***California’s Elusive, Murky and Slippery Legal Malpractice Statute of Limitations***

***Can Leave Good Lawyers Holding the Bag***

We all know that the quickest way to a malpractice lawsuit is to blow a statute of limitations on a client’s case. But, how often have you taken over or evaluated a case from another lawyer, discovered that it has malpractice written all over it, and not told (or incorrectly told) the client how long they have to file an action against the allegedly negligent attorney?

Do you realize that you may have just stepped into the negligent attorney’s shoes?

In the last couple of years, I have seen a disturbing number of cases in which an attorney who has taken over a case ends up facing potential malpractice liability because they unwittingly allowed the malpractice statute of limitations to run against the first attorney. It presents a terrible situation: The truly negligent attorney is off the hook and the client’s claim is now against the attorney who they consulted and who may even have tried to help them correct the problems with the case.

The problem seems to me to be caused by a lack of awareness or confusion about California’s elusive legal malpractice statute of limitations. It’s truly a minefield, having several murky factors that come into play in determining when the statute starts to run.

The purpose of this article is threefold. First, to provide a brief overview of California law on the legal malpractice statute of limitations; secondly, to provide an approach to examining the issue, and finally, to provide some practical tools to the practitioner who wants to avoid stepping into the shoes of the negligent attorney.

**The Statute**.

CCP 340.6 is the governing statute and provides two alternate baseseither four years from occurrence or one year from discoveryfor cutting off potential liability for attorney malpractice. An action for attorney malpractice "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, whichever occurs first."

However, the statute also provides for a tolling of the statute if: (1) the plaintiff has not sustained actual injury; or, 2) the attorney continues to represent the client in the same matter; (3) the attorney conceals the facts that constitute the act or omission; (4) plaintiff is under legal disability.

Sounds simple enough, doesn’t it? However, within the rule lies at least three factors that can cause difficulty in calculating the start and expiration of the statute: (1) When does discovery occur? (2) When does a client sustain actual injury? and (3) At what point does an attorney no longer represent a client?

**The Discovery Element**

As with many other causes of action, the plaintiff’s claim does not begin to run until he has knowledge of the facts of the wrongdoing. Your first inquiry should be on when the client may have first gotten knowledge (in whatever manner) that there was some wrongdoing on the part of the prior lawyer. Don’t assume that just because you’ve been the one to announce to the client that his prior attorney screwed up the case that constitutes the client’s first knowledge of wrongdoing. Chances are pretty high that if the client is sitting talking to you about his case, he already has some idea that something has gone wrong and his prior attorney had something to do with it. This might be all the knowledge that’s needed. Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . “A plaintiff need not be aware of the specific facts’ necessary to establish the claim; that is a process contemplated by pretrial discovery. . . . So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.” *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110‑11; *Apple Valley Unified School Distribution. . V.Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App. 4th 934, 943 as amended at 99 Cal. App. 4th 815.

You should utilize your best questioning skills and probe the client about what his understanding was of what was going on in the case, and what sense he had of when things began to go wrong. Ask him whether the prior attorney ever admitted doing something wrong (you’d be surprised how often this happens). Check the correspondence and email between attorney and client to see if there is an admission by the attorney of wrongdoing that has led to a serious problem. That wouldn’t just be constructive notice...that’s actual notice. Ask the client what other lawyers he may have spoken with said about their case and how it was being handled. The client may have gotten information that would clearly have put a reasonable person on notice of possible malpractice. Notice or knowledge of wrongdoing can come to the client through a myriad of ways; remember, it’s not the fact of malpractice that’s at issue; that’s for the trial to decide...it’s just the suspicion of wrongdoing by the attorney that will satisfy the knowledge of wrongdoing prong.

**The Actual Injury Element**

The statute is tolled until the client suffers actual injury. These two words have been the subject of much debate and many opinions. Since I only have about 1500 words to do this article, and this one subject alone could easily take 15,000 words, I’m going to sum it up very, very simply.

Again, if the client is talking to you, chances are already very high that they have suffered some injury that will trigger the start, or more properly, the re-start of the statute. Okay, okay, I can’t just leave it at that. This is a legal article, so let me give you some law on this particular element.

First, as a threshold matter, there is no longer any difference between transactional cases and litigation cases as to when actual injury occurs. For a number of years, transactional malpractice cases applied a different interpretation of actual injury than litigation cases for purposes of when tolling ended. However, *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739 remains not only the leading case on the issue of what constitutes actual injury for the purposes of the tolling provision of CCP 340.6(a)(1), but also did away with any differences between cases on when actual injury occurred. Under *Jordache*, the rule that applies when a plaintiff sustains actual injury from malpractice in transactional matters cannot differ from the rule that applies when claims involve other areas of legal advice and services. What is critically important to note is that *Jordache* made it clear that the resolution of litigation related to alleged malpractice may or may not mark the point at which a plaintiff first sustains actual injury under section 340.6. *Id* at 763.

Although *Jordache* remains the leading case as to when actual injury occurs, perhaps the clearest analysis comes in an earlier case. In *Adams v. Paul* (1995) 11 Cal.4th 583, the high court confirmed the following propositions: (1) determining actual injury is predominantly 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 pp. 585‑586, 589, 591‑592). Further, *Adams* established that the loss or diminution of a right or remedy constitutes injury or damage and neither uncertainty of amount nor difficulty of proof renders that injury speculative or inchoate. (*Id.* at 590).

*Jordache* reiterated the rules of law set forth in *Adams*. The *Jordache* court stated that the statute is no longer tolled: "once the client can plead damages that could establish a cause of action for legal malpractice." *(Jordache, supra*, at 743) and [t]he test for actual injury under section 340.6 ... is whether the plaintiff has sustained any damages compensable in an action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of professional services.

*Jordache* specifically rejected the proposition that the statute of limitations under CCP 340.6 (a) is tolled pending the resolution of related actions that might rectify or mitigate the actual harm caused by the malpractice. In other words, as in *Adams*, the court reiterated that injury for the purposes of the commencement of the running of the limitations period does not require a prior judgment or settlement of a related action.

Stated simply, if you have taken over the case from the prior attorney, the client cannot await the outcome of the trial or an appeal, or whatever final resolution may have to occur to finalize his damage to commence an action for legal malpractice. His cause of action is running. Moreover, the expenditure of any additional legal fees by the client to rectify the first attorney’s wrongdoing, or the loss or diminution of the client’s claim in any way is very likely sufficient to constitute actual injury.

**When Does the Attorney Cease to Represent the Client**

The statute is tolled while the attorney continues to represent the client on the same matter. Because the elements of discovery and actual injury are often difficult to pin down with certainty, I strongly advise that attorneys evaluating client’s cases use the end of the first attorney’s representation to calculate the start of the statute. The filing of a substitution of attorneys form, or determining the last date of any work on the client’s behalf can usually be figured to the exact date. But, even this element can cause problems.

The statute is not tolled unless the attorney continues to perform services on the same matter on which the malpractice occurred. If the attorney is working for the client on several matters, the inter-relationship of which is less than clear, the statute may not be tolled. I have seen this several times, where the client is aware of the attorney’s wrongdoing, actual damage has unquestionably occurred, but the attorney is handling several different matters for the client. The client, for whatever reason, is unwilling to assert a claim because it would mean pulling all the work from the attorney.

Additionally, there is case law that holds that while a substitution of attorneys form is usually the event that marks the termination of the attorney/client relationship, the relationship (for purposes of starting the statute of limitations) may be deemed to have ended earlier. The substitution of attorneys form merely becomes the memorialization of the relationship’s demise, which may, upon factual inquiry, be determined to have occurred months earlier. This is not as unusual as it may sound. Often, the attorney/client relationship may have ceased for all practical purposes weeks or months before a new attorney comes into the picture. The first attorney stays on the case in a babysitting capacity, or to avoid the client having to go in on a pro per basis, and a substitution of attorneys form is eventually filed months later. I have seen cases where a new attorney has come in, a substitution of attorneys form is signed by all persons, but not actually filed for weeks while the new attorney comes up to speed. All of these situations (and many more) can create uncertainty on the issue of when representation ceases.

**How to Calculate When the Statute Starts**

If you’re looking at, or handling a case in which there is a potential for attorney malpractice by a prior attorney, here’s a practical suggestion on how to approach the problem.

Sit down and create a time line. There will be only three events that you mark on the time line. What order you approach these events is relatively unimportant, but where they’re placed on the time line will determine whether and when the statute has started to run. Put a mark on the time line for the answer to each of the following questions:

1. What was the earliest date the client had knowledge of the possible malpractice of the attorney? The answer here is really the function of two questions: (a) When did the client first know that something had gone wrong with the case? And, (b) Was the client able to relate it to the attorney’s incompetence or mistake?

2. When did the client suffer actual injury as a result of the attorney’s wrongdoing? Remember, the fact that the full impact of the malpractice is not clear, or could even be undone (say, through an appeal) does not stop the statute from running.

3. When did the first attorney’s representation end?

Now look at your time line. What is the last date for any event you’ve entered? That is very likely the start of your statute of limitations.

**What You Need to Do**

Wherever you are on the time line, it is going to be necessary for you to take some action for your client. What action you should take will depend on how close you are to the year’s anniversary. If you are very close (meaning less than a few weeks away from the one year anniversary), you should consider filing a protective malpractice action on behalf of the client. If necessary, do so in pro per for the client. If you are a month or two away from the one year anniversary, you could seek a tolling agreement from the prior attorney. If you are a couple of months away or more, you should, at the very least, notify the client of your (tentative) opinion regarding the discovery of malpractice, and advise the client of his rights and responsibilities, and in particular, inform them of the time periods they are operating under.

To assist practitioners who face these problems, I have prepared and listed on my website, some forms that may be of assistance. You are welcome to utilize these forms, or if your situation is a little more difficult to evaluate, please feel free to call me for some advice. The forms on the website are a sample letter to the client advising them of the alleged malpractice you’ve discovered, and a sample tolling agreement that I’ve used in numerous cases. Adopt them as you feel is necessary, but the important thing is to act quickly. You don’t want to step into the shoes of the malpracticing attorney.