S141131

IN THE SUPREME COURT OF CALIFORNIA

BEAL BANK, SSB,

Plaintiff and Appellant,

vs.

ARTER & HADDEN, LLP, et al.,

Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO
CASE NO. B179383

OPENING BRIEF ON THE MERITS

HORVITZ & LEVY LLP
DAVID M. AXELRAD (STATE BAR NO. 75731); daxelrad@horvitzlevy.com
FREDERIC D. COHEN (STATE BAR NO. 56755); fcohen@horvitzlevy.com
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157

MOSCARINO & CONNOLLY LLP
JOHN M. MOSCARINO (STATE BAR NO. 122105); jmoscarino@mosconn.com
PAULA C. GREENSPAN (STATE BAR NO. 166332); pgreenspan@mosconn.com
1100 GLENDON AVENUE, 14TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3503
(310) 500-3411 • FAX: (310) 824-3543

ATTORNEYS FOR DEFENDANTS AND RESPONDENTS
ARTER & HADDEN, LLP AND ERIC DEAN

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(310) 500-3411 • FAX: (310) 824-3543

ATTORNEYS FOR DEFENDANTS AND RESPONDENTS
ARTER & HADDEN, LLP AND ERIC DEAN

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QUESTION PRESENTED

Can the plain language of Code of Civil Procedure section 340.6 be construed to permit a law firm's associate to automatically and vicariously toll the statute of limitations for a malpractice claim against the law firm and its past and present partners by resigning from the firm, forming a new law firm and replacing the prior firm as sole counsel of record for one of the prior firm's former clients?

INTRODUCTION

Code of Civil Procedure section 340.6 (section 340.6) establishes two alternate time periods within which legal malpractice actions must be filed: one year after the client discovers, or should have discovered, the attorney's wrongful act or omission, or four years from the date the wrongful act or omission occurred, whichever date occurs first. These deadlines are tolled if "the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." (Code Civ. Proc., § 340.6, subd. (a)(2).)

As is readily apparent from the face of the statute, the continuous representation tolling rule applies only if an attorney "continues to represent the plaintiff regarding the specific subject matter" of the alleged malpractice. The Court of Appeal, however, read the statute differently. It concluded the statute should be tolled not only as to the attorney who continues to represent the client, but also as to the law firm for which that attorney previously worked at the time the initial act of malpractice took place, and the partners of that firm, even though the firm and the partners long ago ceased representing the client. Applying that interpretation to the present case, the court ruled the client's malpractice action against Arter & Hadden and one of its partners was timely even though it was filed more than four years after an adverse judgment should have led the client to conclude that Arter & Hadden had been negligent, and even though the client severed its relationship with Arter & Hadden almost four years before it initiated the malpractice litigation. The court ruled the statute was tolled because, after firing Arter & Hadden, the client hired one of the firm's former associates to challenge the adverse judgment.

The Court of Appeal's conclusion that continuous representation by one attorney can toll the statute of limitations as to another attorney is contrary to the plain language of the statute, contrary to the rationale underlying the Legislature's decision to enact the continuous representation tolling rule, and contrary to the broader goals section 340.6 was designed to serve.

The language of the continuous representation tolling rule is in no way ambiguous. The statute provides that "[a]n action against an attorney . . . shall be tolled during the time that . . . [t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." (Code Civ. Proc., § 340.6, subd. (a) & (a)(2).) By its plain terms, the statute provides that the time periods are tolled only as to the attorney who is actually engaged in the continuous representation and not as to the attorney's former law firm or its individual lawyers.

Even if it were necessary to resort to legislative history to construe the statute, that history reinforces the statute's plain meaning. In *Laird v. Blacker* (1992) 2 Cal.4th 606 (*Laird*), this Court concluded the Legislature had two goals in mind when it enacted the continuous representation tolling rule: to avoid disrupting the attorney-client relationship while an attorney attempts to correct or minimize an apparent error, and to prevent attorneys from defeating malpractice claims by dragging cases out until the statutory deadlines expired. Neither of these goals is served by applying the continuous representation tolling rule to attorneys who are no longer representing their clients.

The Court of Appeal's counter-intuitive interpretation of the phrase "continues to represent" is also inconsistent with the broader goals section 340.6 was designed to serve. When the statute was enacted in 1977, a cause of action for legal malpractice did not accrue until the client discovered, or should have discovered, that he had an actionable claim. This "discovery"

rule resulted in virtually open-ended liability for attorneys, and the cost of legal malpractice insurance premiums skyrocketed.

Section 340.6 was the Legislature's response to this crisis. According to several committee reports, the statute was designed to impose predictable outer time limits on an attorney's exposure to malpractice suits, which in turn would lead to lower insurance rates. Construed in accordance with its plain meaning, the statute accomplishes these goals. When a lawyer that arguably committed a negligent act severs his relationship with a client, the attorney knows he faces potential exposure for a fixed one or four-year period, and malpractice insurance premiums can be priced accordingly. But if the statute of limitations can be tolled even if the lawyer no longer represents the client, the predictability the statute was designed to foster will disappear. Lawyers will once again be exposed to liability for indeterminable periods, during which time they will have no control over the client's ongoing representation, and no opportunity to correct any perceived errors. Lawyers will also be hindered in their ability to defend themselves against malpractice claims, since they will not be alerted in a timely fashion of the need to prepare a defense, and the passage of time will cause memories to fade, files to be scattered, and witnesses to disappear. Furthermore, the longer the potential exposure to malpractice suits, the higher the cost of malpractice insurance premiums will become. The effect of longer exposure will be particularly harsh on attorneys who retire or are partners in small firms that dissolve. To protect themselves against past acts of malpractice, the attorneys or the firms will have to purchase "tail coverage," and such coverage is generally available for only limited periods of time, and is extremely costly.

The Court of Appeal rationalized its interpretation of section 340.6 on the ground that if a client was forced to file suit against the client's prior firm, or one of its partners, the firm or the partner might file a cross-complaint for

indemnity against the departed attorney, thereby disrupting that attorney's relationship with the client. The Court of Appeal concluded the purposes underlying the continuous representation tolling provision would best be served by reading the statute broadly to encompass both the attorney engaged in the continuous representation, as well as that attorney's prior firm and his prior colleagues.

The Court of Appeal's conclusion that public policy is best served by a broad reading of the continuous representation tolling rule is in error for two reasons. First, this Court has already concluded that courts may not alter the balance the Legislature struck between the rights of plaintiffs and the rights of defendants "by devising expedients that extend or toll the limitations period." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 756 (*Jordache*).) The Court of Appeal violated that principle when it read a new tolling provision into the statute.

Second, the Court of Appeal's assumption that a suit against Arter & Hadden and one of its partners would precipitate a cross-complaint against its former associate is not well founded. For reasons we discuss below, there are both legal and practical impediments to a firm initiating such an indemnity action. Moreover, in the unlikely event a firm were to file such a cross-complaint, case management tools this Court has already endorsed in the context of malpractice suits would ensure no disruption of the relationship between the client and its existing attorney. The Court of Appeal's public policy concerns do not justify its tortured reading of the continuous representation tolling rule.

STATEMENT OF THE CASE

A. Facts alleged in the first amended complaint.[1/]

1. Beal Bank acquires a portfolio of unpaid loans.

Between 1990 and 1994, Guardian Bank (Guardian) made a series of loans to Thien Koan Ng and Carol Ng (the Ngs), either directly or through entities they controlled. (CT 7-8.) Each of the notes contained a "default interest" rate clause that gave Guardian the option to demand a higher rate of interest if a loan went into default. (CT 8.) In 1995, the Ngs missed payments on several of their loans. Guardian, however, took no action to accelerate the loans or put the default interest rate into effect. (See *In re Crystal Properties, Ltd., L.P.* (9th Cir. 2001) 268 F.3d 743, 750-751, a prior appeal arising from plaintiff Beal Bank's dispute with the Ngs.)

In January 1995, the Federal Deposit Insurance Corporation (FDIC) placed Guardian into receivership and assumed control of its affairs. (CT 8.) The FDIC continued to pressure the Ngs to bring their loans current. (*Ibid.*) Although the FDIC threatened to invoke the default interest rate, it too took no affirmative steps to do so and instead reached an accommodation that allowed the Ngs to pay off their loans at a slight discount. (CT 9; See *In re Crystal Properties, Ltd., L.P., supra*, 268 F.3d at pp. 746-747.)

In December 1996, approximately a year after the FDIC assumed control over Guardian's affairs, Beal Bank (Beal), the plaintiff in the present legal malpractice action, purchased the Ngs' unpaid promissary notes from the

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1/ Because this appeal arises from a judgment of dismissal following the sustaining of a demurrer without leave to amend, the court assumes the truth of all facts properly pleaded in the complaint. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.)

FDIC. (CT 54.) Beal unsuccessfully attempted to reach an agreement with the Ngs about the overall payment amount. (*Ibid.*) When that effort failed, Beal informed the Ngs it was accelerating the interest rate on their loans and that interest at the higher rate was due for the previous two and one-half years. (CT 54-55.) Beal recorded notices of default. (CT 54.)

2. Beal retains Arter & Hadden to enforce the loans.

On March 6, 1997, Beal hired Arter & Hadden, a registered limited liability partnership, to enforce the unpaid loans. (CT 51, 54.) Eric Dean, a partner with Arter & Hadden, assumed primary responsibility for Beal's representation. (CT 54.)

Three months after Arter & Hadden commenced its efforts to collect the loans, the Ngs transferred the collateral for the loans to Crystal Properties, Ltd., a real estate entity they controlled, and immediately placed Crystal into Chapter 11 bankruptcy proceedings. (CT 58.) Steven Gubner, a bankruptcy associate at Arter & Hadden, assumed responsibility for representing Beal in the Ng matters. (*Ibid.*)

3. The bankruptcy court rejects Beal's position that it is entitled to interest at the higher default interest rate. After Arter & Hadden files an appeal, Beal severs its relationship with the firm.

In April 1998, Beal and the Ngs filed cross-motions for summary judgment in the bankruptcy court to determine whether Beal was entitled to apply the default interest rate to the Ngs' outstanding loans. (CT 58.) In May 1998, the bankruptcy court ruled in favor of the Ngs and concluded Beal could

not recover interest at the default interest rate. (*Ibid.*) The court reasoned that Guardian and the FDIC had each waived the right to default interest for the periods during which they were the holders of the notes, and that Beal, as their successor, could not "'go back and retroactively apply default interest from a period long before it had any connection with this loan . . . .'" (*Ibid.*)

Arter & Hadden appealed the bankruptcy's court's adverse ruling to the District Court. (CT 58.) On December 31, 1998, while the appeal was pending, Gubner left Arter & Hadden and formed Gubner & Associates. (CT 59.)

4. While Gubner is acting as Beal's counsel, the District Court and Ninth Circuit affirm the bankruptcy court's ruling.

Gubner & Associates merged with another firm and became Ezra, Brutzkus & Gubner. (CT 59.) That firm continued to represent Beal in its appeal from the bankruptcy court's ruling. (*Ibid.*) In April 1999, four months after Gubner left Arter & Hadden, the District Court affirmed the bankruptcy court's ruling. (CT 58-59.) Gubner then filed an appeal on Beal's behalf to the Ninth Circuit. (CT 59.) On September 25, 2001, two years and nine months after Gubner parted ways with Arter & Hadden, the Ninth Circuit issued its opinion affirming the district court's decision. (CT 59, 65-80.) The following day, September 26, 2001, Gubner ended his representation of Beal. (CT 100-101; see *Beal Bank, SSB v. Arter & Hadden, LLP* (2006) 135 Cal.App.4th 643, 647, review granted Apr. 19, 2006, B179383 (*Beal Bank*) [Beal argued below that the statute of limitation began running on September 25, 2001, when the Ninth Circuit issued its opinion].)

5. Beal initiates a legal malpractice action against Gubner, Dean, and Arter & Hadden.

On September 24, 2002, almost a year after the Ninth Circuit issued its decision, and almost four years after Arter & Hadden and Dean last provided representation to Beal, Beal filed a malpractice case against Gubner, Gubner's law firms, Arter & Hadden, and Dean. (CT 60.) The September 24, 2002 case was dismissed under a written tolling agreement. (CT 60-61.)

Beal initiated the present action on December 30, 2003, a day before the date specified as the end date in the tolling agreement. (CT 1, 61.) Arter & Hadden was in bankruptcy when the action was filed, but was subsequently added as a Doe defendant. (CT 120, 132.) The crux of Beal's complaint was that all of the defendant attorneys were negligent in failing to inform Beal of the "significant likelihood" that it would not be able to establish a right to interest at the higher default rate and that defendants failed to inform Beal that its "positions lacked merit or were legally insupportable." (CT 59.) Beal also alleged that all of the defendant attorneys failed to inform Beal of the risks involved in continuing to maintain the position that default interest could be collected. (*Ibid.*) Beal contended that because of its attorneys' negligence, it was "deprived of an opportunity to settle their disputes on favorable terms and incurred unnecessary legal fees in litigating the question of default interest in the Bankruptcy Court, the U.S. District Court and the Ninth Circuit Court of Appeals." (CT 60.) Beal claimed it suffered more than $3.5 million in damages. (*Ibid.*)

6. The trial court determines that Beal's legal malpractice case against its former counsel is barred by the statute of limitations.

Dean and Arter & Hadden separately demurred, arguing that Beal's legal malpractice claim was barred by the applicable statute of limitations, Code of Civil Procedure section 340.6.[2/] (CT 85, 88, 135, 141.) In their respective demurrers, Dean and Arter & Hadden argued that the limitations period began to run on May 28, 1998, when the bankruptcy court held that Beal could not seek default interest on the Ngs' loans. (CT 88, 138.) The attorneys conceded that, under the "continuous representation" tolling rule in section 340.6, subdivision (a)(2), the statute of limitations was tolled from May 28, 1998 until December 31, 1998, because between those dates the firm and Dean continued to act as Beal's counsel. (*Ibid.*) However, they argued the statute of limitations commenced running on December 31, 1998 because (a) prior to that date, Beal suffered an "actual injury" when the bankruptcy court entered a judgment against Beal (under section 340.6, subdivision (a)(1), the statute of limitations is tolled until the plaintiff suffers an actual injury); and (b) subsequent to December 31, 1998, the firm and Dean no longer represented Beal. The one-year statute expired a year later, on December 31, 1999. (*Ibid.*)

In its opposition to the demurrers, Beal acknowledged that Gubner and his new firm had replaced Arter & Hadden as his attorneys on December 31, 1998 and that Arter & Hadden and Dean provided no services to the bank after that date. (CT 98, 101.) However, Beal argued that Gubner's "continuous representation" of Beal tolled the statute of limitations not only as to Gubner,

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2/ Dean's demurrer was heard first, before the complaint was amended to add Arter & Hadden as a Doe defendant. (See CT 116, 132.) After Dean's demurrer was sustained, Arter & Hadden successfully demurred, raising the same arguments Dean had made. (CT 192.)

who had left the firm, but also as to Arter & Hadden and Dean. (CT 100-101.) In so arguing, Beal asked the trial court to apply the Third District's decision in *Beane v. Paulsen* (1993) 21 Cal.App.4th 89, in which the Court of Appeal ruled that one attorney's continued representation of a client tolled the statute of limitations not only as to that attorney but also as to that attorney's former partners, who left the firm three years before the plaintiff filed her malpractice action. (CT 105-108.) Beal acknowledged that *Beane*'s interpretation of the continuous representation tolling rule had been criticized and rejected by the Fourth District in *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509 (*Crouse*), but urged the trial court to find that *Beane* was better reasoned than *Crouse*. (*Ibid.*)

The trial court aligned itself with *Crouse* and concluded that Beal's legal malpractice claim was time barred as to Arter & Hadden and Dean. (CT 116-118, 191.) The court implicitly found that Beal became aware it suffered actual injury on May 28, 1998, when the bankruptcy court issued its order rejecting Beal's position on the default interest rate. The one-year period within which to file a legal malpractice action was tolled until December 31, 1998 while Arter & Hadden and Dean continued to serve as counsel of record. However, when Gubner's new firm replaced Arter & Hadden on December 31, 1998, the continuous representation tolling period ended and the statute of limitations on Beal's claim against Arter & Hadden and Dean began to run. The statutory period expired one year later, on December 31, 1999. Accordingly, Beal's claims against Arter & Hadden and Dean were untimely, and the demurrers were sustained without leave to amend. (CT 155, 198.)

7. The Court of Appeal's opinion.

The Second District reversed the trial court's order sustaining the demurrers. The court began its analysis by addressing section 340.6, subdivision (a), which provides that "[a]n action against an attorney" is tolled during the time that "[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred . . . ." (*Beal Bank, supra*, 135Cal.App.4th at p. 648.) Arter & Hadden and Dean argued that the plain meaning of those terms was that if a person wished to sue "an attorney," suit must be filed within the statutory one or four-year deadlines unless "the attorney" continued to represent the person regarding the subject matter of the alleged malpractice. In other words, the statute was tolled only as to the attorney who engaged in the continued representation. (*Ibid.*) The Court of Appeal rejected that interpretation. Because the word "attorney" has been interpreted to include law firms, the court reasoned that the provisions of the statute quoted above could be construed to toll the statute as to a law firm and its partners, even if the attorney who continued to represent the plaintiff no longer worked at the firm and had not done so for years. (*Id.* at pp. 648-649.)

Having concluded that the statute's plain meaning did not resolve the issue, the Court of Appeal ruled that the statute should be interpreted in accordance with its purpose. Citing *Laird, supra*, 2 Cal.4th 606, the Court of Appeal identified two purposes served by section 340.6's continuous representation tolling provision: "(1) to avoid the disruption of an ongoing attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error; and (2) to prevent an attorney from defeating a malpractice claim by continuing to represent the client until the statutory period has expired." (*Id.* at p. 649.)

The Court of Appeal concluded that the foregoing goals could only be satisfied if the statute of limitations was tolled as to each of the attorneys that had been involved in representing Beal, even those who had long since severed their relationship with the client. If the statute was not tolled against the prior attorneys, the client would be place "'in an extremely awkward position, preserving on the one hand her attorney-client relationship with the active tortfeasor, while chasing his former partners to the courthouse on the other. This would undermine the express legislative intent, since the former partners if sued . . . would immediately file cross-claims against [the partner who continued to represent the client], disrupting the attorney-client relationship.'" (*Beal Bank, supra*, 135 Cal.App.4th at p. 649, quoting *Beane v. Paulson, supra*, 21 Cal.App.4th at p. 99.) The court reasoned that the threat of a cross-complaint required tolling because "[t]he purpose of the continuing-representation tolling provision is to benefit the client's interest by preserving undisturbed the client's relationship with its attorney so that the attorney can undo the damage he has done to the client." (*Id.* at p. 652.)

The court acknowledged that there was potential merit to Arter & Hadden and Dean's argument that applying the tolling provision to former attorneys would result in an enormous increase in malpractice insurance rates, stating "[w]e agree that this is a serious concern. But it is not one that can be resolved on the record before us." (*Beal Bank, supra*, 135 Cal.App.4th at pp. 652-653.) The Court of Appeal did not explain how or why the record was insufficient to assess the policy implications of a decision to dramatically increase the potential exposure of lawyers and law firms by extending the statute of limitations applicable to lawsuits against them. Nor did the Court of Appeal explain what steps lawyers and law firms should be expected to take in response to their continuing exposure in cases that are being handled by former colleagues who have scattered away to different firms.

Arter & Hadden and Dean filed a petition for review on February 14, 2006. This Court granted review on April 19, 2006.

LEGAL DISCUSSION

I.

THE PLAIN LANGUAGE OF SECTION 340.6 DOES NOT PERMIT TOLLING BASED ON THE CONTINUING REPRESENTATION OF A FORMER ASSOCIATE.

As this Court has observed, """"the judicial role in a democratic society is fundamentally to interpret laws, not write them. The latter power belongs to the people and the political branches of government . . . ."""" *(Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 578 (quoting *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633 and *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 675).) For that reason, the judiciary """"has no power to rewrite a statute to conform to a presumed intention which is not expressed."""" (*Drouet v. Superior Court* (2003) 31 Cal.4th 583, 593 (quoting *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 59).) The Court's obligation is to "construe, not to amend the statute." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.) The Court cannot "under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the words used." (*Ibid.*)

The first rule in construing legislative intent is to look "'to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs.'" (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063 (quoting *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000); *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129

citing *People v. Furhman* (1997) 16 Cal.4th 930, 937 [where statutory language is clear and ambiguous, "judicial construction is not necessary and a court should not indulge in it"].)

The meaning of the continuous representation tolling provision in section 340.6, subdivision (a)(2) could not be clearer. The statute provides that the time for commencing an "action against *an attorney* for a wrongful act" is tolled when "(2) [*t*]*he attorney* continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred."[3/] (Code Civ. Proc., § 340.6, subd. (a), emphases added.) The foregoing provisions are not ambiguous. They plainly state that if an attorney who commits a wrongful act continues to represent the client with respect to the same subject matter, the time for commencing a legal malpractice action against that attorney is tolled. However, if the attorney who

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3/ Section 340.6 provides in full:

(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, 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:

(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; and

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(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.

commits the wrongful act no longer represents the client, the statute of limitations is *not* tolled, and suit must be commenced within either the one or four-year periods specified in section 340.6, whichever is applicable.

In rejecting defendants' position that section 340.6 should be construed according to its plain meaning, the Court of Appeal reasoned that "[m]ere examination of the statutory language does not end the inquiry, because Section 340.6, which establishes the limitations period for 'an action against an attorney,' has already been applied to actions against both the attorney and the law firm." (*Beal Bank, supra*, 135 Cal.App.4th at pp. 649-650, citing *Jordache, supra,* 18 Cal.4th 739 and *Gold v. Weissman* (2004) 114 Cal.App.4th 1195 (*Gold*).) Since "attorney" can mean "law firm," the court concluded that the continuous representation tolling rule could be interpreted to apply not only to "[a]n action against an attorney" (the language used in the statute), but also to "an action against the attorney or anyone who was previously associated with him or her."

The Court of Appeal's reasoning is flawed. The fact that law firms can be sued for legal malpractice, and that section 340.6 establishes the time period with which such suits must be filed, provides no support for the court's interpretation of the continuous representation rule. Whether the defendant is a law firm or an individual attorney, the statute makes clear that continuous representation tolling comes into play only when the defendant that is the target of the malpractice suit is the same person or firm (i.e., "attorney") that has continued to represent the plaintiff.

The Court of Appeal's conclusion that the continuous representation of a client by an attorney who used to work at a firm can toll the statute of limitations against the firm and its individual lawyers, even if the firm no longer represents the client, does violence to the language of the statute because it ascribes two different meanings to the word "attorney" in the same

section of the statute. In section 340.6, subdivision (a)(2), which refers to "the attorney" engaged in the continuous representation, the court interprets "attorney" to refer to the individual attorney who continues to work for the client. (See *Beal Bank, supra*, 135 Cal.App.4th at p. 652 [holding the action was timely because "the Gubner defendants continued to represent Beal Bank in the collection matters until September 26, 2002"].) But in the preceding paragraph of the statute, which describes the attorney against whom suit is being filed, the court interprets "attorney" to refer both to the attorney engaged in the continuous representation, and to the law firm and partners of that firm who *once* represented the client but no longer do. (*Ibid*, holding the statute of limitations was tolled as to the attorney who continues to represent the client "and the attorney's former law firm and its attorneys"].) In other words, as the Court of Appeal construes section 340.6, the term "attorney" sometimes refers to the individual who continues to work for the client, sometimes refers to the law firm, partners, and associates with whom that attorney was once associated, and sometimes refers to individuals who have left the firm and had no further contact with the client. This construction of section 340.6 is not only grammatically illogical, it violates a fundamental rule of statutory construction: "when a word or phrase is repeated in a statute, it is normally presumed to have the same meaning throughout." (*People v. McCart* (1982) 32 Cal.3d 338, 344, citing *Hoag v. Howard* (1880) 55 Cal. 564, 565.)

The Court of Appeal's interpretation of section 340.6 also violates the maxim that in construing statutes, a court may not "insert what has been omitted or . . . omit what has been inserted." (Code Civ. Proc., § 1858.) Section 340.6 provides for tolling when "the attorney continues to represent the plaintiff . . . ." The Court of Appeal, however, read the statute to provide for tolling when "the attorney *or anyone previously associated with him or her* continues to represent the plaintiff." The italicized words are not part of the

statute, and it was impermissible for the court to add them. (*California Fed. Savings & Loan Assn. v. City of Los Angeles*, *supra*, 11 Cal.4th at p. 349 [the Court's role is to "construe, not to amend the statute"].)

To support its conclusion that the words "the attorney" in the second sentence of section 340.6(a) can be construed to refer to a different person than the words "an attorney" in the first sentence of the statute, the Court of Appeal cited *Jordache*, *supra*, 18 Cal.4th 739 and *Gold*, *supra*, 114 Cal.App.4th 1195, both of which involved suits against law firms as well as attorneys. (*Beal Bank*, *supra*, 135 Cal.App.4th at pp. 648-649.) However, neither case supports the court's interpretation of the statute. While some of the defendants in *Jordache* and *Gold* happened to be law firms, that fact had no relevance to any of the issues before the courts: in *Jordache*, this Court addressed the meaning of the term "actual injury," a phrase that appears in an unrelated tolling provision of the statute[4/]; and in *Gold*, the Court of Appeal addressed the question whether the attorney's continued representation arose out of the same "subject matter in which the alleged wrongful act or omission occurred." (Code Civ. Proc., § 340.6, subd. (a)(2).) Neither case made even a passing reference to how the words "an attorney" should be construed, and neither suggests the words can have different meanings in different parts of the statute.

Here, an interpretation of the statute consistent with its plain meaning requires that the Court reverse the Court of Appeal's decision. The operative complaint concedes that on May 28, 1988, the bankruptcy court entered a final order ruling against Beal, that on December 31, 1998 Gubner left Arter & Hadden and his new firm became Beal's sole counsel, and that a malpractice

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4/ Section 340.6, subdivision (a) provides that the one-year statutory deadline is "tolled during the time that . . . (1) [t]he plaintiff has not sustained actual injury."

case was not filed until September 24, 2002. (CT 58-60.) On the facts admitted in the operative pleading, the case is time barred.

II.

LEGISLATIVE HISTORY SUPPORTS AN INTERPRETATION OF SECTION 340.6 THAT IS CONSISTENT WITH ITS PLAIN MEANING.

A. If a statute is ambiguous, courts may rely on legislative history to ascertain legislative intent.

The principal goal of statutory construction is to discover and give effect to the Legislature's intentions. (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1064-1065 ["'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law' [citation omitted]"].) If the language of a statute is clear and unambiguous, "then there is no need to look further to ascertain legislative intent. (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977.) "If, on the other hand, the statutory language is susceptible to more than one reasonable interpretation, the courts may consider various extrinsic aids to determine legislative intent, including the legislative history and the wider historical circumstances surrounding the law." (*Id.*, at pp. 977-978; *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055 ["[o]nly when the language of a statute is susceptible to more than one reasonable construction is it appropriate to turn to extrinsic aids, including the legislative history of the measure, to ascertain its meaning"].)

In construing other provisions of section 340.6, this Court has taken the legislative history of the statute into account. (See, e.g., *Jordache, supra,* 18

Cal.4th at p. 748 & fn. 6; *Laird*, *supra*, 2 Cal.4th at p. 618.) If the Court concludes the continuous representation provision in section 340.6 is ambiguous (for the reasons discussed above, it is not), the Court should follow the same procedure and construe the statute in light of its legislative history.

That legislative history shows that the rationale for tolling the statute of limitations only arises in cases where an attorney is actually involved in providing continuous representation to a client. Indeed, applying the rule in other circumstances undermines the goals section 340.6 and the continuous representation tolling rule were designed to serve.

B. The Legislature enacted section 340.6 to create fixed deadlines for legal malpractice suits with the objective of reducing the cost of malpractice insurance. The continuous representation tolling rule extends those deadlines so that attorneys can correct their own mistakes, but at the same time prevents attorneys from procrastinating until the statutory deadlines have expired.

Prior to the enactment of section 340.6, the statute of limitations for legal malpractice actions was governed by Code of Civil Procedure section 339, subdivision (1), which establishes a two-year limitations period for any action based on "'a contract, obligation or liability not founded upon an instrument in writing . . . .'" (*Laird*, *supra*, 2 Cal.4th at pp. 610-611.) Code of Civil Procedure section 339, subdivision (1) did not establish any accrual date for legal malpractice actions. However, under the so-called "occurrence" rule which originated in *Hays v. Ewing* (1886) 70 Cal. 127, the statute of limitations began to run as soon as the attorney committed a negligent act, whether or not the client was aware the attorney had acted negligently, and

whether or not the client's injury had become manifest. (See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal. 3d 176, 183-187.)

The obvious injustices created by the "occurrence" rule led this Court in 1971 to reject it in two companion cases in favor of a new accrual rule for legal malpractice suits. In *Neel*, the court ruled that a legal malpractice action did not accrue until the client discovered, or reasonably should have discovered, that he had an actionable claim against his attorney. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, *supra*, 6 Cal.3d at p. 190.) In *Budd v. Nixen* (1971) 6 Cal.3d 195, the Court ruled the cause of action did not accrue until the client began suffering "appreciable and actual harm" as a result of the attorney's negligent conduct. (*Id.* at p. 201.)

The Court acknowledged that its new discovery rule would significantly expand attorney's exposure to malpractice suits:

> We recognize that the instant ruling will impose an increased burden upon the legal profession. An attorney's error 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. On the other hand, when an attorney raises the statute of limitations to occlude a client's action before that client has had a reasonable opportunity to bring suit, the resulting ban of the action not only starkly works an injustice upon the client but partially impugns the very integrity of the legal profession.

(*Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, *supra*, 6 Cal.3d at p. 192.)

As the Court predicted, the new discovery rule created virtually open-ended liability for attorneys and led to dramatic increase in the cost of legal malpractice insurance premiums. As a leading commentator observed in an influential article published in February 1977, "[d]uring the last year, insurance premiums of California attorneys have increased from 100 percent to almost 400 percent. [Footnote.] The enormous increase of insurance premiums has been accompanied by a dramatic decline in the number of companies willing to insure attorneys. These factors, coupled with awareness

of the so-called 'medical malpractice crisis,' have created concern about stemming the costs of legal malpractice insurance." (Mallen, *A Statute of Limitations for Lawyers* (1977) 52 Cal. State Bar J. 22, 22 (Mallen).)

Section 340.6 was enacted in response to the pending crisis in malpractice insurance that resulted from attorneys' open-ended exposure to legal malpractice claims. Several bills were drafted to address the problem, but a common theme in each was creating predictable time limits within which such actions must be filed, time limits that would be tolled under very narrow circumstances. In 1976, the first of these proposals, Assembly Bill 3068, was introduced by Assemblyman Willie Brown. This statute would have required that suit be filed no later than three years after the date of the negligent act, or one year from the date the plaintiff discovered, or through the use of reasonable diligence should have discovered, his or her damages. (Request for Judicial Notice, exh. 1 (RJN), p. 9.) These deadlines could be tolled only for fraud or intentional concealment. (*Ibid.*) AB 3068 ultimately died in the Assembly Committee on the Judiciary. (RJN 12.)

In January 1977, Assemblyman Brown reintroduced his legal malpractice statute of limitations initiative as Assembly Bill No. 298. (RJN 21.) The proposed legislation was explicit about its goal of reducing the cost of legal malpractice insurance, providing in one subsection that "[a]ny decrease in cost to an insurer resulting from the enactment of this section in insuring against professional negligence shall be passed on to individuals insured against professional negligence." (RJN 22; see also RJN 47 ("Fact Sheet" circulated by Assemblyman Brown's office, stating the bill would make malpractice insurance easier to obtain, and reduce the cost of insurance).) A competing bill, Assembly Bill No. 259, was introduced by Assemblyman Maddy. (RJN 122.) The bills were similar. Each proposed an outer limit on

the date within which a legal malpractice action could be filed[5/], and each provided for tolling in the case of fraud and intentional concealment by the attorney. (RJN 21, 122.)

While the Brown and Maddy bills were pending, Mallen published the article mentioned above, which both encouraged the Legislature to adopt a legal malpractice statute of limitations, and proposed specific language for the legislation. In language that closely tracks current section 340.6, Mallen's proposed statute provided that an action must be commenced "within two years from the date 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." In addition, he proposed three tolling rules, which closely resemble the language the Legislature ultimately adopted. Under Mallen's proposal, the statutory deadlines would be tolled: (1) if the plaintiff has not sustained "significant injury"; (2) if the attorney "continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred"; and (3) if the attorney withholds information about the wrongful act or omission. (Mallen, *supra*, 52 Cal. State Bar J. at p. 24.)

Mallen observed that the second of these tolling rules "adopts the continuous representation rule as it exists in other jurisdictions." (Mallen, *supra*, 52 Cal. State Bar J. at p. 24.) Citing precedent in New York, Ohio and Michigan, Mallen explained that:

> The rule serves several purposes. Primarily, it avoids disruption of the attorney-client relationship by a lawsuit while enabling

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5/ Brown's bill contained a three year outer limit from the date of the negligent act, or one year from the date the client discovered or should have discovered the negligent act. Maddy's bill proposed a three year deadline from the date of *injury*, with the same one-year period as the Brown bill.

> the attorney to clarify, correct or minimize an apparent error. The rule would prevent an attorney from defeating a cause of action for legal malpractice merely by continuing to represent the client until the statutory period ran.

(*Ibid.* at pp. 24-26.)

Mallen's article was circulated to the members of the Assembly Judiciary Committee who were considering Brown and Maddy's bills. (RJN 34.) In his article, Mallen explained that his proposal was a response to "[t]he literally indeterminate liability of the discovery rule . . . ." (Mallen, *supra*, 52 Cal. State Bar J. at p. 24.) In a report on the bills before it, the Judiciary Committee echoed that theme, commenting that the bills were designed to redress the problem of "virtually open-ended" liability for legal malpractice claims that resulted from the fact "the [current] statute does not commence to run until discovery." (RJN 34.)

The Digest also endorsed Mallen's suggestion that, if the Legislature did away with open-ended liability by imposing an outer limit on filing legal malpractice suits, it would be incumbent on the Legislature to enact a continuous representation tolling rule:

> Neither bill provides that where a continuous attorney-client relationship exists the statute of limitations commences to run only upon the termination of the relationship. Provision of a tolling period could prove crucial if an absolute limit is enacted.

(RJN 35.)

Ultimately, Assemblyman Brown and Assemblyman Maddy consolidated their legislative efforts by supporting an amended version of Brown's bill. (RJN 70.) Amended Assembly Bill 298 largely tracked the language of Mallen's proposed statute, including its provision for tolling in the event of continuous representation.[6/] (RJN 23.) Like its predecessor, amended

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6/ The bill contained minor changes in the language Mallen proposed, and reduced from two years to one year the time within which a plaintiff with

Assembly Bill 298 provided that any decrease in insurance costs resulting from the new statute of limitations must be passed on to attorneys. (RJN 24.)

A Senate Judiciary Committee Report on Assembly Bill 298 underscored that the overriding goal of the statute was to reduce the cost of insurance by placing an outer time limit on filing legal malpractice claims. (RJN 42.) With respect to continuous representation, the Committee explained that it was designed to serve the same purposes as those suggested by Mallen's article, in which the continuous representation language was first proposed:

> [T]he provision that a cause of action shall be tolled for the time during which the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred serves two purposes: (1) to avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and (2) to prevent an attorney to defeat a legal malpractice cause of action by continuing to represent the client until the statutory period has expired.

(RJN 44.) In *Laird*, this Court observed that the Senate Judiciary Report accurately summarized the reasons the Legislature enacted the "continuous representation" tolling rule. (*Laird*, *supra*, 2 Cal.4th at p. 618, quoting the above language from the Senate Judiciary Committee Report.)

The Senate adopted Assembly Bill 298, and it ultimately was enacted as section 340.6. The only language the Senate dropped from the Assembly Bill was the requirement that any decreases in costs to insurers had to be passed on to attorneys. The Senate apparently concluded there was no way to enforce that provision. (RJN 45, 50.)

The foregoing legislative history establishes that section 340.6 and the continuous representation tolling rule were designed with two objectives in

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notice of malpractice must file suit. (Compare RJN 23 with Mallen, *supra*, 52 Cal. State Bar J. at p. 24.)

mind: first, to impose predictable one and four-year time limits on legal malpractice suits, in order to reducee the cost of malpractice insurance; second, to postpone the statutory deadlines so that attorneys could attempt to correct their own errors, while at the same time preventing attorneys from using that time to run the clock out on the client's statute of limitations deadline.

Neither of these objectives is served by applying the continuous representation rule to attorneys who are no longer representing their former clients.

C. The rationale for tolling the statute of limitations does not apply when an attorney no longer represents his former client.

As the legislative history demonstrates, the first objective of the continuous representation tolling rule is to give attorneys the opportunity to correct their own mistakes. That objective can only be accomplished while an attorney continues to represent the client. As long as an attorney-client relationship continues to exist, an attorney has an "obligation to exercise due care to protect a client's best interests in all ethical ways and in all circumstances." (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1147; *Buehler v. Sbardellati* (1995) 34 Cal.App.4th 1527, 1544 [same].) When it enacted the continuous representation rule, the Legislature believed that duty included an obligation to correct or mitigate the effects of the attorney's prior negligent acts. (See RJN 38 ["The court has held that a continuous attorney-client relationship imposes a continuous obligation upon the attorney to remedy a remediable error and the failure to correct such error extends the period of limitation"].)

Tolling the statute during periods of continuous representation serves the goal of encouraging attorneys to correct their mistakes because, while attorneys are pursuing such efforts, clients can refrain from filing malpractice suits. As a leading treatise on legal malpractice actions observes, the continuous representation tolling rule "is fair to all concerned parties. The attorney has the opportunity to remedy, avoid or establish that there was no error, or attempt to mitigate the damages. The client is not forced to end the relationship, though the option exists. This result is consistent with all expressed policy bases for the statute of limitations." (3 Mallen & Smith, Legal Malpractice (2006 ed.) § 22.13, p. 373 (footnotes omitted).)

However, once an attorney severs his relationship with a client, or has been fired by the client, as happened to Arter & Hadden and Dean in the present case, the attorney is no longer in a position to perform work on the client's behalf. To the extent the continuous representation tolling rule was designed to give attorneys the opportunity to undo the harmful effects of their own wrongful acts, it follows that the Legislature could not have intended the tolling rule to apply after the attorney's relationship with the client has ended.

In *Crouse*, *supra*, 67 Cal.App.4th 1509, the Court of Appeal accurately observed that applying the continuous representation tolling rule to a firm that has severed its relationship with a former client would impose the burdens of the tolling rule on the firm (open-ended exposure to a malpractice suit) without affording to the firm any of the rule's benefits:

> The statutory price for the attorney's availing himself of the continuing-representation benefit is the tolling of the statute of limitations on a malpractice claim against him . . . [¶] If . . . the negligent attorney's election to continue the client representation is enforced against his former partners, those former partners pay the statutory price of the tolling of the statute of limitations without any voice in the election *and* without obtaining the statutory benefit of participating in eliminating or minimizing their liability for damages from the negligence. The attorney's

> election should bind only the attorney himself and those for whom he is authorized to act. His election should not bind parties for whom he is not authorized to act.

(*Id.* at p. 1539.)

Tolling the statute of limitations after the attorney-client relationship has been severed also does nothing to further the second goal the continuous representation rule was designed to serve, "'prevent[ing] an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.'" (*Laird*, *supra*, 2 Cal.4th at p. 618, quoting the Senate Judiciary Committee's analysis.) An attorney who no longer represents a client is not in a position to delay legal proceedings until the statutory period has run.

In reaching the conclusion that the statute of limitations should be tolled not only as to Gubner but also as to the firm and the partners with whom Gubner previously worked, the Court of Appeal reasoned that tolling the statute as to all of the lawyers who had represented Beal furthered two of the statute's goals: first, if the statute was *not* tolled as to former counsel Arter & Hadden and Dean, and if Beal was forced to file suit against those attorneys, then Arter & Haden and Dean would file a cross-complaint for indemnity against Gubner, disrupting Gubner's ongoing relationship with the client and interfering with Gubner's efforts to mitigate the client's harm[7/] (*Beal Bank*, *supra*, 135 Cal.App.4th at pp. 651-652 ["[t]he purpose of the continuing-representation tolling provision is to benefit the client's interest by preserving undisturbed the client's relationship with its attorney so that the attorney can

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7/ Absent tolling by Arter & Hadden's continuous representation of Beal through December 31, 1998, Beal would have been required to file suit against Arter & Hadden and Dean within one year after judgment was entered against Beal by the bankruptcy court because, once that judgment was entered, Beal either knew or should have known about Arter & Hadden and Dean's alleged negligence.

try to undo the damage he has done to the client"]); second, the Court of Appeal reasoned the statute of limitations should be tolled as to the firm because "[i]f the attorney who continues the representation ultimately corrects or mitigates the error, the former law firm benefits by not being sued or by having its potential liability reduced" (*id.* at p. 651).

The court's analysis on both points is flawed.

1. A law firm is very unlikely to file a cross-complaint against a former associate. The Court of Appeal assumed that if suit were filed against Arter & Hadden, Arter & Hadden would file a cross-complaint for indemnity against its former associate. Whether Arter & Hadden could file such a claim is questionable.[8/] But even if a law firm theoretically could file an indemnity

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8/ Labor Code section 2802, subdivision (a) provides that an employer must indemnity its employees "for all necessary expenditures or losses incurred by the employee in the direct consequence of the discharge of his or her duties, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful." (Labor Code § 2802(a).) This statute suggests it is the negligent associate, not the law firm, that would be entitled to seek indemnity. (See *Holt v. Booth* (1991) 1 Cal.App.4th 1074, 1080 fn. 6 [Labor Code section 2802 would "squarely" apply to a case in which an employee negligently injured someone with a car during the course and scope of employment].) On the other hand, Labor Code section 2865 provides that "[a]n employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the employer." The phrase "culpable degree of negligence" has been interpreted to include cases where the employee "fails to use ordinary care." (*Dahl-Beck Electric Co. v. Rogge* (1969) 275 Cal.App.2d 893, 905, cited with approval in *Kerivan v. Title Ins. & Trust Co.* (1983) 147 Cal.App.3d 225, 229.) A leading treatise observes that the question whether Labor Code section 2802 bars an employer from seeking indemnity from a negligent employee "has never been determined by a California Appellate Court." (21 Bender, Cal. Forms of Pleading and Practice (2005) Employer's Liability for Employee's Torts, § 248.20(2) (rel. 159-10/05).) Under the current state of the law, it is unclear whether Arter & Hadden would have the right to file a cross-complaint for indemnity against its former associate, or whether it is the associate that could file a claim for indemnity against Arter & Hadden.

action against a former associate, it is highly unlikely it would ever do so. Initiating such litigation would create tremendous morale problems at the firm. Young lawyers would likely be offended by the notion that their firm had a practice of suing former associates, and firms that engaged in that practice could find themselves at a competitive disadvantage in recruiting new talent.[9/] The Court of Appeal's assumption that a law firm would file a cross-complaint against a former associate and disrupt that associate's relationship with the client is therefore very unlikely to come to pass.

In the unlikely event a law firm did file a cross-complaint against a former associate, there is no reason the cross-complaint should disrupt the relationship between the former associate and the client. Any potential disruption to the attorney-client relationship between the client and the former associate can be avoided by using "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." (*Jordache*, *supra*, 18 Cal.4th at 758; see, e.g., *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1210-1211 [former criminal defendant must file legal malpractice action within the deadlines mandated by section 340.6 even though he could not prevail without first overturning his conviction; once suit is filed, "the court should stay the malpractice action during the period in which such a plaintiff timely and diligently pursues postconviction remedies"]; *Adams v. Paul* (1995) 11 Cal.4th 583, 593 ["trial courts have inherent authority to stay malpractice suits, holding them in abeyance pending resolution of underlying litigation. (Cf. *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 310 [24 Cal.Rptr.2d 467, 861 P.2d 1153] [stay of declaratory relief action pending

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9/ Similar considerations make it unlikely a firm would file an indemnity action against a former partner, assuming a partner left the firm and took over a client's representation.

outcome of third party suit]; *Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 978-980 [39 Cal.Rptr.2d 520] [in insurer's declaratory relief action, stay of discovery logically related to underlying action against insured]; *Rosenthal v. Wilner* (1988) 197 Cal.App.3d 1327 [243 Cal.Rptr. 472] [malpractice action stayed pending appeal of underlying suit]"].)

In the event a cross-complaint against a former associate is filed, the case management tools endorsed by this Court are readily available to avoid any disruption to the attorney-client relationship between the client and the client's new attorney. At the same time, requiring prompt filing of the malpractice suit against the prior firm, particularly in cases that could drag on for many years, would further the goal that statutes of limitation are designed to serve, specifically, "'to protect defendants from having to defend stale claims by providing notice in time to prepare a fair defense on the merits [Citation.].'" (*Coscia v. McKenna & Cuneo*, *supra*, 25 Cal.4th at p. 1210.) Among other things, a timely filed suit would allow lawyers and law firms to (a) conduct a timely investigation into the matter while memories are fresh and witnesses are available; (b) take measures to preserve evidence (e.g., interviewing or deposing witness who may not be available when the claim ultimately proceeds to trial, including elderly or ill witnesses); (c) if the matter is ongoing, monitor further proceedings to assess and plan for any risk the defendant attorneys face in the future; (d) report the claim to the defendant attorneys' insurer and keep the insurer apprised of the status of the matter so they can appropriately adjust their reserves; and (e) evaluate the exposure at or near the time of the events at issue.

Thus, contrary to the Court of Appeal's assumption, requiring clients to file suit against their former counsel within the time limits prescribed by section 340.6 will not interfere with the work of their current counsel, and at

the same time will further the objectives served by having fixed and predictable time limits on the filing of legal malpractice claims.

2. The possibility a law firm could benefit from the continued representation of a client by another attorney is not a basis for tolling the statute of limitations.

In *Laird, supra*, 2 Cal.4th 606, the Court ruled that a cause of action for legal malpractice arises when the client discovers an act of malpractice and suffers some form of compensable harm. The statute is not tolled by an appeal even though the appeal could affect or mitigate the plaintiff's harm:

> [A]lthough appellate review may correct judicial error, and thus reduce the client's damages, an appeal does not necessarily exonerate the attorney, nor does it extinguish the client's action against him for negligence in the conduct of the trial.

(*Laird, supra*, 2 Cal.4th at p. 614.) Because it is the fact of damage, not its amount, that causes the statute of limitations to begin to run, the Court ruled the statute began to run upon entry of an adverse judgment, even if the judgment is subject to reversal or modification on appeal. (*Id.* at p. 615.)

The Court of Appeal's conclusion in the present case that the statute of limitations should be tolled as to a client's former counsel because another attorney might "correct[] or mitigate[] the error" (*Beal Bank, supra*, 135 Cal.App.4th at p. 651) is inconsistent with the Court's reasoning in *Laird*. In *Laird*, the Court ruled that the plaintiff, in arguing that the appeal tolled the statute, "confuses the distinction between the *fact and knowledge* of damage, and the *amount* of damage." (*Laird, supra*, 2 Cal.4th at p. 615.) The Court of Appeal in the present case exhibited the same confusion. When the bankruptcy court entered its order rejecting Beal's contention that it was entitled to interest at the higher default rate, Beal suffered injury and its malpractice action accrued. As this Court ruled in *Laird*, the possibility that

a subsequent appeal to the District Court or the Ninth Circuit might mitigate Beal's harm has no bearing on the statute of limitation deadlines.

In addition to ignoring the distinction between the fact of injury and the amount of injury, the Court of Appeal's conclusion that the statutory deadlines should be tolled as to former counsel who stand to benefit from another attorney's continued representation, even counsel who no longer have any relationship with the plaintiff, upsets the policies that underlie the continuous representation tolling rule. An attorney who continues to represent a client has an opportunity to correct or mitigate an error. The statutory price for availing himself of this opportunity is that the statute of limitations on a malpractice claim against the attorney is tolled. (*Crouse*, *supra*, 67 Cal.App.4th at p. 1539.) But if the attorney's election is enforced against a law firm or an attorney that has no involvement with the client, this cost-benefit equation is upset. The firm or the attorney pays the price of the continued representation (the statute of limitations period is tolled) without its benefits (the ability to correct or mitigate the error).[10/]

The Court of Appeal's conclusion that the statute should be tolled if a client's former lawyer stands to benefit from another attorney's continued representation ignores the costs and benefits of the continuous representation rule, and should be rejected.

10/ Enforcing the attorney's election against his former colleagues is also inconsistent with normal rules of agency. When an associate or partner leaves a law firm, he or she can no longer act as an agent of the firm. The Court of Appeal's decision, however, makes Gubner, a former associate of Arter & Hadden, an agent of both the firm and the other lawyers in the firm for the purposes of extending the statute of limitations. The Court of Appeal's failure to take account of fundamental principles of agency law constitutes yet another reason why its opinion should be reversed.

D. Tolling the statute of limitations on malpractice suits against attorneys who no longer represent their former clients is also in conflict with the broader goals section 340.6 was designed to serve.

In construing the language of an ambiguous statute, this Court has ruled that, in addition to legislative history, "[t]he court may [also] consider the impact of an interpretation on public policy, for 'where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.'" (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1082, citations and internal quotation marks omitted; see also *Calatayud v. State of California, supra*, 18 Cal.4th at pp. 1064-1065 [court must "remain cognizant of 'the object to be achieved and the evil to be prevented by the legislation. [Citations.]' (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159 [278 Cal.Rptr. 614, 805 P.2d 873]; *Ex parte Ellis* (1858) 11 Cal. 222, 224-225.)"].)

As the legislative history discussed at *ante*, pages 21-26, demonstrates, section 340.6 was enacted with two specific objectives in mind: (1) to establish predictable time limits on attorneys' exposure to a legal malpractice suit, and (2) to reduce the cost of legal malpractice insurance.

The Court of Appeal opinion undercuts both of these goals.

1. The Court of Appeal's interpretation of the continuous representation tolling rule is inconsistent with the goal of have having fixed and predictable limitation periods on malpractice suits. Section 340.6 was enacted to eliminate the open-ended exposure to liability that was the product of the discovery-accrual rule. (See *ante*, pp. 21-26.) The Court of Appeal's interpretation of section 340.6, which provides for tolling even when an attorney no longer represents a former client, resurrects the very uncertainty

the statute was designed to eliminate. No longer will a firm that has severed its relationship with a client be able to count on a malpractice claim being filed within the one and four-year periods specified in the statute. Those outer time limits will be rendered null and void if the statute of limitations can be tolled by *another* attorney's continued representation of the client. A firm that no longer has an attorney-client relationship with a client, that is no longer communicating with the client, that has no fiduciary duty to the client, and that has no information about how the client's case or business affairs are being handled, will no longer be in a position to predict when its potential liability has ended if an attorney who previously worked at the firm decides to continue to represent the firm's former client.

The Court of Appeal's ruling is also inconsistent with the broader goals statutes of limitation are designed to serve. As the Court ruled in *Jordache*, *supra*, 18 Cal.4th at p. 755, statutes of limitation enable defendants "to marshal evidence while memories are fresh and to provide defendants with repose for past acts." Their goal is to "require diligent prosecution of known claims so that legal affairs can have their necessary finality and predictability and so that claims can be resolved while evidence remains reasonably available and fresh." (*Id.* at p. 756.)

While there are sound policy reasons to extend the statutory deadlines if an attorney continues to represent the client, those reasons carry no weight once the attorney-client relationship has ended. In addition to the reasons for extending the statutory deadlines identified by the Legislature and discussed above – allowing attorneys to correct their own errors, and preventing attorneys from delaying matters until the statute of limitations has run – tolling the statute of limitations when attorneys are still representing their clients is consistent with the goal of resolving malpractice claims while records are still available and memories are still fresh. An attorney who is actively involved

in representing a client retains familiarity with the case and will not be at a tactical disadvantage if malpractice litigation eventually ensues.

The same cannot be said for lawyers that have severed their relationship with the client. As time passes, it becomes increasingly likely that the lawyers who represented the former client will no longer be associated with the firm, and that the attorneys who remain will not remember the case. In addition, files can be lost, and even if not lost, they will not have been updated. Even attorneys who remain at the firm and were involved with the client's case may have trouble recalling the reason key strategic decisions were made. The problem of fading memories and disappearing witnesses is exacerbated by today's legal environment, in which lawyers frequently change firms, and mergers and dissolutions of firms are commonplace.

The one and four-year limitation periods in section 340.6 were intended to address the problems attorneys faced defending themselves against stale claims. The statute's deadlines "reflect[] the balance the Legislature struck between a plaintiff's interest in pursuing a meritorious claim and the public policy interests in prompt assertion of known claims. *The courts may not shift that balance by devising expedients that extend or toll the limitations period.*" (*Jordache*, *supra*, 18 Cal.4th at p. 756, emphasis added.) The Court of Appeal ignored this restriction on its role when it adopted a tolling rule that goes well beyond the plain meaning of the statute.

2. The Court of Appeal's interpretation of the continuous representation rule will lead to increased insurance rates. The inevitable effect of allowing stale claims to be filed against attorneys who are ill prepared to defend themselves against the claims will be an increase in the cost of malpractice insurance. The Court of Appeal acknowledged that its interpretation of section 340.6 created a "serious concern" that insurance rates would increase and that policies would become unavailable to some attorneys,

but it concluded that problem "is not one that can be resolved on the record before us." (*Beal Bank*, *supra*, 135 Cal.App.4th at p. 652.) However, no factual record is required to infer that increased risk will lead to an increase in premiums, thereby undermining the Legislature's goal when it enacted section 340.6 of bringing the cost of malpractice insurance premiums under control.

The connection between a longer and more uncertain statute of limitations and higher premium rates is largely the result of the fact that in California, lawyers are typically insured under "claims-made" policies. A claims-made policy provides coverage for malpractice claims that are made against attorneys during the one-year period of the policy, regardless of when the act of malpractice occurred.[11/] (5 Mallen & Smith, Legal Malpractice, *supra*, §§ 34.13, 34.14, pp. 71, 76, 86.) A claims-made policy "does not afford coverage after the policy expiration. Therefore, an attorney must renew or obtain coverage each year so that there is no gap in coverage." (*Id.* at p. 99.) To avoid gaps in coverage, attorneys must insure against long-term exposure to potential malpractice claims by clients they no longer represent. The longer an attorney is exposed to potential claims by former clients, the greater the risk suit will be filed on one of these claims during a policy period, and the higher the insurance premiums will become.

If section 340.6 is construed literally, and if, as in this case, the attorney-client relationship ends after an adverse judgment alerts, or should alert, the client to its attorney's alleged malpractice, then a claims-made policy would only have to provide coverage for the one-year statute of limitations period. (*Laird*, *supra*, 2 Cal.4th at p. 615 ["the statute of limitations for legal

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11/ By contrast, in an "occurrence" policy, the insurable event that triggers coverage during the policy period is a negligent act or omission. (5 Mallen & Smith, Legal Malpractice (2006 ed.) § 34.14, p. 99.)

malpractice actions commences on entry of adverse judgment or order of dismissal"].)

But under the tolling rule adopted by the Court of Appeal, lawyers and law firms would be exposed to suits by former clients for as long as a former colleague represents the client, even if the firm has no continuing contact with the client and no ability to influence what acts are or are not taken to mitigate the damages flowing from an alleged error. Exposure to liability for such indeterminate periods translates into a greater risk of claims being made under claims-made policies. This greater risk, which could be enhanced by the subsequent negligent acts of a former associate who is no longer being supervised, will inevitably lead to higher malpractice insurance premiums.

The effect of extending the time in which malpractice suits can be filed will be particularly hard on sole practitioners who retire, and on attorneys at small firms that dissolve. Because these attorneys are no longer covered by their firms' policies, either they or the dissolved firm must purchase "tail" coverage to protect against prior negligent acts or omissions. (5 Mallen & Smith, Legal Malpractice, *supra*, § 34.14, p. 99.) This form of coverage is expensive and is usually available for very limited time periods. (*Ibid.* ["An extended reporting endorsement of unlimited duration has become rare and is very expensive, if available"].) In the context of limited liability partnerships that dissolve, the Legislature assumed that tail coverage would be available for only *three years*. (See Corp. Code § 16956(a)(1)(A) [providing that dissolved limited liability partnership must "maintain or obtain an extended reporting period endorsement or equivalent provision in the maximum total aggregate limit of liability required to comply with this subparagraph for a minimum of three years *if reasonably available from the insurer*" (emphasis added)].)

Under the Court of Appeal's opinion, there is no assurance that a claim will be reported within three years of the date an attorney leaves his or her firm

or within three years of the date the firm dissolves. Thus, the opinion creates the very real possibility that attorneys who retire or whose firms dissolve will be subjected to uninsured liabilities. Attorneys who retire or whose firms dissolve should not be forced to make an election between purchasing expensive tail insurance for an indefinite time period (assuming it is available) or facing personal liability for acts or omissions in cases the attorney worked on in the distant past.

In short, open-ended liability will create tremendous practical difficulties for lawyers and law firms and foster the very difficulties in obtaining malpractice insurance that the Legislature intended to eliminate when it enacted section 340.6.

E. The Court of Appeal improperly relied on equitable principles to adopt a tolling rule that is inconsistent with the statutory language.

In its opinion, the Court of Appeal stated it would be "inequitable" not to toll the statute of limitations against Arter & Hadden and Dean because "Beal Bank is seeking to hold all defendants directly liable for their own allegedly negligent acts." (*Beal Bank, supra*, 135 Cal.App.4th at p. 652.) The court's decision to construe section 340.6 based on its perception of the supposed equities of a particular case was improper, for two reasons.

First, the tolling rule adopted by the court is not limited to cases where members of the client's former firm were directly involved in committing wrongful acts. If Gubner, the associate who continued to represent Beal Bank after leaving the firm, had been the *only* attorney at Arter & Hadden to work on the case, and if Arter & Hadden's liability had therefore been purely vicarious, then under the Court of Appeal's interpretation of section 340.6, the

statute would *still* be tolled as to Arter & Hadden. (*Beal Bank*, *supra*, 135 Cal.App.4th at p. 652 ["the limitations period for a legal malpractice action under section 340.6 is tolled as to the attorney and the attorney's former law firm and its attorneys while the attorney continues to represent the client . . . "].) Indeed, even if the only wrongful acts or omissions had been committed by Gubner *after* Gubner left Arter & Hadden, the statute would *still* be tolled as to Arter & Hadden during the period that Gubner continued to represent Beal Bank in the underlying litigation. Arter & Hadden could defend itself against a malpractice claim on the ground it committed no wrongful acts, but it could not defend itself on statute of limitations grounds.

Second, the court's views about what is fair should not have played any role in its analysis of the statute. If the continuous representation tolling rule had been a product of the common law, application of the doctrine might hinge on equitable considerations. But in California, the doctrine was created by statute, and its scope raises issues of statutory construction. The goal of statutory construction is to determine what the Legislature intended, not to redraft the statute based on the courts' views about what is socially beneficial. (Code Civ. Proc., § 1858 ["In the construction of a statute . . . , the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted"]; *California Fed. Savings & Loan Assn. v. City of Los Angeles*, *supra*, 11 Cal.4th at p. 349 ["It is our task to construe, not to amend, the statute"]; *People v. Guzman* (2005) 35 Cal.4th 577, 587 ["'insert[ing]' additional language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes'"].)

As this Court made clear in its prior opinions construing section 340.6, the statute reflects the balance the Legislature struck between the plaintiff's interest in pursing a meritorious claim, and the public interest in the prompt

assertion of known claims. "The courts may not shift that balance by devising expedients that extend or toll the limitations period. The Legislature expressly disallowed tolling under any circumstances not stated in the statute." (*Jordache*, *supra*, 18 Cal.4th at p. 756; *Laird*, *supra*, 2 Cal.4th at p. 618 [same].) The Court of Appeal's decision to alter the plain language of the statute to comport with its general notions of fairness was improper. As the Court observed in *Jordache* when it rejected the plaintiff's argument that sound policy dictated tolling the statute of limitations while related litigation ran its course, "[w]hatever the merits of these policies in other settings, the legislative scheme embodied in section 340.6 allocates their relative weight in legal malpractice actions." (*Jordache*, *supra*, 18 Cal.4th at p. 757.)

CONCLUSION

For the foregoing reasons, Arter & Hadden and Dean respectfully request that the Court reverse the Court of Appeal's opinion and affirm the trial court's entry of judgment in their favor.

Dated: June 19, 2006

HORVITZ & LEVY LLP
DAVID M. AXELRAD
FREDERIC D. COHEN
MOSCARINO & CONNOLLY LLP
JOHN M. MOSCARINO
PAULA C. GREENSPAN

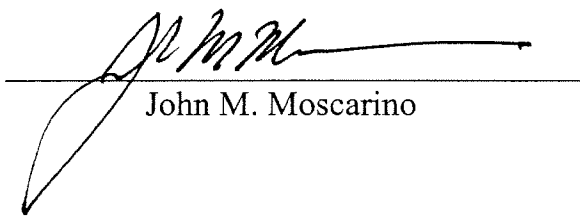
By: _____
John M. Moscarino

Counsel for Defendants and Respondents
ARTER & HADDEN LLP AND ERIC DEAN

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 29.1(c)(1))

The text of this brief consists of 12,401 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

DATED: June 19, 2006



John M. Moscarino

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action; my business address is 1100 Glendon Avenue, 14th Floor, Los Angeles, California 90024-3503.

On **June 19, 2006**, I served the foregoing document described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action by placing a true copy thereof enclosed in a sealed **Federal Express** envelope(s) addressed as follows:

Vicki L. Freimann, Esq. Carroll, Burdick & McDonough LLP 633 West Fifth Street, 51st Floor Los Angeles, California 90071	David M. Rice, Esq. Carroll, Burdick & McDonough LLP 44 Montgomery Street, Suite 400 San Francisco CA 94104
The Honorable John P. Shook Los Angeles County Superior Court 111 North Hill Street, Department 53 Los Angeles, CA 90012	Court of Appeal California Second Appellate District Division Two 300 South Spring Street, Suite 2217 Los Angeles, CA 90013

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **June 19, 2006**, at Los Angeles, California.

Tunizia Abdur-Raheem