#J-111

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

REVISED TENTATIVE RECOMMENDATION

Statute of Limitations for Legal Malpractice

September 2005

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

COMMENTS ON THIS REVISED TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **February 17, 2006.**

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

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SUMMARY OF REVISED TENTATIVE RECOMMENDATION

A client may believe that an attorney has mishandled a matter. To comply with the statute of limitations for legal malpractice (Code Civ. Proc. § 340.6), the client may have to sue the attorney for the apparent misconduct before final resolution of the underlying matter. For example, suppose an attorney misses a critical deadline in a personal injury case. Under the statute of limitations for legal malpractice, the client may have to sue the attorney for this mistake before the personal injury case is over and the impact of the mistake is clear. The client is thus forced to simultaneously litigate both the malpractice action and the underlying proceeding. This may be prohibitively expensive for the plaintiff and may also entail other problems.

The Law Revision Commission proposes to address this situation by expressly authorizing a court to stay a legal malpractice action on motion by a party if there is a reasonable likelihood that the existence or amount of the plaintiff's damages in the malpractice action will depend on the outcome of the underlying proceeding. A stay would be permissive, not mandatory. If the court denies a stay, the proposal would require the court to state the reasons for its decision in writing or on the record.

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

STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE

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

Requirements of the Statute of Limitations for Legal Malpractice

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

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

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

In addition, the Commission has investigated concerns regarding application of the statute of limitations for legal malpractice in the context of estate planning. That portion of its study is on hold pending further action by the State Bar. The Commission welcomes input on any aspect of its work on the statute of limitations for legal malpractice.

3. Section 340.6 provides:

> 340.6. (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, or whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
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> (1) The plaintiff has not sustained actual injury;
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> (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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> (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
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> (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

discovery doctrine, under which the limitations period does not begin to run until the client "discovers, or through the use of reasonable diligence should have discovered" the attorney's malpractice.[4] The client must commence the malpractice action within one year from the date of actual or constructive discovery.[5] 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 wrongful act or omission occurred."[8] Even after the client replaces the attorney,

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

4. The California Supreme Court first applied the discovery doctrine to a legal malpractice action in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 187-91, 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 in *Neel* 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.*

5. Section 340.6(a).

6. In *Neel*, the Supreme Court recognized that application of the discovery doctrine in legal malpractice actions would "impose an increased burden on the legal profession." 6 Cal. 3d at 192. The Court observed that an attorney's mistake "may not work damage or achieve discovery for many years after the act, and the extension of liability into the future poses a disturbing prospect." *Id.* The Court indicated that an outer limit on delayed accrual of legal malpractice actions might be desirable. *Id.* The Legislature established an outer limit by codifying the four-year alternate limitations period. Due to the tolling provisions in Section 340.6, 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); Bonifield v. County of Nevada, 94 Cal. App. 4th 298, 303-04, 114 Cal. Rptr. 2d 207 (2001); see also Woods v. Young, 53 Cal. 3d 315, 326 n.3, 807 P.2d 455, 279 Cal. Rptr. 613 (1991) ("Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended.").

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).

the limitations periods are tolled until the client sustains actual injury.[9] Additional tolling provisions apply in certain specific contexts.[10]

Actual Injury and the Necessity of Simultaneous Litigation

The actual injury tolling provision is key in understanding the need for reform. The provision stems from the basic principle of tort law that damages are an essential element of a negligence cause of action. Until an attorney's negligence harms a client, the client cannot state a cause of action.[11] It would be unfair to start the running of the limitations period before the client is able to bring suit.

There is no statutory definition of actual injury. From case law, it is clear that nominal or speculative damages are not actual injury. But any true harm to the plaintiff constitutes actual injury and is sufficient to end the tolling period.[12] It is not necessary that the harm exceed a threshold amount[13] or that the total amount of harm from the malpractice be calculable.[14]

An important issue is whether the fact of injury is sufficiently well-established to constitute actual injury. For example, suppose an attorney fails to timely file a claim on behalf of a client. One could argue that actual injury occurs when the attorney misses the statute of limitations, diminishing the value of the client's

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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 changed text of bill "in order to clearly toll both the one- and four-year provisions of the statute when the plaintiff sustains no actual injury.").

10. Both the one-year and the four-year limitations periods are 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).

11. "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).

12. "The first injury of any kind to the plaintiff, attributable to the attorney defendant'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 583, 589, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995) (plurality opinion) (same); Laird v. Blacker, 2 Cal. 4th 606, 612, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992) (same).

13. 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.

14. "[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 ("[T]he cause of action may arise before the client sustains all or even the greater part of damage.").

claim. One could also argue 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.

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

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

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

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

In recent cases, the California Supreme Court adopted the third approach, under which actual injury can occur before a related proceeding is resolved by the initial tribunal.[15] In earlier decisions, the Court appeared to support the second approach, the bright-line rule that actual injury does not occur until the related proceeding is resolved by the initial tribunal.[16] The Court has consistently rejected the first approach, under which all appeals or other review processes in a related

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

16. See ITT Small Bus. Fin. Corp. v. Niles, 9 Cal. 4th 245, 258, 885 P.2d 965, 36 Cal. Rptr. 2d 552 (1994) ("[I]n transactional legal malpractice cases, when the adequacy of the documentation is the subject of dispute, an action for attorney malpractice accrues *on entry of adverse judgment, settlement, or dismissal of the underlying action*.") (emphasis added); *Laird*, 2 Cal. 4th at 609 ("[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).

proceeding must be complete before actual injury occurs.[17] Consequently, it may be necessary for a plaintiff to file a legal malpractice action while a related proceeding is still pending, and simultaneously litigate the malpractice action and the related proceeding.

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

Early assertion of a legal malpractice action has important advantages. It helps to ensure that the action is litigated when evidence is accessible, memories are fresh, and witnesses are available.[18] It also promotes the interest in repose, the need for a measure of certainty and stability in conducting one's affairs.[19] The attorney defendant 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.[20]

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

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

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

18. 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 a 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).

19. 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 Consol., 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 18, at 15.

20. If a claim is not promptly asserted, the potential defendant may be oblivious to the threat of liability and thus make plans without taking the potential claim into account. 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.

Burden of Simultaneously Pursuing Multiple Cases

Conducting simultaneous litigation is a significant burden on clients.[21] Prosecuting or defending a lawsuit is expensive, time-consuming, and emotionally draining. For some clients, the burden of simultaneously litigating a legal malpractice action and a related proceeding may be prohibitive.[22]

Inconsistent Positions

Simultaneous litigation of a malpractice action and a related proceeding may force a client to simultaneously take inconsistent positions. For example, it may be debatable whether an attorney timely filed a proceeding on behalf of a client.[23] As a result, the client may have to show the attorney's timeliness in the related proceeding, while at the same time proving the attorney's untimeliness in a malpractice action.[24] The result may be inconsistent judgments or application of collateral estoppel in a manner harmful to the client.[25] In addition, respect for the legal system is undermined when a litigant is compelled to take inconsistent positions before different decisionmakers.[26]

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21. See *Jordache*, 18 Cal. 4th at 769 (Mosk, J., dissenting); Sirott v. Latts, 6 Cal. App. 4th 923, 934, 8 Cal. Rptr. 2d 206 (1992) (Johnson, J., dissenting).

22. Ochoa & Wistrich, *supra* note 18, 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).

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

24. See, e.g., Pleasant v. Celli, 18 Cal. App. 4th 841, 849-50, 22 Cal. Rptr. 2d 663 (1993); see also Adams v. Paul, 11 Cal. 4th 583, 605, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995) (Lucas, J., dissenting). A further problem in this situation is that assertion of the malpractice claim may alert the defendant in the underlying proceeding to the limitations defense.

For another situation in which a client would be forced to take inconsistent positions in a malpractice action and a related proceeding, see *U.S. Nat'l Bank of Oregon v. Davies*, 274 Or. 663, 548 P.2d 966 (1976) ("[P]laintiff'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, 35 Tex. Sup. J. 157 (1991) (parental rights termination suit and action for malpractice in adoption process).

25. *Sirott*, 6 Cal. App. 4th at 934 (Johnson, J., dissenting); Ochoa & Wistrich, *supra* note 18, at 20-21.

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

Judicial Economy, Litigation Expenses, and Malpractice Premiums

Often, resolution of a related proceeding may render a malpractice action unnecessary.[27] For example, when an attorney misses the statute of limitations, the other side may never realize that the lawsuit was untimely.[28] There is no need for a malpractice action because the malpractice caused the client no harm.

A policy of forcing a client to pursue a malpractice action without awaiting the outcome of a related proceeding may increase the number of malpractice actions and drive up insurance premiums. This, in turn, may increase legal fees.

Similarly, forcing a client to engage in simultaneous litigation may waste judicial resources.[29] A court may have to spend time on a malpractice action that turns out to be unnecessary. Simultaneous litigation of a malpractice action and an underlying proceeding can also impede access to justice by clogging court dockets.[30]

Perhaps most significantly, if a client must pursue a malpractice action while a related proceeding is pending, clients, attorneys, and witnesses may be subjected to the financial and emotional stress of litigation that ultimately proves unnecessary. This may have serious adverse consequences for the persons involved.

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27. Ochoa & Wistrich, *supra* note 18, at 22-23; see Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 767, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998) (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...."); ITT Small Bus. Fin. 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); *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").

28. As one court explained,

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

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

If the underlying proceeding is settled, rather than decided on the merits, the impact of the attorney's error may not be 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.

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

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

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

Simultaneous litigation of a malpractice action and a related proceeding may also result in a prejudicial waiver of the lawyer-client or work product privilege.[31] To establish malpractice, the client may need to disclose the attorney's work product or confidential communications with the attorney. But such a disclosure may waive the work product or lawyer-client privilege, giving the opposing party in the related proceeding access to information that would otherwise be privileged. This may seriously prejudice the client's case.[32]

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

Tolling Agreement

Often, it is possible for a client with a legal malpractice claim to avoid simultaneous litigation and the concomitant problems by entering into a tolling agreement with the attorney who allegedly committed malpractice.[33] The attorney may be amenable to this approach because defending a malpractice claim can be costly, time-consuming, and stressful, and may adversely affect the cost or availability of the attorney's malpractice insurance. By entering into a tolling agreement, the attorney can postpone some, if not all, of these problems. With the passage of time and resolution of the related proceeding, the malpractice action may even become unnecessary and the attorney can escape it altogether.

In some instances, however, a client may be hesitant to ask for a tolling agreement or an attorney may be unwilling to enter into a tolling agreement.[34] For example, the attorney may regard the malpractice allegations as a frivolous attempt to pressure the attorney into reducing a fee bill. Rather than acceding to the client's demands or agreeing to delay resolution of the malpractice allegations, the attorney may wish to have a court promptly review and dispose of those allegations. In such a situation, the client may have to file a malpractice action before a related proceeding is fully resolved.

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31. Ochoa & Wistrich, *supra* note 18, at 21.

32. *Id*.

33. Letter from Ronald Mallen to Barbara Gaal (Jan. 11, 2005) (Commission Staff Memorandum 2005-20, Exhibit pp. 2-3 (available from the Commission, www.clrc.ca.gov)); Letter from Wells Lyman to California Law Revision Commission (Mar. 30, 2005) (Commission Staff Memorandum 2005-20, Exhibit pp. 4-5 (available from the Commission, www.clrc.ca.gov)); Letter from State Bar Committee on Administration of Justice to California Law Revision Commission (Apr. 25, 2005) (Commission Staff Memorandum 2005-20, Exhibit pp. 6-7 (available from the Commission, www.clrc.ca.gov)) (hereafter, "CAJ Letter").

34. See, e.g., Ochoa & Wistrich, *supra* note 18, at 66; CAJ Letter, *supra* note 33.

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

Once a plaintiff files a legal malpractice action, the parties may be under immediate pressure to proceed with it. Such pressure can stem from a number of sources, such as delay reduction deadlines,[35] the deadline for service of a summons and complaint,[36] the deadlines for responding to a complaint,[37] and other deadlines.

Instead of proceeding with the malpractice action, the plaintiff might prefer to keep it on the court's docket without actively pursuing it until after resolution of an underlying proceeding. To be able to do this, the plaintiff would have to seek a stay of the malpractice action from the trial court.

Alternatively, the plaintiff might want to proceed with the malpractice action but the attorney defendant might want it stayed until after resolution of an underlying proceeding. For example, the attorney defendant might seek a stay on the ground that the client is likely to prevail in the underlying proceeding, making the malpractice action unnecessary.

In either situation, a court might be tempted to grant a stay. Most of the problems arising from simultaneously litigating a legal malpractice action and a related proceeding can be alleviated to some extent by staying the malpractice action until the related proceeding is resolved.[38] For example, when a malpractice action is stayed, both the plaintiff and the attorney defendant are temporarily spared the expense, time demands, and stress inherent in litigating the malpractice action. This may be particularly critical to the plaintiff, who may lack the resources to simultaneously pursue both the malpractice action and a related proceeding.

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

If a malpractice action is stayed until a related proceeding is resolved, the parties will know the outcome of the related proceeding before having to litigate the malpractice action. In some instances, the outcome of the related proceeding will make the malpractice action unnecessary. Staying the malpractice action will thus

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

36. Section 583.240.

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

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

help to conserve judicial resources, reduce litigation expenses, and perhaps also control legal malpractice premiums.

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

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

A court has inherent authority to stay a legal malpractice action in appropriate circumstances.[39] A court may be reluctant to exercise that authority, however, either because it is unaware or uncertain that the power exists,[40] or because it is concerned about controlling its docket.[41]

The Law Revision Commission recommends adding a provision to the codes that would expressly authorize a court to stay a legal malpractice action pending the resolution of a related pending or anticipated civil or criminal action, administrative adjudication, arbitration, tax audit, or other formal proceeding. Such a provision would help alert parties, attorneys, and courts to the option of a stay, and would demonstrate legislative support for that approach in appropriate circumstances. A statutory provision would also be a means of providing a number of procedural protections.[42]

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

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39. Coscia v. McKenna & Cuneo, 25 Cal. 4th 1194, 1211, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001); *Jordache*, 18 Cal. 4th at 758; Adams v. Paul, 11 Cal. 4th 583, 593, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995) (plurality opinion).

40. CAJ Letter, *supra* note 33; see also Rosenthal v. Wilner, 197 Cal. App. 3d 1327, 1331, 243 Cal. Rptr. 472 (1998) (Trial court erred in denying stay but ruling was reversed in writ proceeding).

41. Ochoa & Wistrich, *supra* note 18, at 66.

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

action is delayed. If the attorney defendant seeks a stay, the notice requirement would ensure that the plaintiff has an opportunity to contest the motion.

Under the proposed provision, a stay would be permissive, not mandatory. The provision would give a court discretion to take into account the particular circumstances of the legal malpractice action and the related proceeding. Factors for a court to consider include:

- The interest in litigating the malpractice action when evidence is accessible, memories are fresh, and witnesses are available.
- The extent to which the malpractice plaintiff and attorney defendant would be able to gather and effectively preserve evidence relating to the malpractice action if that action were stayed.
- The interest in providing certainty and stability by promptly resolving the malpractice action.
- The extent to which the interest in providing certainty and stability has been served by filing the malpractice action, thus alerting the attorney defendant to the allegations and permitting the attorney defendant to take the claim into account in future planning.
- The financial burden, time demands, and emotional stress of simultaneously litigating the malpractice action and a related proceeding, and the ability of the malpractice plaintiff to cope with those constraints.
- The danger of inconsistent judgments or problematic application of collateral estoppel if the malpractice action is litigated before the related proceeding is fully resolved.
- The likelihood that the malpractice plaintiff would be forced to take inconsistent positions in the malpractice action and the related proceeding if those matters were pursued simultaneously, and the degree to which that would adversely affect public respect for, and confidence in, the judicial system.
- The likelihood that resolution of the related proceeding would make the malpractice action unnecessary.
- The likelihood that simultaneously litigating the malpractice action and the related proceeding would force the malpractice plaintiff to reveal privileged communications, other privileged material, or other information that could be used against the plaintiff in the related proceeding, and the extent to which such harm could be prevented by a protective order.
- The likelihood that the outcome of the related proceeding would have no effect, or only a minimal effect, on the malpractice action.
- If a related proceeding is anticipated but has not yet commenced, the likelihood that the anticipated proceeding will actually commence and, if so, how soon that is likely to occur.
- The likelihood that a malpractice plaintiff will be unable to state a valid cause of action against an attorney defendant because of an inability to plead damages, which may be dependent upon the outcome of a related proceeding.

- Any other factor that is relevant in achieving justice in the malpractice action or a related proceeding.

If the court denies a stay, the proposed provision would require the court to state the reasons for its decision in writing or on the record. This requirement would help ensure that a court does not deny a stay arbitrarily or for reasons unrelated to achieving justice in the malpractice action or a related proceeding. Such assurance may be particularly important to a potential malpractice plaintiff who is weighing the risks and benefits of filing a malpractice action.

A stay granted under the proposed provision would remain in effect until the court lifts it.[43] The court would be required to lift the stay on noticed motion once the related proceeding is fully and finally resolved, including any appeal or other review process. The court would also have discretion to lift the stay earlier. If the court exercises that discretion, however, it would have to state its reasons for doing so in writing or on the record.

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

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

PROPOSED LEGISLATION

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

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

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

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

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

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

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

In deciding whether to grant a stay under this section, a court should consider the following factors:

(1) The interest in litigating the malpractice action when evidence is accessible, memories are fresh, and witnesses are available.

(2) The extent to which the malpractice plaintiff and attorney defendant would be able to gather and effectively preserve evidence relating to the malpractice action if that action were stayed.

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

(4) The extent to which the interest in providing certainty and stability has been served by filing the malpractice action, thus alerting the attorney defendant to the

allegations and permitting the attorney defendant to take the claim into account in future planning.

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

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

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

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

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

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

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

(12) The likelihood that a malpractice plaintiff will be unable to state a valid cause of action against an attorney defendant because of an inability to plead damages, which may be dependent upon the outcome of a related proceeding.

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

The express statutory authority and procedural rules provided in this section supplement and reinforce a court's inherent authority to stay a legal malpractice action in appropriate circumstances. For guidance on a court's inherent authority to stay a legal malpractice action, see Coscia v. McKenna & Cuneo, 25 Cal. 4th 1194, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001); Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 758, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1998); Adams v. Paul, 11 Cal. 4th 583, 593, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995) (plurality opinion).

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

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

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