

RESOLUTION 08-08-2018

DIGEST

Legal Malpractice: Tolling Statute of Limitations Pending Mandatory Fee Arbitration
Amends Code of Civil Procedure section 340.6 to toll the statute of limitations for legal malpractice actions during Mandatory Fee Arbitration.

STATEMENT OF REASONS

The Problem: The purpose of the Mandatory Fee Arbitration Act (“MFAA”) is to provide an effective and inexpensive forum for resolving fee disputes between clients and attorneys without the necessity of a client hiring another attorney. However, under Code of Civil Procedure §340.6’s current deadlines for attorney-client disputes, clients must often give up the efficiency of the MFAA to preserve their civil claims; attorneys then have to incur time and costs defending a civil lawsuit. This undermines the purpose and efficiency of the MFAA.

Business & Professions Code §6206 tolls the time for filing a civil action regarding a dispute subject to the MFAA until 30 days after an award is served, or the arbitration is otherwise terminated. However, it does not toll Code of Civil Procedure §340.6’s one-year statute of limitations regarding a client’s action against an attorney for any other matter arising from the attorney’s services (other than actual fraud).

The Solution: Amending Code of Civil Procedure §340.6 to allow time for the parties to fully participate in a fee arbitration will promote efficiency, preserve costs, and allow both attorneys and clients to actually benefit from the MFAA. Currently, Business & Professions Code §6201(d)(2) provides that a client waives their right to maintain arbitration under the MFAA if the client files an action against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct. Therefore, with the current, unwaivering, one-year statute of limitations on all client claims against attorneys (except for actual fraud), to ensure that they are made whole from an attorney’s alleged error, clients often have to file and litigate an extremely expensive, multi-year, civil lawsuit, and give up the opportunity to resolve their financial dispute through a quick, low-cost fee arbitration. This also means that attorneys have to defend such civil suits. This problem was exacerbated by the California Supreme Court’s decision in *Lee v Hanley* (2015) 61 Cal.4th 1225, where the Court held that Code of Civil Procedure section 340.6 applies to a client’s claim for the return of unearned fees held by the attorney after the representation terminated. Tolling the statute of limitations until a fee arbitration is concluded would allow clients and attorneys the opportunity to actually benefit from the MFAA.

By amending Code of Civil Procedure §340.6(a), to add a new subsection (5), expressly providing that the statute of limitations for a client’s civil claim is tolled during the pendency of a fee dispute between the attorney and client under the MFAA, both attorneys and clients will have the opportunity to fully avail themselves of the benefit of the MFAA, without the additional cost of a civil litigation.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 340.6 to read as follows:

1 § 340.6

2 (a) An action against an attorney for a wrongful act or omission, other than for actual
3 fraud, arising in the performance of professional services shall be commenced within one year
4 after the plaintiff discovers, or through the use of reasonable diligence should have discovered,
5 the facts constituting the wrongful act or omission, or four years from the date of the wrongful
6 act or omission, whichever occurs first. If the plaintiff is required to establish his or her factual
7 innocence for an underlying criminal charge as an element of his or her claim, the action shall be
8 commenced within two years after the plaintiff achieves postconviction exoneration in the form
9 of a final judicial disposition of the criminal case. Except for a claim for which the plaintiff is
10 required to establish his or her factual innocence, in no event shall the time for commencement
11 of legal action exceed four years except that the period shall be tolled during the time that any of
12 the following exist:

13 (1) The plaintiff has not sustained actual injury.

14 (2) The attorney continues to represent the plaintiff regarding the specific subject matter
15 in which the alleged wrongful act or omission occurred.

16 (3) The attorney willfully conceals the facts constituting the wrongful act or omission
17 when such facts are known to the attorney, except that this subdivision shall toll only the four-
18 year limitation.

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

21 (5) A dispute between the lawyer and client concerning fees, costs, or both is pending
22 resolution under Business & Professions Code Sections 6200-6206. As used in this subsection,
23 “pending” means from the date a request for arbitration is filed until 30 days after receipt of
24 notice of the award of the arbitrators, or receipt of notice that the arbitration is otherwise
25 terminated, whichever comes first.

26 (b) In an action based upon an instrument in writing, the effective date of which depends
27 upon some act or event of the future, the period of limitations provided for by this section shall
28 commence to run upon the occurrence of that act or event.

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

PROPONENT: Sacramento County Bar Association

IMPACT STATEMENT

This resolution would impact/expand tolling pursuant to Business & Professions Code section 6206.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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**RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE**

History:

Identical to Resolution 04-06-2017, which was disapproved.

Reasons:

This resolution amends Code of Civil Procedure section 340.6 to toll the statute of limitations for legal malpractice actions during Mandatory Fee Arbitration. This resolution should be approved in principle because it protects clients from unknowingly waiving their rights and upholds the policy underpinning the Mandatory Fee Arbitration program, which is a client protection statute designed to allow a quick and inexpensive resolution of attorney-client fee disputes.

Under existing law, the statute of limitations for a client's claim against her/his attorney for any attorney wrongdoing (except actual fraud) is complex, purely a creature of statute, and depends upon a number of factors. First, the claim does not accrue until the client discovers (or could have discovered) the facts constituting the wrongdoing, and the client has one year from the date of discovery to commence the lawsuit. (Code Civ. Proc., § 340.6, subd. (a).) Second, the statute provides an outside time limit of four years from the date of wrongdoing, and further provides that the limitations period is one year from discovery or four years from wrongdoing, whichever occurs first. (Code Civ. Proc., § 340.6, subd. (a).) Third, if a client must first prove factual innocence of an underlying crime, the limitations period is two years after the client is exonerated, and the four-year outside limit does not apply. (Code Civ. Proc., § 340.6, subd. (a).) Fourth, and where the claim is based on an instrument in writing with an effective date governed by a future act or event, the limitations period for that claim begins to run only when that future act or event occurs. (Code Civ. Proc., § 340.6, subd. (b).) Finally, all of these interconnected limitations periods are statutorily tolled, (see Code Civ. Proc., § 340.6, subs. (a)(1) – (4)) (which apply only to attorney wrongdoing); and see also Code Civ. Proc., §§ 350-353 (which apply to all civil actions).

Therefore, under current law, it can be many years before a client's claims against a former attorney accrue. And sometimes, the claims continue to be tolled even after they accrue. For this reason, the argument that allowing tolling while a Mandatory Fee Arbitration is pending will unreasonably delay claims against attorneys is not persuasive. As demonstrated below, such tolling is needed to effectuate the policy purpose for such fee arbitration, which is a consumer protection program designed to provide clients with a low cost and speedy means to resolve fee disputes with their attorneys.

Mandatory Fee Arbitration is currently governed by Business and Professions Code, sections 6200-6206, and is administered by local county bar associations. It is a separate proceeding from

a civil action, and is limited to adjudicating only the amount of fees or costs owed. While the client may assert malpractice and breach of fiduciary duty as defenses in this proceeding, these defenses only provide an off-set against the attorney's fee claim. The Mandatory Fee Arbitration proceeding does not toll the limitations period for the civil lawsuit.

Thus, for affirmative damages based on legal malpractice and fiduciary breach claims, the client must file a separate civil action within the limitations period prescribed by Code of Civil Procedure section 340.6. The damages claimed in these civil actions often include damages related to attorney over-billing. But, the problem is that if the over-billing claims are included in this civil action, the client waives the right to Mandatory Fee Arbitration by filing the lawsuit.

Thus, the client faces the unfair choice **either** 1) to initiate a Mandatory Fee Arbitration and take the chance that the limitations period for affirmative claims will be lost during the pendency of the arbitration; **or** 2) to proceed with a civil lawsuit for all attorney wrongdoing, including overbilling, waiving the right to a Mandatory Fee Arbitration; **or** 3) to proceed simultaneously with two parallel proceedings, namely the fee arbitration for the fee dispute and the civil action for the malpractice / breach of fiduciary duty claims (but without the overbilling claims). If the client chooses the third option for two parallel proceedings, the client faces significant procedural and substantive hurdles. Procedurally, the client has no certainty that (a) the defendant attorney and court will agree to stay the lawsuit while the fee arbitration is pending (there is no right to such a stay); nor that (b) the court will later allow the client to add the overbilling claims to the lawsuit if the fee arbitration does not resolve those claims. Substantively, if the fee dispute involves malpractice / breach of fiduciary duty as a defense to the claimed fees, there is a danger of inconsistent rulings and results from the two proceedings.

This unfair choice effectively undermines the client protection purpose of the Mandatory Fee Arbitration Act, which is designed to allow the clients a cost-effective way to resolve attorney fee disputes. The proposed tolling provision corrects this very real problem in furtherance of the legislative purpose of the Mandatory Fee Arbitration Act.

The resolution adds a tolling provision to Code of Civil Procedure section 340.6 which tolls the limitations periods for the client's legal malpractice and fiduciary breach claims against a former attorney while the Mandatory Fee Arbitration is pending. This will effectuate the policy for the Mandatory Fee Arbitration program, allowing clients to avail themselves of the low cost and speedy remedy to resolve fee disputes without having to face this very unfair choice, which works in the attorney's favor and to the client's prejudice.

Related to Resolution 08-07-2018.