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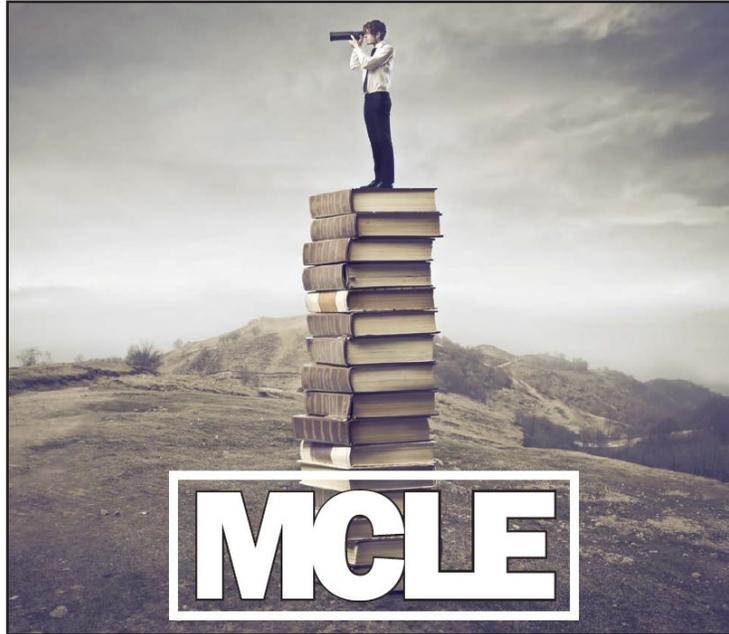
PERSPECTIVE

Demurrer can dispose of legal malpractice claims based on the statute of limitations tolling provision

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On April 24, the 6th District Court of Appeal issued a landmark decision in *Nguyen v. Ford*, 2020 DJDAR 4610, upholding the trial court's sustaining of a demurrer, without leave to amend, based on a statute of limitations defense. Nguyen brought an untimely legal malpractice claim, relying on the tolling provision of Code of Civil Procedure Section 340.6(a), and unsuccessfully arguing that she had a reasonable expectation that Ford would continue to represent her in litigation. To our knowledge, this opinion is the first California published case in which a court disposed of a legal malpractice case by demurrer by finding, based on the plaintiff's allegations alone, that the tolling provision could not apply as a matter of law. The opinion provides welcomed clarity on the statute of limitations tolling provision that in the past has often permitted untimely malpractice claims to linger until a motion for summary judgment is brought.

Attorneys weather many battles on behalf of their clients, whether in litigation, to close a deal, or to give advice in an unsettled area of law. When the client's goal is finally accomplished or a compromise is reached, willingly or unwillingly, the relief felt by clients or their attorneys alike can distract from engaging in formalities that signal the end of the attorney-client relationship. If years later a claim for malpractice is brought, this ambiguity can unnecessarily prolong litigation that could have otherwise been disposed of with a straightforward statute of limitations defense.



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Even attorneys who implement the sound practice of sending their clients a timely and formal letter denoting that all work on a subject matter has been completed may find themselves in a gray area when the client continues to communicate with the attorney and request their services.

For example, the former or current client may:

- Return for a related deal;
- Retain the lawyer for another lawsuit without a separate legal services agreement;
- Have follow up questions or minor related work for the attorney; or
- Have the attorney on a *de facto* permanent retainer for any legal question or issue that arises without executing a separate agreement that defines the scope of legal services to be provided.

In short, the lines can easily become blurred as to when the work on a certain client and subject matter ends. Courts then look to how the

attorney interacts with and responds to the client after the representation on that specific subject matter allegedly ended.

Legal malpractice claims can be an exercise of hindsight and are often brought when the client has had time to cool down and reflect on the outcome of a matter, or when the dissatisfied client refuses to pay bills and the attorney sues in quantum meruit for unpaid fees. At that point in time, would-be plaintiffs may run up against California's strict legal malpractice statute of limitations.

California Code of Civil Procedure Section 340.6(a) provides that a legal malpractice claim (other than for actual fraud) must be brought within one year after the plaintiff discovered or should have discovered the alleged act or omission constituting malpractice, or four years from said act or omission, whichever is sooner. The date of discovery is usually not an area of confusion because the principle is embodied

in many other torts statutes of limitation. Rather, the "continued representation" tolling rule in Section 340.6(a)(2) is a more likely cause of uncertainty and has precipitated much litigation that has evolved its applicability and meaning.

Section 340.6(a)(2) prevents the statute of limitations for malpractice from accruing until the attorney's representation regarding the *specific subject matter* ends, but does not apply when the attorney only serves a tangentially related role. *Foxborough v. Van Atta*, 26 Cal. App. 4th 217, 229 (1994). The rationale behind the tolling provision is to afford attorneys an opportunity to correct mistakes and avoid unnecessary lawsuits while the client is still represented without the client running up against a deadline to file; and simultaneously the provision discourages attorneys from artificially extending the relationship until after the statute has run. *Id.* at 228. The policy is to avoid litigation in courts, and not to revive stale claims of former clients.

In recent years, the California Courts of Appeal have clarified when the termination of an attorney-client relationship occurs with respect to a specific subject matter, thus distinguishing it from legal work on unrelated or mere administrative matters. *See Gonzalez v. Kalu*, 140 Cal. App. 4th 21, 28 (2006); *GoTek Energy v. Socal IP Law Group, LLP*, 3 Cal. App. 5th 1240 (2016); *Flake v. Neumiller*, 9 Cal. App. 5th 223 (2017); and now *Nguyen v. Ford*.

Whether a representation has ended is an objective inquiry based on evidence of facts showing the client's reasonable belief that the representation will continue, i.e., "evidence of an ongoing mutual

relationship and of activities in furtherance of the relationship.” Although it would provide conclusive evidence, the termination of the attorney-client relationship need not be based on a motion to withdraw as counsel, and rarely will there be such certainty indicating the end of the relationship in a legal malpractice case. See *Flake v. Neumiller*, 9 Cal. App. 5th at 232; *Nguyen*.

The determination of whether an attorney “continues to represent the plaintiff regarding the specific subject matter” is generally a question of fact, but it can be decided as a matter of law if the undisputed facts can support only one conclusion. In most published cases, these determinations were made upon a motion for summary judgment showing that no reasonable person could conclude on the facts that the relationship would continue. However, *Nguyen* held that such a determination can even be made at the pleading stage.

In *Nguyen*, attorney Ford filed an employment discrimination action in the Northern District of California on Nguyen’s behalf, which was dismissed by summary judgment. The original retainer agreement executed between the parties specifically excluded appeals, but the parties signed a separate agreement to prosecute an appeal in the 9th U.S. Circuit Court of Appeals. At some point into the appeal, Ford filed a motion to withdraw as attorney of record for Nguyen in the 9th Circuit, which was granted on April 17, 2015, and of which Nguyen was admittedly aware. Ford then filed a notice of withdrawal as counsel in the district court action, attaching the 9th Circuit order that granted her motion to withdraw from the appeal. Nguyen associated new counsel for the appeal, but the 9th Circuit affirmed the district court’s ruling on May 11, 2018.

Nguyen alleged that but for Ford’s untimely filing of a brief in the district court case, she would have defeated summary judgment. She also alleged that while the appeal was pending, and after Ford withdrew from the appeal, Ford remained her counsel for the district court action, and that the statute

of limitations should be tolled because Ford never informed Nguyen of her intention to withdraw in the district court. Nguyen based her opposition to the statute of limitations challenge on her “reasonable belief” that Ford continued to represent her in the district court action because (1) she executed separate retainer agreements with Ford for the trial court action and the appeal, so that Ford’s withdrawal from the appeal would not translate to Nguyen’s representation in the district court, (2) Ford never told Nguyen she no longer wished to represent her in the district court, and (3) the district court never issued an order relieving Ford as counsel of record for Nguyen.

To determine whether Nguyen’s belief regarding the continuing attorney-client relationship was reasonable, the court examined interactions between Nguyen and Ford after the 9th Circuit granting Ford’s motion to withdraw as counsel. The court found that Nguyen did not allege ongoing communications with Ford regarding the district court case, or that Ford made any other legal appearances for her, billed her for any work performed, or made any affirmative representations towards Nguyen that she would continue to represent her in the district court.

The *Nguyen* court ruled that, as a matter of law, Nguyen’s belief that Ford continued to be her attorney was unreasonable once Ford filed notices in the district court “describing herself as Nguyen’s former attorney” and placed an attorney’s lien on Nguyen’s potential

recovery from the matter. In line with previous California authority on the issue, *Nguyen* held that Ford’s compliance with local court rules regarding proper procedure for withdrawal as counsel was irrelevant for determining when Nguyen would no longer have a reasonable expectation that the relationship would continue.

Finally, the court found that, at the latest when Ford filed her notices in the district court on April 30, 2015, Nguyen no longer held a reasonable belief that the relationship would continue, and at that point had one year to file her malpractice action. Nguyen’s action fell outside of the limitations period by waiting until 2018 to file her complaint, presumably because she waited on the outcome of her 9th Circuit appeal.

Additionally, Nguyen’s action for breach of fiduciary duty against Ford was also barred by CCP Section 340.6(a) because the central purpose of Nguyen’s allegations to support the cause of action is to demonstrate that Ford provided “deficient professional services,” which includes Ford’s legal services, but also ancillary and non-legal services or duties. Remarkably, the court also found that there was no reasonable probability of an amendment that could cure the pleading defects and thus denied Nguyen leave to amend the complaint.

Nguyen v. Ford sets new precedent for attorneys seeking to dispose of malpractice actions at the pleading stage based on a statute of limitations affirmative defense.

Going forward, when there is no fact alleged to indicate the plaintiff’s reasonable belief as to a continuing representation, courts may readily dispose of such actions on a demurrer and deny leave to amend. The *Nguyen* court again emphasized that no formal pleading or filing with the court is necessary to signal the end of the representation to the client, thus demurrers based on a statute of limitations defense may be sustained on allegations of informal communications or mere circumstantial evidence (i.e., factual allegations) showing the relationship ended.

Attorneys should take away from this case that:

1. They can more easily protect themselves against the unwitting continuation of the attorney-client relationship, and the corresponding statute of limitations, by making clear to the client when work on a specific subject matter starts and ends — preferably in writing with a separate legal services agreement, distinct invoicing and billing, or other form of written notice indicating that no further work will be performed;

2. Plaintiffs’ counsel prosecuting legal malpractice actions should be cautious in laying out allegations that will be taken as true by the court if challenged by demurrer; and

3. The Courts of Appeal have made great strides in clarifying ambiguous language in CCP Section 340.6 so that its application in cases at the trial court level should be consistent. ■

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Self-Assessment Test

Test prepared by the Daily Journal. Questions do not necessarily reflect the opinion of the author(s) of the accompanying article.

1. After an attorney sends a client a timely and formal letter denoting that all work on a subject matter has been completed, all work between the two parties must cease for a period of five years.
True False
2. Most legal malpractice lawsuits must be brought within one year after the plaintiff discovered or should have discovered the alleged act or omission.
True False
3. Legal malpractice cases that regard actual fraud have a different statute of limitations than legal malpractice claims without actual fraud.
True False
4. The date of discovery of the legal malpractice is unique from the date of discovery in other torts.
True False
5. The “continued representation” tolling rule in Section 340.6(a)(2) is often a cause of uncertainty.
True False
6. Section 340.6(a)(2) explicitly states it applies to attorneys who are lead counsel as well as those who served only in tangentially related roles.
True False
7. Section 340.6(a)(2) prevents the statute of limitations for malpractice from accruing until the attorney’s representation regarding the specific subject matter ends.
True False
8. The policy behind the tolling provision is to give attorneys an opportunity to correct mistakes.
True False
9. The tolling provision encourages litigation in courts.
True False
10. The tolling provision discourages attorneys from extending the lawyer-client relationship until after the statute of limitations has run.
True False
11. Administrative work is included in the definition of “specific subject matter” as it relates to the attorney-client privilege.
True False
12. Whether representation has ended is a subjective inquiry that requires expert testimony into the subjective state of mind of the parties.
True False
13. The termination of the attorney-client relationship based on a motion to withdraw as counsel provides conclusive evidence of the termination of the relationship.
True False
14. Whether an attorney “continues to represent the plaintiff regarding a specific subject matter” can be decided as a matter of law.
True False
15. Rarely, in legal malpractice cases is there certainty about when the end of lawyer-client relationship occurred.
True False
16. The determination of whether an attorney “continues to represent the plaintiff regarding the specific subject matter” is generally a question of fact.
True False
17. Attorneys can more easily protect themselves against the unwitting continuation of the attorney-client relationship, and the corresponding statute of limitations, by making clear to the client when work on a specific subject matter starts and ends.
True False
18. The Courts of Appeal have not tried to clarify ambiguous language in CCP Section 340.6.
True False
19. Determinations of whether the attorney-client relationship continued cannot be made at the pleading stage.
True False

20. When there is no fact alleged to indicate the plaintiff's –reasonable– belief as to a continuing representation, courts may readily dispose of such actions on a demurrer and deny leave to amend.

True False

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