

# ARBITRATION ADVISORY

2016-01

## STATUTE OF LIMITATIONS FOR FEE ARBITRATIONS

Replaces and Supersedes Arbitration Advisory 2011-02

**March 25, 2016**

**Revised May 20, 2016**

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### INTRODUCTION

Like civil actions, disputes regarding fees, costs or both under the Mandatory Fee Arbitration Act ("MFAA", Business & Professions Code §§ 6200 et seq.) are subject to statutes of limitations. An arbitrator or panel may be required to determine whether a client's or attorney's request for fee arbitration is time-barred.

This Advisory addresses the application of the one-year statute of limitations for professional liability actions against an attorney set forth in Code of Civil Procedure ("CCP") Section 340.6 to mandatory fee arbitration and provides guidance to arbitrators in those cases where the statute of limitations is asserted as a defense.

### **WHEN MAY A STATUTE OF LIMITATIONS DEFENSE BE RAISED IN FEE DISPUTES SUBJECT TO ARBITRATION UNDER BUSINESS AND PROFESSIONS CODE SECTION 6200 ET SEQ.?**

The statute of limitations may present a question for the arbitrator. Business and Professions Code (Bus. & Prof. Code) §6206 provides that a mandatory fee arbitration may not be commenced if a civil action requesting the same relief would be barred by any applicable statute of limitations in Title 2 (commencing with section 312) of Part 2 of the Code of Civil Procedure. However, there is a limited, but important, exception to this rule, allowing arbitration to be commenced by a client, after the statute of limitations would otherwise have expired, if it follows the filing of a civil action by the attorney.

Two things are therefore clear:

- (1) A Bus. & Prof. Code §6200 arbitration is subject to the defense of the statute of limitations in the same way that a civil action for the same relief would be; but

(2) The filing of a lawsuit by the attorney against the client revives the client's right to seek fee arbitration under Section 6200 et seq., even after the statute of limitations has run. This prevents an attorney from waiting until after the client's right to MFA becomes time barred to sue for fees in court.

Therefore, the first step in the analysis as to whether a fee arbitration is barred by the statute of limitations would be to determine whether the arbitration was initiated in response to the filing of a civil action by the attorney. If that is the case, Bus. & Prof. Code Section 6206 makes it clear that the arbitration is not time barred, and any assertion of the statute of limitations by the attorney must be denied.

## **DOES CODE OF CIVIL PROCEDURE §340.6 APPLY TO MFAA ARBITRATIONS?**

### **A. Prior Advisory on Statute of Limitations**

Traditionally, attorney-client fee disputes were considered subject to the same statutes of limitations as other types of contractual disputes: two years for breach of oral contract (CCP §339(1)); two years for money had and received (CCP §339(1)); four years for breach of written contract (CCP §337(1)), and four years for an account stated or open book account (CCP §337(2)). These statutes of limitations can be tolled for up to two years if the person entitled to bring the action was imprisoned on a criminal charge at the time the cause of action accrued. (Code of Civ. Proc. §352.1.)

In the previous version of this Advisory, the Committee on Mandatory Fee Arbitration ("Committee") opined that the one-year statute of limitations in CCP Section 340.6 for wrongful acts or omissions by an attorney, other than for actual fraud, did not apply to fee arbitration under Bus. & Prof. Code Section 6200. The Committee's opinion was based on the conclusion that MFAA arbitrations do not provide the same relief as a legal malpractice claim or an action for malpractice pled as a breach of contract. Bus. & Prof. Code Section 6203(a) provides that evidence of professional misconduct or negligence may only be received for the limited purpose of determining whether the alleged malpractice or professional misconduct bears upon the fees, costs, or both to which the attorney is entitled. However, Section 6203(a) specifically precludes arbitrators from awarding affirmative relief in the form of damages or offset or otherwise for the attorney's alleged malpractice or professional misconduct. Thus, by definition, fee arbitration does not seek the same relief as a claim which may be barred under CCP Section 340.6 because arbitrators cannot award damages or other affirmative relief on any theory sounding in legal malpractice or professional misconduct.

The Committee's opinion also was based on its concern about fundamental fairness and equity if attorneys are given a longer period of time in which to pursue a claim to recover fees than a client has to initiate a claim for fee arbitration to dispute the attorney's fees or to determine a reasonable fee. In enacting the Mandatory Fee Arbitration Act ("MFAA"), the Legislature noted that disputes concerning legal fees were the "most serious problem between members of the bar and the public." The Legislature also noted that there was a "disparity in

bargaining power in attorney fee matters which favors the attorney in dealings with infrequent consumers of legal services” and that “many clients could not afford hiring additional counsel to litigate fee disputes in civil courts.” Thus, the public policy underlying MFAA “is to alleviate the disparity in bargaining power in attorney fee matters which favors the attorney by providing an effective, inexpensive remedy to a client which does not necessitate the hiring of a second attorney.” (*Manatt, Phelps, Rothenberg & Tunney v. Lawrence* (1984) 151 Cal.App.3d 1165, 1174–1175; see also *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 983; *Alternative Systems, Inc. v Carey* (1998) 67 Cal.App.4th 1034, 1043, abrogated on other grounds in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4<sup>th</sup> 557; see also Cal. State Bar Formal Ethics Opinion 1981-86 [“Furthermore, it is the Committee’s opinion that Business and Professions Code section 6200, subdivision (b), and the Rules were established to protect the consumer in general and, therefore, “for a public reason . . .”].)

#### **B. Lee v. Hanley (2015) 61 Cal.4<sup>th</sup> 1225**

A recent decision of the California Supreme Court sheds light on the scope of CCP Section 340.6 and held that it may apply to a client’s claim for a refund of allegedly unearned fees from their attorney. In *Lee v. Hanley* (2015) 61 Cal.4th 1225, the California Supreme Court (“Court”) addressed the question whether CCP Section 340.6 applies to a client’s claim for the return of unearned fees held by the attorney after the representation terminated. The Supreme Court held that the one-year statute of limitations for an action against an attorney based on a wrongful act or omission arising in the performance of professional services applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services and therefore may apply to a client’s claim for the return of unearned fees.

In *Lee*, the client advanced \$110,000 to her attorney to cover attorney’s fees and cost in litigation as well as \$10,000 to be used for expert witness fees. After the case settled, the attorney sent a letter and an invoice for legal services to the client, both of which indicated that the client had a credit balance of \$46,321.85. However, when the client requested a final billing statement and a refund of her final credit balance the attorney responded by stating that the client did not have a credit balance and would not receive a refund. As a result, the client retained a new attorney who sent a letter terminating the attorney’s services and demanding a refund of \$46,321.85 in unearned attorney’s fees and approximately \$10,000 in unused expert witness fees. In response, the attorney returned \$9,725 in unused expert witness fees but did not return any of the unearned attorney’s fees.

Over a year after the client’s demand letter was sent, the client filed a lawsuit against her former attorney seeking a return of the allegedly unearned fees. The attorney demurred on the ground that client’s lawsuit was time-barred under CCP §340.6(a). Before the trial court ruled on the demurrer, the client filed a first amended complaint, so the trial court ruled that the demurrer was moot. The attorney demurred to the first amended complaint on the same basis as his original demurrer and the trial court sustained the demurrer with leave to amend holding that section 340.6 barred all of the client’s claims.

The client filed a second amended complaint alleging that her attorney “provided appropriate legal services” and that she did not suffer any injury from said services. However, the second amended complaint further alleged that the attorney’s last billing informed the client that she had a credit balance of \$46,321.85 after all professional services were completed. The client further alleged that within a reasonable time after the last billing, but no later than March 1, 2010, the attorney should have refunded the client’s credit balance, but did not, and that the attorney was therefore unjustly enriched by his failure to return the unearned fees/costs. The client further alleged that she sustained damages of the loss of her \$46,321.85, plus interest on said funds, at the legal rate of 10% from March 1, 2010 through Judgment.

The trial court sustained the demurrer, holding that the client’s claims were barred by section 340.6, but granted leave to amend by adding a count for fraud. When the client did not file a further amended complaint, the trial court dismissed the action with prejudice. The client appealed, arguing that section 340.6(a) did not apply to her claims. The court of appeal reversed, holding that legal malpractice statute of limitations is inapplicable to garden variety theft or conversion of client funds and that whether the attorney’s alleged failure to refund unearned attorney fees to client was garden variety theft or conversion was fact issue not suitable for resolution on demurrer.

The Supreme Court granted review “to decide whether an attorney’s refusal to return a former client’s money after the client terminated the representation was a ‘wrongful act or omission . . . arising in the performance of professional services’ under section 340.6(a).” (*Lee v. Hanley, supra*, 61 Cal.4<sup>th</sup> at 1229.) The Court analyzed the legislative history of section 340.6, and concluded that in enacting the final version of the bill:

“the Legislature intended to establish a limitations period that would apply broadly to any claim concerning an attorney’s violation of his or her professional obligations in the course of providing professional services regardless of how those claims were styled in the plaintiff’s complaint.” (*Lee v. Hanley, supra*, at 1235.)

The Court explained that it drew two conclusions from the legislative history of section 340.6. First, the Legislature sought to eliminate the former limitations scheme’s dependence on the way a plaintiff styled his or her complaint so that the applicable limitations period would instead turn on the conduct alleged and proven. Second, the Legislature wanted a broader sweep so that the statute applies not only to claims for professional negligence but to any action involving wrongful conduct, other than actual fraud, arising in the performance of professional services. (*Id.* at 1236.)

The Court held that “section 340.6’s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services.” The Court further explained that in that context a “professional obligation” is:

“an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in the legal services contract into which an attorney has entered, and the obligations embodied in the Rules of Professional Conduct.” (*Id.* at 1237.)

However, the Court concluded that section 340.6 does not bar garden-variety theft or a claim that does not require proof that the attorney violated a professional obligation. The Court also explained that section 340.6 does not bar a claim arising from an attorney’s performance of services that are not “professional services.” The Court defined “professional services” as:

“services performed by an attorney which can be judged against the skill, prudence and diligence commonly possessed by other attorneys.” (*Id.*)

The Court explained that “the attorney-client relationship often requires attorneys to provide nonlegal professional services such as accounting, bookkeeping, and holding property in trust.” (*Id.*) Thus, the Court stated that “the term ‘professional services’ is best understood to include nonlegal services governed by an attorney’s professional obligations.” (*Id.*) However, the Court concluded that for purposes of section 340.6, misconduct does not arise in the performance of professional services “merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct.” (*Id.* at 1238.) The Court gave examples that claims that an attorney stole from or sexually battered his client while the attorney was providing legal advice would not be barred by section 340.6.

The Court’s ultimate holding in *Lee* was that the trial erred in sustaining the attorney’s demurrer on the basis of section 340.6 because it could not be determined from the allegations of the complaint whether it necessarily depended on proof that the attorney violated a professional obligation. In this regard, the Court noted that the complaint may be construed to allege that the attorney is liable for conversion for simply refusing to return an identifiable sum of the client’s money and that such a claim would not necessarily depend on proof that the attorney violated a professional obligation in the course of providing professional services. (*Id.* at 1240.)

The Supreme Court’s decision in *Lee* makes no reference to fee arbitration or the MFAA statutes, which is a distinct statutory process for the resolution of disputes between attorneys and clients regarding fees, costs, or both. (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 984; *Greenberg Glusker Fields Claman & Machtinger LLP v. Rosenson* (2012) 203 Cal.App.4th 688, 693; *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 C4th 557, 564.)

### **C. Committee Position on Statute of Limitations Following *Lee v. Hanley***

While *Lee v. Hanley* may properly reflect the Legislative intent in enacting section 340.6, the decision seems to undermine the Legislature intent in enacting MFAA as it may provide a means by which an attorney could circumvent “mandatory” fee arbitration and instead file an action in court to collect unpaid fees and costs simply by waiting more than one-year after the attorney’s representation of the client terminates before providing the client with notice of the client’s right to MFA as required by Bus. & Prof. Code §6201(a).

The Committee is concerned with the fundamental fairness and equity if, under *Lee v Hanley*, attorneys are given a longer period of time in which to pursue a claim to recover fees from a former client than the client has to initiate a claim for fee arbitration under the MFAA. As discussed above, such a result is inconsistent with the Legislative intent in adopting the MFAA and its main public policy “to alleviate the disparity in bargaining power in attorney fee matters which favors the attorney by providing an effective, inexpensive remedy to a client which does not necessitate the hiring of a second attorney.”

Nonetheless, the Court’s analysis in *Lee*, including its favorable citation of *Levin v. Graham & James* (1995) 37 Cal.App.4<sup>th</sup> 798, 803-805 (section 340.6 barred claim that law firm charged unconscionable fees because claim was based on allegation that firm provided deficient legal services), strongly suggests that the one-year limitations period under section 340.6 applies to the arbitration of attorney-client fee disputes under the MFAA where the nature of the dispute in any way involves the nature and propriety of the attorney’s legal services. Thus, in the absence of future clarification of this issue by the Supreme Court or the Legislature, it appears that the one-year limitations period under section 340.6 may apply to the arbitration of attorney-client fee disputes under the MFAA where the nature of the dispute in any way involves the nature and propriety of the attorney’s legal services. But it does not necessarily apply to claims that an attorney converted client funds or defrauded the client in a manner which impacts the attorney’s right to recover fees or the amount thereof, or engaged in garden-variety theft of client funds. However, that is an issue which may ultimately need to be resolved by the Supreme Court or the Legislature.

**DOES THE ONE-YEAR LIMITATIONS PERIOD IN SECTION 340.6 NECESSARILY BAR A CLIENT’S REQUEST FOR FEE ARBITRATION IF IT IS MADE MORE THAN ONE-YEAR AFTER THE ATTORNEY’S SERVICES TERMINATED?**

The answer to this question will depend on the circumstances of the client’s request for fee arbitration and whether the statute of limitations is raised by the attorney as a defense to fee arbitration.

**A. Client Requests MFA in Response to a Lawsuit or Contractual Arbitration Commenced by the Attorney.**

Bus. & Prof. Code §6201(a) requires that an attorney forward to the client written notice of the client’s right to fee arbitration “prior to or at the time of service of summons or claim in an action against the client, or prior to the commencement of any other proceeding against the client

under a contract which provides for an alternative to arbitration under this article, for recovery of fees, costs or both.”

Bus. & Prof. Code §6206 provides that the filing of a lawsuit by the attorney against the client revives the client’s right to seek fee arbitration even after the statute of limitations has run. This prevents an attorney from waiting until after the client’s right to MFA becomes time barred to sue for fees in court. Thus, if an attorney provides the required notice in conjunction with, or after, filing a lawsuit or commencing a contractual arbitration against the client then the client’s request for MFA is not time-barred even if the request is made more than one-year after the representation terminated.

**B. Client Requests MFA More Than One-Year After Attorney’s Representation Terminated But Before the Attorney Files a Lawsuit or Commences Contractual Arbitration**

If the attorney provides the required notice more than one-year after the representation terminated but prior to filing a lawsuit or commencing a contractual arbitration against the client, several factors must be considered.

**1. Has the Respondent Attorney Asserted the Statute of Limitations as a Defense to the Client’s Request for MFA?**

In civil actions, a statute of limitations operates as an affirmative defense to a claim for relief. (*Adams v. Paul* (1995) 11 Cal.4th 583, 597; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 396.) Because the statute of limitations is an affirmative defense, the general rule is that it must be raised by the defendant in the responsive pleading or it is waived. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 8; *Minton v. Cavaney* (1961) 56 Cal.2d 576, 581; *Reed v. Norman* (1953) 41 Cal.2d 17, 21–22.)

Mandatory Fee Arbitration is intended to provide a speedy, inexpensive remedy to a fee dispute which does not necessitate the client’s hiring of a second attorney. As a result, MFA matters do not have pleadings that strictly frame the issues as in civil litigation.

Because the overwhelming majority of fee arbitrations are initiated by a client disputing the fees, costs or both charged by an attorney, a statute of limitations defense is typically something which may be raised by the respondent attorney. Even though strict rules of pleading do not apply to MFA, it is the opinion of the Committee that if the respondent attorney does not raise the statute of limitations in the reply to a client’s request for arbitration then the issue has not been tendered and fee arbitration should proceed even if it appears to the program or the arbitrator(s) that the client’s request for MFA may be time barred.

In cases where the attorney is the party who initiates fee arbitration, the client appearing without attorney may not have the sophistication to be aware of or assert special defenses such as the statute of limitations. In light of the public policy behind mandatory fee arbitration to

alleviate the disparity in bargaining power in attorney fee matters which favors the attorney by providing an effective, inexpensive remedy to a client which does not necessitate the hiring of a second attorney, the Committee believes that in cases initiated by the attorney it is permissible for the arbitrator to raise the statute of limitations issue *sua sponte* if it is apparent from the attorney's request for arbitration, client's response, materials presented, and/or testimony that the action is time-barred. In such cases, the arbitrator should ask questions to evaluate the possible statute of limitations defense and give both parties the opportunity to address the issue rather than issuing an award without hearing arguments. For example, if an attorney is seeking to recover fees based on bills which reflect that the services were rendered more than four years ago, ask attorney to explain why statute of limitations does not bar the claim. If necessary, the arbitrator may request briefing on the issue.

**2. Is The Client's Fee Dispute One Where the Merits Necessarily Depend on Proof That the Attorney Violated A Professional Obligation in the Course of Providing Professional Services?**

Under the Supreme Court's holding in *Lee v. Hanley*, for C.C.P. §340.6 to apply to fee arbitrations the merits of the client's fee dispute must necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. (*Lee v. Hanley, supra*, 61 Cal.4<sup>th</sup> at 1237-1238.) A review of the Court's holding in *Lee*, and the cases cited therein with approval, suggests that the following issues which may arise in a fee dispute will most likely depend on proof that an attorney violated a professional obligation in the course of providing professional services:

- Breach of contract (*Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417);
- Professional negligence and/or professional misconduct based on an attorney's ethical obligations under the Rules of Professional Conduct (*Lee v. Hanley, supra* at 1237-1240);
- Charging an unconscionable fees for professional services (*Levin v. Graham & James* (1995) 37 Cal.App.4th 798)
- Breaches of fiduciary duties (*Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362; *Pompilio v. Kosmo, Cho & Brown* (1995) 39 Cal.App.4th 1324; *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946);
- Wrongful retention of settlement funds (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105);
- Negligent misrepresentation (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54);

- Constructive fraud (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303; (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54);
- Failure to refund an unearned fee or retainer deposit, unless the failure to refund constitutes a conversion or theft of client funds (*Lee v. Hanley, supra* at 1239-1240);
- Trust accounting issues regarding client funds (*Lee v. Hanley, supra* at 1237).

While some of the foregoing claims may have been subject to a two, three or four year statute of limitations before the decision in *Lee v. Hanley*, they will now be subject to the one-year statute of limitations in C.C.P. §340.6.

However, if the facts demonstrate that an attorney's failure to refund fees constitutes conversion or garden-variety theft then section 340.6 would not apply. The statute of limitations for conversion of personal property is three years. (Code of Civ. Proc. §338(c).) The statute for a conversion claim generally runs from the date of taking or other act of conversion. (*AmerUS Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631, 639.) But, where the defendant fraudulently conceals his or her wrongful acts from the property owner, a conversion action accrues when the owner discovers or should have discovered that defendant wrongfully took the property. (*Naftzger v. American Numismatic Soc.* (1996) 42 Cal.App.4th 421, 428-429.)

### **3. Can a Client Refile for MFA if the Client Previously Request MFA and the Case was Dismissed Pursuant to C.C.P. §340.6 Because the Attorney Had Not Yet Filed a Lawsuit or Commenced Contractual Arbitration?**

Because the Supreme Court's decision in *Lee v. Hanley* provides attorneys with a longer period of time in which to pursue a claim to recover fees from a former client than the client has to initiate a claim for fee arbitration under the MFAA there may be situations where an attorney waits more than a year and then serves the client with notice of the client's right to MFA but the attorney does not file a lawsuit or commence binding arbitration. The attorney's service of the notice of client right to MFA will trigger the thirty-day period for the client to request MFA or waive their right to do so. The client may request MFA only to be met with the attorney's claim that the request is barred by the one-year limitations period in C.C.P. §340.6. Based on the Supreme Court's holding in *Lee v. Hanley*, the program or arbitrator(s) in such cases may have no choice but to dismiss the fee arbitration on the grounds that it is time barred under Code of Civ. Proc. §340.6 and Bus. & Prof. Code §6206. However, the Committee recommends that in the case of a dismissal based on the statute of limitations defense, particularly with respect to the one-year limitations period provided by C.C.P. §340.6, the program or the arbitrator(s) should only issue an order dismissing the case *without prejudice* as it is not dispositive of the client's right to refile for MFA if the attorney subsequently files a lawsuit against the client.

If the attorney subsequently files a lawsuit or commences arbitration against the client seeking to recover unpaid fees, costs or both, that raises a question whether the client can refile a request for MFA in response to the attorney's lawsuit or demand for arbitration. As discussed above, Bus. & Prof. Code §6206 provides that the filing of a lawsuit by the attorney against the client revives the client's right to seek fee arbitration even after the statute of limitations has run. However, it is unclear if that applies where there has been a prior dismissal based on the statute of limitations.

The Committee is not aware of authority on this issue, but it appears that the intent of the Legislature in providing the revival provision in Bus. & Prof. Code §6206 was to allow a client to request MFA in response to an attorney's filing of the lawsuit for fees in order to prevent an attorney from gaining an unfair advantage from possibly having a longer statute of limitations or from gamesmanship with respect to the statute of limitations. Under this interpretation of §6206, a client's request for MFA would only be time barred where the request is filed after the statute of limitations has expired and the attorney never files a lawsuit or commences arbitration against the client to collect unpaid fees, costs, or both. Therefore, it is the opinion of the Committee that whenever an attorney files a lawsuit or contractual arbitration against a client to collect fees, costs or both, §6206 allows the client to file for MFA even if the statute of limitations has expired and even if the client previously filed for MFA under the circumstances discussed above and that case was dismissed based on the statute of limitations. Any other interpretation would allow an attorney to circumvent MFA and thereby undermine the Legislature's intent to provide a system to address the "serious problem" of attorney-client disputes concerning legal fees and to alleviate the "disparity in bargaining power in attorney fee matters which favors the attorney" by providing an effective, inexpensive remedy to a client which does not necessitate the hiring of a second attorney.

The Committee believes the foregoing analysis is supported by Code of Civ. Proc. §431.70, which provides that where cross-demands for money exist between two persons at a time when neither is barred by the statute of limitations, they are deemed compensated to the extent they equal each other. Thus, a client's time-barred malpractice claim could also be used as an offset to an attorney's fee claim against the client. (*Safine v. Sinnott* (1993) 15 Cal.App.4th 614, 618.)

### **WHEN DOES THE STATUTE OF LIMITATIONS START TO RUN?**

In cases where arbitrators are confronted with a statute of limitations defense, they will have to determine when the statute of limitations starts to run, particularly in cases governed by Code of Civ. Proc. §340.6. The legal malpractice statute of limitations is a complex area of law. The following is intended to help guide programs and/or arbitrators determine when the limitations period starts to run and the effect of statutory tolling provisions.

Code of Civ. Proc. §340.6 provides that the action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services must 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.”

There is an exception for criminal malpractice cases where the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim. In such cases, Code of Civ. Proc. §340.6 provides that “the action shall be commenced within two years after the plaintiff achieves post-conviction exoneration in the form of a final judicial disposition of the criminal case.”

There are four express tolling provisions in Code of Civ. Proc. §340.6 which provide that that the limitations 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.
- (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.
- (4) The plaintiff is under a legal or physical disability which restricts the plaintiff’s ability to commence legal action.

The statutory tolling provisions in section 340.6 are exclusive. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618; (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 756.) Thus, the doctrine of equitable tolling does not apply to legal malpractice actions. (*Gordon v. Law Offices of Aguirre & Meyer* (1999) 70 Cal.App.4th 972, 980.) In addition, where the attorney’s malpractice results in an adverse judgment against the client, the client’s appeal of the judgment does not toll the statute of limitations. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 614-615.)

With the exception of willful concealment by the attorney, the tolling provisions of §340.6 apply to both the one-year and four-year provisions. (*O’Neill v. Tichy* (1993) 19 Cal.App.4th 114, 119; *Gurkewitz v. Haberman* (1982) 137 Cal.App.3d 328, 336.)

Discovery, for purposes of accrual of the one-year limitations period, occurs upon the plaintiff’s discovery of *facts* constituting the wrongful act or omission, or once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry as to the alleged malpractice. (*Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 822 [once the plaintiff has, or should have had, a suspicion of wrongdoing, the plaintiff must go forth and find the facts]; *Village Nurseries, L.P. v. Greenbaum* (2002) 101 Cal.App.4th 26, 42-45; See also, *McGee v. Weinberg* (1979) 97 Cal.App.3d 798, 803-804 [it is the occurrence of some cognizable event, rather than knowledge of its legal significance which starts the running of the statute of limitations].)

The client's knowledge of the attorney's malpractice is not by itself enough to start the statute of limitations and the statute will be tolled until the client has sustained actual injury. (*Moss v. Stockdale, Peckham & Werner* (1996) 47 Cal.App.4th 494, 499.) There is no "bright line" rule for determining "actual injury" in all cases; rather "the particular facts of each case must be examined in light of the wrongful act or omission the plaintiff alleges against the attorney." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 764.)

Actual injury occurs once the client has sustained any appreciable/actionable harm flowing from an attorney's negligent conduct upon which the client may sue, including but not limited to the loss or diminution of a right or remedy. (*Budd v. Nixen*, (1971) 6 Cal.3d 195, 201; *Adams v. Paul* (1995) 11 Cal.4th 583, 589-590 [actual injury may consist of an impairment or diminution of a right or remedy, and occurs, for purposes of the legal malpractice statute of limitations, as soon as damage -- meaning any "manifest and palpable" harm -- occurs]; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [the test for actual injury is whether the plaintiff has sustained any damages compensable in an action against an attorney for a wrongful act of omission arising from the performance of professional services; actual injury under Section 340.6 refers only to the legally cognizable damage necessary to assert a cause of action].) The fact of actual injury does not depend upon or require a final adjudication, as by judgment or settlement. (*Laird v. Blacker*, (1992), 2 Cal.4th 606, 609, 615; *Adams v. Paul, supra*, 11 Cal.4th at 591, fn. 4; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, supra*, 18 Cal.4th at 752, 755.)

The statute is also tolled during the period the attorney continues to represent the plaintiff/client regarding the specific subject matter in which the alleged wrongful act or omission occurred. [*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 514.] The rationale of the continuing representation tolling is to avoid disrupting the attorney-client relationship while enabling the attorney to correct or minimize the error. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618.) The attorney's formal withdrawal is not required to commence the statute of limitations if the relationship has otherwise terminated by operation of law or by the attorney's discharge. (*Hensley v. Caietti* (1993) 13 Cal.App.4th 1165, 1172-1173; *Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, 848-849.)

## CONCLUSION

Bus. & Prof. Code Section 6206 provides that a Mandatory Fee Arbitration may not be commenced if a civil action requesting the same relief would be barred by any applicable statute of limitations set forth in the Code of Civil Procedure. It is the Committee's opinion that the law in this area is unsettled but that fee arbitration may be subject to the statute of limitations defense in C.C.P. Section 340.6 and recent case law interpreting it, where the nature of the dispute involves the propriety of the attorney's legal services. It does not apply to claims where an attorney converted a client's funds or defrauded the client. It is also the Committee's opinion that the proper course of action is that a fee arbitration may be commenced, even if the statute of

limitations otherwise bars it, depending on several factors identified in this advisory. An arbitrator or panel should carefully analyze these factors and include the analysis and finding in the award.