the plaintiff discovered, or through the use of reasonable diligence should have discovered, the facts constituting the alleged legal malpractice.[75]

In reaching that decision, the Court relied primarily on the plain language of Section 340.6 and Evidence Code Section 500. In particular, the Court pointed out that Section 340.6 establishes an affirmative defense of the statute of limitations.[76] Under Evidence Code Section 500, the defendant normally bears the burden of proof on an affirmative defense.[77] The Court thus concluded that the defendant attorney bears the burden of proving the time of discovery, because Section 340.6 must be construed according to its plain language and the normal allocation of the burden of proof established by the Legislature.[78]

The defendant sought to avoid that result by contending that the statute merely codifies the common law discovery rule, under which the plaintiff bears the burden of proving the time of discovery of the facts giving rise to a cause of action.[79] But the Court rejected that contention, pointing out that the plain language of the statute differs from the common law discovery rule in significant respects, such as the statutory tolling provisions.[80]

The focus of this discussion is on the burden of proof, not on the burden of producing evidence.

74. 22 Cal. 4th 1, 989 P.2d 701, 91 Cal. Rptr. 2d 273 (1999). The Commission is not aware of any other published California decision addressing this point.

75. *Id*. at 5. Justice Baxter dissented, criticizing the majority's "semantic analysis" of Section 340.6 as "overliteral and exaggerated." *Id*. at 24 (Baxter, J., dissenting).

76. *Id*. at 7.

77. Section 500 states that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

78. *Samuels*, 22 Cal. 4th at 7-8.

79. *Id*. at 9, 10; see, e.g., April Enterprises, Inc. v. KTTV, 147 Cal. App. 3d 805, 832-33, 195 Cal. Rptr. 421 (1983).

80. *Samuels*, 22 Cal. 4th at 12-13; but see *id*. at 23-24 (Baxter, J., dissenting) (legislative history and statutory language demonstrate no intent to deviate from traditional allocation of burden of proof under common law discovery rule).

The Court also rejected the defendant's attempt to draw an analogy between Section 340.6 and the statute of limitations for fraud claims, which requires the plaintiff to prove the time of discovery of the fraud. *Id*. at 14. Noting differences between the two provisions, the Court said that Section 340.6 has to be construed "on its own terms" and according to its plain language, rather than by reference to the statute of limitations for fraud claims. *Id*. at 17.

Policy Analysis

In *Samuels*, the Court identified some policy considerations pertinent to allocation of the burden of proof on the time of discovery of legal malpractice.[81] The Court declined to balance the competing interests, however, explaining that its function was to apply the law according to the balance struck by the Legislature in enacting Section 340.6.[82]

Analysis of the pertinent policy considerations reveals a need to reallocate the burden of proof regarding the time of actual or constructive discovery of legal malpractice.

Guiding Principles

As a general matter, an affirmative defense based on the statute of limitations is neither favored nor disfavored.[83] The competing interests in repose and in disposition on the merits are equally strong.[84] Thus, the field is presumptively level, favoring neither the client nor the defendant attorney.

Basic considerations of fairness are of paramount importance in allocating the burden of proof.[85] There is no one formula to apply in all cases.[86] The proper allocation of the burden of proof is a question of policy and fairness to be decided based on experience in the particular situation under consideration or in analogous situations.[87]

Party Who Benefits From Application of One-Year Limitations Period

Application of the one-year-from-discovery limitations period under Section 340.6 benefits the defendant attorney as the shorter of the alternate limitations periods.[88] Allocating the burden of proof on the time of discovery to the defendant attorney would thus be consistent with the general concept that the party who benefits from a legal doctrine should bear the burden of proving its application.[89]

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81. *Id*. at 17-19 (fairness of allocating burden of proof to party who benefits from application of one-year-from-discovery limitations period); *id*. at 19-20 (access to evidence).

82. *Id*. at 20 (In light of Evidence Code Section 500 and plain language of Section 340.6(a), Court is not free to impose and thus need not strain to discern universally desirable result in terms of public policy).

83. Norgart v. Upjohn Co., 21 Cal. 4th 383, 397, 981 P.2d 79, 87 Cal. Rptr. 2d 453 (1999).

84. *Id*.

85. Evid. Code § 500 Comment; see also Adams v. Murakami, 54 Cal. 3d 105, 119-20, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991); Galanek v. Wismar, 68 Cal. App. 4th 1417, 1425-28, 81 Cal. Rptr. 2d 236 (1999).

86. Evid. Code § 500 Comment, *quoting* 9 Wigmore, Evidence § 2486, at 275 (3d ed. 1940).

87. *Id*.

88. *Samuels*, 22 Cal. 4th at 18.

89. See Civ. Code § 3521 ("He who takes the benefit must bear the burden."); see also *Samuels*, 22 Cal. 4th at 18.

Access to Evidence

Another consideration in allocating the burden of proof is access to evidence regarding when the plaintiff discovered, or should have discovered, the facts constituting the malpractice.

Although the defendant normally bears the burden of proof on an affirmative defense, it is sometimes appropriate to deviate from that rule in the interest of fairness and sound public policy.[90] In deciding whether to deviate from the normal rule, the knowledge of the parties concerning the particular fact and the availability of pertinent evidence to the parties are important factors.[91] Those factors call for reallocation of the normal burden of proof in the context of legal malpractice because evidence regarding when the client discovered or should have discovered the alleged malpractice is peculiarly within the client's access and control.[92]

In particular, discovery of legal malpractice may hinge on consultations between a client and a second attorney.[93] The timing of those conversations is not privileged,[94] but the content of the conversations is. There is no client-litigant exception to the lawyer-client privilege.[95] When a client sues an attorney for malpractice, conversations between the client *and that attorney* are not privileged.[96] But that exception applies only to a communication between the client and the attorney accused of malpractice.[97] It does not abrogate the privilege as to a communication between the client and another lawyer, such as the attorney representing the client in the malpractice suit.[98]

Further, establishing the date when a client first contacted another attorney may not be sufficient to show when the client discovered, or through the use of reasonable diligence should have discovered, the facts constituting the

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90. Evid. Code § 500 Comment; *Samuels*, 22 Cal. 4th at 26 (Baxter, J., dissenting).

91. Evid. Code § 500 Comment. Other relevant factors are "the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact." *Id*. Those factors are not illuminating in allocating the burden of proof on the time of discovery of legal malpractice.

As previously explained, an affirmative defense based on the statute of limitations is neither favored nor disfavored. Thus, neither proof nor disproof of the defense is a more desirable result in terms of public policy. See "Guiding Principles" *supra*.

The probability of the existence or nonexistence of a client's actual or constructive discovery of legal malpractice is likely to vary widely depending on the factual circumstances of each particular case. It is impossible to generalize, making this factor useless in allocating the burden of proof.

92. See generally Thomas v. Lusk, 27 Cal. App. 4th 1709, 1717, 34 Cal. Rptr. 2d 265 (1994) (burden of proof is more appropriately borne by party with greater access to information).

93. *Samuels*, 22 Cal. 4th at 27 (Baxter, J., dissenting) ("[D]iscovery of one lawyer's malpractice will most often arise, as it did here, from the substance of the client's consultations with another attorney.").

94. *Id*. at 20 n.5.

95. Schlumberger, Ltd. v. Superior Court, 115 Cal. App. 3d 386, 393, 171 Cal. Rptr. 413 (1981).

96. Evid. Code § 958.

97. *Schlumberger*, 115 Cal. App. 3d at 392.

98. *Id*.

malpractice. That date may not always be determinative. The client might have been aware of, or on notice of, crucial facts well before then. Conversely, the client might not have learned of the malpractice until after the second attorney investigated the situation to some extent and conveyed key findings to the client.

Thus, at least in some cases, determining when a client knew or should have known the facts constituting legal malpractice may turn on what transpired in privileged conversations between the client and a second attorney.[99] If the burden of proving the time of discovery were on the client, the client might elect to waive the privilege to establish the time of discovery. If the burden of proof is on the defendant attorney, however, the client has no need or incentive to waive the lawyer-client privilege and thereby aid the attorney in establishing a limitations defense.[100]

The defendant attorney is thus put in an untenable position. It is the defendant attorney's burden to establish the time of discovery, yet the critical evidence on that point may be shielded by the lawyer-client privilege.[101] That is a fundamentally unfair predicament because the defendant attorney has no meaningful opportunity to show that the malpractice claim is untimely.[102] In

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99. *Id*. at 27 (Baxter, J., dissenting) (Proof of time of discovery of legal malpractice will often depend on content of interviews between client and second attorney).

100. *Id*. at 28 (Baxter, J., dissenting) ("No lawyer worth his salt" would allow client to waive lawyer-client privilege to aid adversary in establishing limitations defense).

In *Samuels*, the Court said there was no apparent reason why a client would be better able than a defendant attorney to determine when the client *should have discovered* the facts constituting the malpractice. *Id*. at 20. The time of constructive discovery might depend, however, on when a client received a particular document or heard a particular piece of information. As with actual discovery, the client is likely to have better access to information on these points than the defendant attorney, especially if the client received the critical document or information in a privileged context.

For example, suppose a client received but failed to promptly read a letter from a new lawyer, asking the client to check whether a particular document drafted by the client's previous lawyer was signed by the correct person. The client might have had constructive notice of a malpractice claim at the time of receiving that letter, but the letter would be privileged, making it inaccessible to the previous lawyer.

101. The defendant attorney might have access to at least some evidence relevant to the time of discovery of the alleged malpractice. For instance,

- It should not be assumed that a malpractice plaintiff would misrepresent the time of discovery under oath.
- The lawyer-client privilege does not protect the time, date, and names of participants in a confidential communication. In some cases, that information may be sufficient to establish the time of discovery.
- If a plaintiff exposes a significant part of a privileged communication, the privilege is waived.
- If an attorney is contacted by another attorney who seeks malpractice remedies on behalf of a client, that communication is not privileged. That information might help to establish the time of discovery.
- If an attorney provides an expert opinion in the malpractice case, the attorney may be cross-examined to the same extent as any other witness.

Id. at 20 n.5.

These types of evidence might not always be available, however, and more crucial evidence may be inaccessible to the defendant attorney. As the Court acknowledged in *Samuels*, "a residual proof difficulty" may exist. *Id*.

assessing who should bear the burden of proof, this compelling practical consideration overrides the more nebulous principle that the party who benefits from a legal doctrine should bear the burden of proving its application.

Reallocation of the Burden of Proof

In light of the foregoing analysis, the Law Revision Commission proposes to amend Section 340.6 to provide that if a defendant attorney raises the one-year-from-discovery limitations period as an affirmative defense, the plaintiff bears the burden of proof on the time of discovery of the facts constituting the wrongful act or omission.[103] That would be consistent with how the common law discovery rule has been interpreted in other contexts.[104] It would also address concerns regarding access to evidence, ensuring that the party with greater access bears the burden of proof.[105]

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

Section 340.6(b) states that "[i]n 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 effect of this provision is unclear. The Commission is not aware of any cases interpreting it.

The provision was included in the initial version of the bill that became Section 340.6.[106] That version did not include a provision tolling the limitations periods until the client sustains actual injury.[107] It is likely that Section 340.6(b) "was intended to toll the statute in common delayed damage situations, such as claims

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102. See *id*. at 27 (Baxter, J., dissenting) (Defendant attorney in malpractice case "faces unique and unfair difficulties if forced to prove the time of his opponent's actual or constructive discovery."); see also *id*. at 23 (Baxter, J., dissenting) (Because client may invoke lawyer-client privilege, defendant attorney may be "left without any opportunity" to show that malpractice claim was untimely). See generally McDermott, Will & Emery v. Superior Court, 83 Cal. App. 4th 378, 99 Cal. Rptr. 2d 622 (2000) (Shareholder derivative action alleging breach of duty to corporate client cannot go forward because "[w]e simply cannot conceive how an attorney is to mount a defense where, by the very nature of such an action, the attorney is foreclosed, in the absence of any waiver by the corporation, from disclosing the very communications which are alleged to constitute a breach of that duty."); Steiny & Co. v. Cal. Elec. Supply Co., 79 Cal. App. 4th 285, 292, 93 Cal. Rptr. 2d 920 (2000) (Plaintiffs "had the right to stand on the privilege, but not the right to proceed with their claim while at the same time insisting on withholding key evidence from their adversary.").

103. See proposed Section 340.6(b) *infra*.

104. See *supra* notes 79-80 and accompanying text.

105. The proposed rule would not compel the plaintiff to waive the lawyer-client privilege as to communications with a second attorney. It would be left up to the plaintiff to decide whether to waive the privilege to satisfy the burden of proof.

106. See AB 298 (Brown), as introduced, Jan. 25, 1977.

107. *Id.*

by beneficiaries of wills who are not damaged and whose causes of action do not arise until their testators die."[108]

But the provision does not effectuate that intent. A mistake in preparing a will results in an action "for" negligence, not an action "upon" the will.[109] Thus, the provision would not help the beneficiary of a will if the term "upon" were interpreted literally. Moreover, it would not add anything to existing contract law. As legal malpractice expert Ronald Mallen explains, "[o]bviously, where a cause of action is upon a writing which depends upon some future event for its effectiveness, a cause of action cannot accrue, and the limitations period does not start to run until the event occurs."[110] Section 340.6(b) would therefore be meaningless if the term "upon" were interpreted literally.

The provision would also be unnecessary if "upon" were interpreted to mean "relating to" or "concerning" a will. When malpractice occurs in preparing a document that is only effective on occurrence of a future event, the document cannot cause damages until that event occurs.[111] The provision tolling the limitations periods until actual injury occurs (Section 340.6(a)(1)) already protects the plaintiff in those circumstances. Section 340.6(b) would add nothing.

Section 340.6(b) is thus a useless and confusing vestige of the legislative drafting process.[112] The Law Revision Commission proposes that it be repealed.

ESTATE PLANNING MALPRACTICE

Estate planning attorneys have expressed concern regarding how Section 340.6 applies to estate planning malpractice. The concern stems from the provision tolling the limitations periods until actual injury occurs. In the context of estate planning, decades can elapse between the time an attorney drafts an estate plan and the time the client dies, triggering the estate plan and perhaps causing damages to a beneficiary. Because the limitations period for a legal malpractice claim is tolled during that time, an estate planning attorney can be sued for work performed many years in the past. This lengthy period of exposure might affect the cost of malpractice premiums, which reportedly have increased dramatically in recent years.

The Law Revision Commission does not propose any reforms to address these concerns at this time. Any solution must be fair to clients and beneficiaries as well

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108. Mallen, *An Examination of a Statute of Limitations for Lawyers*, 53 Cal. State Bar J. 166, 168 (1978).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*; see also R. Mallen & J. Smith, Legal Malpractice, *Statutes of Limitations* § 22.5, p. 325 & nn.35-36 (5th ed. 2000).

as attorneys.[113] The Commission suggests that the State Bar examine the situation with that principle in mind. The Bar is suited for that undertaking because it can explore a wide variety of solutions, not just legislative action.[114] The Commission may propose legislation on this topic in the future.

RETROACTIVITY OF PROPOSED REFORMS

How will the proposed reforms of the statute of limitations affect a malpractice case that was filed before the operative date of the reform, or a malpractice incident that occurred before the operative date but has not yet resulted in litigation?

It is well-established that a party does not have a vested right in the time for commencement of a lawsuit.[115] Likewise, a party does not have a vested right in the running of the statute of limitations prior to its expiration.[116] If the Legislature shortens the limitations period, however, parties must be given a reasonable time to bring suit before the reform takes effect.[117]

None of the reforms proposed here would shorten a limitations period. The new tolling provision would provide an additional means of extending the time in which to sue, avoiding the need for simultaneous litigation. Reallocation of the burden of proof on the time of discovery would benefit an attorney asserting the one-year limitations period as a defense, but would not change the length of that period. Deletion of Section 340.6(b), relating to an action on a written instrument effective in the future, would not have any substantive impact.

Nonetheless, the Law Revision Commission recommends that the operative date of the proposed reforms be delayed until one year after the new law becomes effective. That would give parties a reasonable time to take responsive action before the law changes. The Commission further recommends that the proposed reforms apply only in an action commenced on or after the operative date.

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113. "[W]hen an attorney raises the statute of limitations to occlude a client's action before that client has had a reasonable opportunity to bring suit, the resulting ban of the action not only starkly works an injustice upon the client but partially impugns the very integrity of the legal profession." Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 192, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

114. The role of the Law Revision Commission is to study topics assigned by the Legislature and recommend legislative reforms to the Legislature and the Governor. See Gov't Code §§ 8280-8298.

115. See, e.g., Carlson v. Blatt, 87 Cal. App. 4th 646, 650, 105 Cal. Rptr. 2d (2001); Rubinstein v. Barnes, 195 Cal. App. 3d 276, 281, 240 Cal. Rptr. 535 (1987).

116. See, e.g., *Carlson*, 87 Cal. App. 4th at 650.

117. See, e.g., *id*.; *Rubinstein*, 195 Cal. App. 3d at 281; Bell v. Hummel, 136 Cal. App. 3d 1009, 1018 n.10, 186 Cal. Rptr. 688 (1982).

PROPOSED LEGISLATION

Code Civ. Proc. § 340.6 (amended). Limitations period for legal malpractice

SEC. __. Section 340.6 of the Code of Civil Procedure is amended to read:

340.6. (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, ~~or~~ whichever occurs first.

(b) If the attorney raises the one-year limitation of subdivision (a) as an affirmative defense, the plaintiff bears the burden of proof regarding when the plaintiff discovered, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission.

(c) In no event shall the time for commencement of legal action exceed four years except that the limitations ~~period shall be~~ periods of subdivision (a) are tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual ~~injury;~~ injury.

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission ~~occurred~~; occurred.

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when ~~such~~ those facts are known to the ~~attorney, except that this subdivision shall toll only the four-year limitation; and~~ attorney. This paragraph tolls only the four-year limitation.

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(5) The attorney's liability for a wrongful act or omission in performing professional services may depend on the outcome of a pending or reasonably foreseeable civil or criminal action, administrative adjudication, arbitration, tax audit, or other proceeding affecting the client's rights or obligations, and that proceeding has not been settled or fully resolved [by the trial court or other initial tribunal]. This paragraph applies only if the plaintiff acts reasonably and in good faith, the plaintiff gives the attorney reasonable notice of the potential action for a wrongful act or omission, and the attorney is not unreasonably prejudiced in gathering evidence to defend against the potential action for a wrongful act or omission.

~~(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.~~

Comment. New subdivision (b) is added to Section 340.6 to reallocate the burden of proof on the issue of discovery. It overturns *Samuels v. Mix*, 22 Cal. 4th 1, 989 P.2d 701, 91 Cal. Rptr. 2d 273 (1999), which held that the defendant attorney bears the burden of proving when the plaintiff discovered, or through the use of diligence should have discovered, the facts constituting the

defendant's malpractice. For background on allocating the burden of proof to the plaintiff, see Section 500 (listing factors to be considered in allocating burden of proof); *Samuels*, 22 Cal. 4th at 22-30 (Baxter, J., dissenting) (burden of proving time of discovery of legal malpractice should be on plaintiff because pertinent facts are peculiarly within plaintiff's knowledge and control).

Paragraph (5) is added to subdivision (c) (formerly the second sentence of subdivision (a)) to address the problem of simultaneous litigation. When an underlying proceeding bears on a malpractice incident, the tolling provided by this paragraph spares the client from having to simultaneously pursue both the underlying proceeding and a malpractice action. See generally ITT Small Business Finance Corp. v. Niles, 9 Cal. 4th 245, 257, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994) ("it would be a waste of judicial resources to require both the adversary proceeding and the attorney malpractice action to be litigated simultaneously"); Elkins v. Derby, 12 Cal. 3d 410, 412, 525 P.2d 81, 115 Cal. Rptr. 641 (1974) (awkward duplication of procedures is not necessary to serve fundamental purpose of statute of limitations, which is to insure timely notice to adverse party so that party can assemble defense while facts are fresh); Ochoa & Wistrich, *Limitation of Legal Malpractice Actions: Defining Actual Injury and the Problem of Simultaneous Litigation*, 24 Sw. U. L. Rev. 1, 3 (1994) (simultaneous litigation of malpractice suit and underlying action "can raise a host of legal and practical problems, including collateral estoppel, inconsistent outcomes, and waiver of attorney-client privilege").

[*Alternative A: Tolling Until Underlying Proceeding Final*. Tolling under the proposed law would continue during the pendency of an appeal in the underlying proceeding or other review process. For background on this approach, see Laird v. Blacker, 2 Cal. 4th 606, 621-28 (Mosk, J., dissenting).]

[*Alternative B: Tolling Until Initial Decision in Underlying Proceeding*. Tolling does not continue during the pendency of an appeal, motion to overturn a settlement, or other review process. Laird v. Blacker, 2 Cal. 4th 606, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992). If the circumstances warrant, however, the court or other tribunal can stay the malpractice case pending the outcome of the appeal or other effort to reverse the initial determination. Alternatively, the potential parties can enter into a tolling agreement, making it unnecessary to file the malpractice case until the appeal is resolved.]

For guidance on the tolling requirements codified in subdivision (c)(5), see, e.g., Addison v. State of California, 21 Cal. 3d 313, 317-19, 321, 578 P.2d 941, 146 Cal. Rptr. 224 (1978); McMahon v. Albany Unified School Dist., 104 Cal. App. 4th 1275, 1292-93, 129 Cal. Rptr. 2d 184 (2003), *review denied* (March 19, 2003), *cert. denied*, __ U.S. __, 124 S.Ct. 155 (2003); Waterman Convalescent Hosp., Inc. v. State Dep't of Health Services, 101 Cal. App. 4th 1433, 1441, 125 Cal. Rptr. 2d 168 (2002); Mitchell v. Frank R. Howard Memorial Hosp., 6 Cal. App. 4th 1396, 1406-08, 8 Cal. Rptr. 2d 521 (1992); Ochoa & Wistrich, *supra*, at 51-53.

Former subdivision (b), concerning the limitations period where an instrument in writing is effective on occurrence of a future act or event, is deleted as unnecessary and confusing. See R. Mallen & J. Smith, Legal Malpractice, *Statutes of Limitations* § 22.5, p. 325 & nn.35-36 (5th ed. 2000); Mallen, *An Examination of a Statute of Limitations for Lawyers*, 53 Cal. State Bar J. 166, 168 (1978).

The amendment of this section does not affect the limitations periods or tolling rules for other types of professional malpractice.

Section 340.6 is also amended to make nonsubstantive, stylistic revisions.

☞ **Note.** The Law Revision Commission particularly solicits comment on whether tolling pursuant to proposed subdivision (c)(5) should continue until the underlying proceeding is fully resolved, including completion of any appeal or other review process (Alternative A), or should end when the trial court or other initial tribunal renders its decision (Alternative B).

The Commission is also particularly interested in whether proposed subdivision (c)(5) should toll the limitations periods when an underlying proceeding is reasonably foreseeable, or only when an underlying proceeding is pending. Suppose, for instance, that an attorney prepared a promissory note for signature by the wrong person, who has minimal assets. The client learns of the error after the note is signed and the transaction is completed, but before the note becomes

due. At that point, an action on the note is foreseeable but premature. Should tolling pursuant to proposed subdivision (c)(5) commence in those circumstances, or not until an action on the note is filed? Is some other trigger or restriction appropriate?

Uncodified (added). Operative date

SEC. 2. (a) This act becomes operative on January 1, ____.

(b) This act applies only in an action or proceeding commenced on or after the operative date of this act.

☞ **Note.** The Law Revision Commission proposes that the operative date of the proposed reforms be delayed until one year after the new law becomes effective, so as to give parties a reasonable time to take responsive action before the law changes. The Commission further proposes that the proposed reforms apply only in an action commenced on or after the operative date. The Commission solicits comment on this approach.