

## RESOLUTION 4-05-05

### DIGEST

Statutes of Limitations: Equitable Tolling of Limitations Period for Legal Malpractice

Amends Code of Civil Procedure section 340.6 to allow for equitable tolling of the statute of limitations for legal malpractice actions.

### RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Code of Civil Procedure section 340.6 to allow for equitable tolling of the statute of limitations for legal malpractice actions. This resolution should be disapproved because the express tolling provisions in section 340.6 are sufficient to protect plaintiffs and to advance the legislative purpose of the statute.

The proponent's sole argument is that section 340.6 does not provide for tolling during the time period when the plaintiff has not sustained any actual injury. However, the express language of section 340.6 is directly to the contrary. Section 340.6 at subdivision (a)(1) clearly provides tolling during the time period when the plaintiff has not sustained actual injury, and multiple court decisions support this interpretation. (See, e.g., *Fantazia v. County of Stanislaus* (1996) 41 Cal.App.4th 1444, 1450-55; *Pompilio v. Kosmo, Cho & Brown* (1995) 39 Cal.App.4th 1324, 1327-28; *Tchorbadjian v. Western Home Ins. Co.* (1995) 39 Cal.App.4th 1211, 1218-19; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749-52.) Case law establishes that the tolling applies to both the 1-year and the 4-year limitations periods set forth in the statute. (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 126.) Moreover, the proposed amendment would add vague standards regarding the application of equitable tolling. Such ambiguity would create unnecessary confusion when the current statutory provisions for tolling sufficiently protect plaintiffs from unjust forfeitures of their right to trial.

Finally, the concept of equitable tolling, among others, has recently been addressed by the California Law Revision Commission in its proposed revisions to section 340.6 that are currently out for public comment. The Commission's proposed equitable tolling provision has met with significant opposition, based mostly on concerns of increased confusion and uncertainty being created in legal malpractice actions, leading to additional litigation and costs.

### SECTION/COMMITTEE REPORTS

#### COMMITTEE ON ADMINISTRATION OF JUSTICE RECOMMENDATION

DISAPPROVE

This resolution would apply equitable tolling, by statute, to legal malpractice actions under specified circumstances. The State Bar's Committee on Administration of Justice ("CAJ") recently opposed a similar proposal by the California Law Revision Commission. CAJ recognizes that certain problems exist with "simultaneous litigation" under current law, but questions whether a legislative "fix" is truly called for. CAJ believes that mechanisms and practices exist under current law that may, in many cases, eliminate or at least mitigate the potential problems. For example, the plaintiff client and defendant attorney may, under current law, enter into a tolling agreement pending the outcome of the underlying litigation. Alternatively, if the parties are unable to agree to a pre-filing tolling agreement, a malpractice action may be filed but stayed pending the resolution of the underlying litigation. CAJ is not aware of any specific statutory authorization for the issuance of a stay in these circumstances, but the anecdotal experience of CAJ members is that some trial courts presently do employ this approach, sometimes in the context of ruling on a demurrer. Others, however, report that the authority to issue a stay in the absence of specific

statutory authority is questionable. To the extent a legislative fix is called for, this resolution has several drawbacks. There is a substantial possibility that few plaintiffs would utilize the optional tolling provision. In effect, any plaintiff electing to take advantage of the proposed tolling provision would intentionally be allowing a presumptive limitations period to expire, and, if it later proved necessary to file a malpractice action, relying on the ability to persuade a court that all of the requirements for tolling set forth in the proposal had been satisfied. The requirements specified to invoke the tolling extension are vague and uncertain, and if a plaintiff attempts to make use of the tolling extension, the defendant attorney will likely attempt to persuade the court that at least one of the requirements for tolling has not been satisfied. If any legislative solution is pursued, CAJ suggests that the possibility of a statutory stay be explored in a “simultaneous litigation” situation, along with related issues such as legislative permission to file the complaint that is subject to the stay under seal. In the event any proposal for equitable tolling – by statute – is pursued, CAJ believes the statutory language should be clarified and track the language of existing equitable tolling cases, where applicable.

*This position is only that of the State Bar of California’s Committee on Administration of Justice. This position has not been adopted by the State Bar’s Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.*

## **TRUSTS & ESTATES COMMITTEE RECOMMENDATION DISAPPROVE**

The Law Revision Commission has recently circulated proposed revisions to Code of Civil Procedure §340.6 to account for periods while underlying litigation to remedy the alleged malpractice is continuing. The Section submitted comments to the Commission in that regard suggesting limitations on the proposed language to tighten the standard. This proposal, however, is not even limited to the existence of an underlying dispute, providing instead for the equitable tolling of the statute if the plaintiff “acts reasonably and in good faith”, gives notice and the attorney is “not unreasonably prejudiced”. As this standard provides no limit to the potential tolling or rationale for why tolling should exist in the first place, it is unreasonably vague.

*This position is only that of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar’s Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.*

## **TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Association recommends that legislation be sponsored to amend Code of Civil Procedure Section 340.6 to read as follow:

- 1 § 340.6
- 2 (a) An action against an attorney for a wrongful act or omission, other than for actual fraud,
- 3 arising in the performance of professional services shall be commenced within one year after the
- 4 plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts
- 5 constituting the wrongful act or omission, or four years from the date of the wrongful act or omission,
- 6 whichever occurs first. In no event shall the time for commencement of legal action exceed four
- 7 years except that the period shall be tolled during the time that any of the following exist:
- 8 (1) The plaintiff has not sustained actual injury;
- 9 (2) The attorney continues to represent the plaintiff regarding the specific subject matter in
- 10 which the alleged wrongful act or omission occurred;
- 11 (3) The attorney willfully conceals the facts constituting the wrongful act or omission when
- 12 such facts are known to the attorney, except that this subdivision shall toll only the four-year
- 13 limitation; and
- 14 (4) The plaintiff is under a legal or physical disability which restricts the plaintiff’s ability to

15 commence legal action.  
16 (b) In an action based upon an instrument in writing, the effective date of which depends  
17 upon some act or event of the future, the period of limitations provided for by this section shall  
18 commence to run upon the occurrence of such act or event.  
19 (c) The period of limitation provided for by this section is subject to equitable tolling if the  
20 plaintiff acts reasonably and in good faith, the plaintiff gives the attorney reasonable notice of the  
21 potential action for a wrongful act or omission, and the attorney is not unreasonably prejudiced in  
22 gathering evidence to defend against that potential action for a wrongful act or omission.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

#### STATEMENT OF REASONS

Existing Law: Does not permit the statute of limitations for legal malpractice actions to be equitably tolled.

This Resolution: Would apply the doctrine of equitable tolling to legal malpractice actions under specified circumstances.

The Problem: In applying statutes of limitation, “courts have adhered to a general policy which favors relieving [a] plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage.” (*Addison v. State* (1978) 21 Cal.3d 313, 317.) The judicially created doctrine of “equitable tolling” is one of the manifestations of this policy, and is “designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations - timely notice to the defendant of the plaintiff’s claims - has been satisfied.” (*Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal. App.3d 1, 19.)

This doctrine, however, does not apply to actions for legal malpractice. Section 340.6 states that “in no event shall time for commencing a legal malpractice claim be more than four years except under the circumstances enumerated in the statute.” The courts have construed this language strictly, and have thus refused to apply the doctrine of equitable tolling in the context of legal malpractice. (*Gordon v. Law Offices of Aguirre & Meyer* (2002) 70 Cal App.4th 972, 974; *Leasequip v. Dapeer* (2003) 103 Cal App.4th 394, 406.)

The apparent legislative purpose of Section 340.6 was to reduce liability insurance premiums for lawyers by reducing their potential exposure to malpractice liability. However, the Legislature declined to include any provision that would toll the running of the limitations period until “actual injury” occurred. This inconsistency creates the potential for unnecessary litigation, since clients who might not have suffered “actual injury” are nevertheless forced to file premature actions to protect themselves from the running of the statute. By expressly providing for the application of “equitable tolling,” the number of premature malpractice suits filed against attorneys will be reduced, while meritorious and timely claims will be protected. This solution would better achieve the legislative goal of Section 340.6.

In accordance with CDCBA rules, BASF timely offers this resolution for consideration. Consistent with traditional CDCBA practice, the Proponent reserves the right to timely withdraw or amend the resolution.

#### IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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## **COUNTERARGUMENT**

### **SAN DIEGO COUNTY BAR ASSOCIATION**

This resolution seeks to provide tolling if the plaintiff “acts reasonably and in good faith,” gives reasonable notice to the attorney of intended claims, and the attorney is “not unreasonably prejudiced in gathering evidence...” However, what constitutes acting “reasonably and in good faith” is too vague and could well lead to a virtually unending statute of limitations. Similarly, it would require an after the fact determination of whether the attorney has been unreasonably prejudiced in gathering evidence. Finally, this resolution is rooted in a flawed interpretation of Code of Civil Procedure section 340.6. Section 340.6 provides a 1-year limit from date of discovery of the cause of action with a 4-year outside limit and then proceeds to identify specific grounds for tolling. It provides for tolling of claims up to the time the client suffers “actual injury.” The proponent misconstrues this to mean that unless and until you have actual injury there is no tolling.

### **SACRAMENTO COUNTY BAR ASSOCIATION**

Resolution 04-05-05 is not necessary, nor does the Proponent’s statement of “The Problem” establish the need for the proposed amendment to section 340.6. In the third paragraph of BASF’s statement, the Proponent argues that “the Legislature declined to include any provision that would toll the running of the limitations period until ‘actual injury’ occurred.” This is not a correct statement of the law. Section 340.6, subdivision (a)(1) clearly states that the limitations period “shall be tolled” during the time that the “plaintiff has not sustained actual injury; ...”

Section 340.6 is notable because it contains a broad range of tolling provisions reflecting the legislative balance “struck between a plaintiff’s interests in pursuing a meritorious claim and the public policy interest in prompt assertion of known claims.” (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 756.) The proposed amendment would not only disrupt this careful legislative balance, but it would also impact a significant body of case law interpreting the statutory tolling provisions. (See e.g., *Coscia v. McKenna and Cuneo* (2001) 25 Cal.4th 1194; *Jordache Enterprises, Inc. v. Brobeck Phleger & Harrison, supra*, 18 Cal.4th 739; *Adams v. Paul* (1995) 11 Cal.4th 583; *Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46; and *Hensley v. Caietti* (1993) 13 Cal.App.4th 1165.) Furthermore, the suggested amendment goes far beyond the very limited scope of the equitable tolling principles addressed in *Addison v. State* (1978) 21 Cal.3d 313, 317, referenced by the Proponent.

At best the proposed amendment would create confusion and uncertainty with regard to its interpretation and application. At worst, it would have the effect of negating the statute of limitations as a means of disposing of stale claims.