Study J-111 May 23, 2003

Memorandum 2003-14

Statute of Limitations for Legal Malpractice: Input on Estate Planning Issues from State Bar

The Commission is studying the statute of limitations for legal malpractice (Code Civ. Proc. Section 340.6). The Commission has examined a number of issues, and is working towards preparation of a tentative recommendation. One of the issues under consideration is whether a special rule is needed to prevent overly long exposure to a claim of estate planning malpractice. In May 2002, the Commission discussed the issue at length and directed the staff to conduct further research and analysis. The Trusts and Estates Section of the State Bar (formerly known as the Estate Planning, Trust, and Probate Law Section) agreed to assist by providing information regarding malpractice insurance rates, availability of insurance, and incidence of litigation. We have now received numerous communications from members of the Trusts and Estates Section regarding this matter. This memorandum discusses the information received, as well as other points pertaining to the limitations period for estate planning malpractice. The key issue for the Commission is whether to invest further time and resources in studying that area, and, if so, how to proceed.

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The following documents are attached as exhibits:

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1. Maxine B. Barton (April 2, 2003) 1
2. Joel A. Biatch (March 25, 2003) 2
3. Edward V. Brennan (April 8, 2003) 3
4. Robert A. Briskin (March 11, 2003) 5
5. Marion L. Cantor (April 2, 2003) 7
6. Kelley R. Carroll (April 10, 2003) 8
7. Diane Cash (March 26, 2003) 9
8. Ronald E. Champoux (March 25, 2003) 9
9. Tucker Cheadle (April 2, 2003) 10

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10. James M. Cowley (May 15, 2003) 11
11. Daniel B. Crabtree (Oct. 28, 2002) 12
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13. W. Edward Dean (April 2, 2003) 14
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24. Michael Hanks (March 26, 2003) 30
25. Kim Marie Herold (March 25, 2003) 31
26. Kim Marie Herold (March 27, 2003) 32
27. Robert L. Hewitt (April 17, 2003) 34
28. Richard K. Hooker (April 3, 2003) 35
29. Christopher B. Johnson (Oct. 10, 2002) 36
30. Thomas Johnson (March 25, 2003) 37
31. Dennis P. Kelly (March 25, 2003) 38
32. MaryClare Lawrence (March 26, 2003) 39
33. Sandra Locke (April 2, 2003) 40
34. Robert A. Mallek, Jr. (March 25, 2003) 41
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46. Rodney Pinks (March 26, 2003) 53
47. Carol Veres Reed (April 18, 2003) 54
48. Scott D. Richmond (April 10, 2003) 55
49. Robby Savitch (May 14, 2003) 56
50. Nicholas J. Schneider (April 18, 2003) 61
51. David S. Schwartz (March 31, 2003) 62

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52. Charles Scott (April 1, 2003) 64
53. Lon D. Showley (March 25, 2003) 66
54. Alan Silver (April 8, 2003) 67
55 Robert Silverman (April 2, 2003) 68
56. Michael A. Simon (Nov. 6, 2002) 69
57. Lemoine Skinner III (April 2, 2003) 71
58. William H. Soskin (March 31, 2003) 72
59. Lynn Stutz (March 26, 2003) 73
60. Pamela M. Topa (March 26, 2003) 74
61. Hugh Verano (March 26, 2003) 75
62. James L. Walker IV (March 26, 2003) 77
63. Theodore I. Wallace, Jr. (March 25, 2003) 78
64. Susan Widule (March 26, 2003) 79
65. W. Scott Williams (April 2, 2003) 80

Also attached are two memoranda prepared by Stanford Law School student Ellen Nudelman, who worked for the Commission last summer. Exhibit pp. 81 (California Statutes of Repose), 82-96 (Statutes of Repose in California and Other Jurisdictions).

Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

STATUTORY FRAMEWORK

The statute of limitations for attorney malpractice is either (1) one year from when the client discovers or should have discovered the facts constituting the wrongful act or omission, or (2) four years from the date of the wrongful act or omission, whichever occurs first:

> 340.6. (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, or 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.

This provision does not apply to an action against an attorney for actual fraud.

The alternate limitations periods under Section 340.6 (one-year-from-discovery and four-years-from occurrence) are tolled — i.e., they do not begin to run — until the client suffers actual injury. The limitations periods are also tolled so long as the attorney continues to represent the client in the matter in which the alleged malpractice occurred, and so long as the client is under a legal or physical disability that prevents the client from bringing suit. If the attorney willfully conceals the wrongful act, the four-year period is tolled during the time of concealment, but the one-year period is not tolled.

APPLICATION OF THE STATUTE TO ESTATE PLANNING MALPRACTICE

Historically, an estate planning attorney was rarely sued for malpractice. Under the doctrine of privity, a beneficiary under a will could not sue the attorney who drafted the will, because the beneficiary did not have a contractual relationship with the attorney. Further, the limitations period for attorney malpractice ran from the time of the malpractice (the "occurrence rule"), not from the time of discovering the malpractice (the "discovery rule"). Consequently, most claims for estate planning malpractice were time-barred before the client died and the malpractice was discovered. M. Begleiter, *Attorney Malpractice in Estate Planning — You've Got to Know When to Hold Up, Know When to Fold Up*, 38 U. Kan. L. Rev. 193, 194-95, 208-10 (1990).

The California Supreme Court abolished the privity defense in *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961). The Court considered the impact that this change would have on the legal profession, but explained that it was appropriate:

> [O]ne of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so and the policy of preventing future harm would be impaired.
>
> Since defendant was authorized to practice the profession of an attorney, we must consider … whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession. Although in some situations liability could be large and unpredictable in amount, this is also true of an attorney's liability to his client. *We are of the view that the extension of his liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss.*

56 Cal. 2d at 589 (emphasis added).

A decade later, the Court also overturned the occurrence rule. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 179, 491 P.2d 421, 98 Cal. Rptr. 837 (1971). The Court explained that in cases of professional malpractice, the special nature of the relationship between the professional and the client justifies postponing the running of the limitations period until the malpractice is or should have been discovered:

> In the first place, the special obligation of the professional is exemplified by his duty not merely to perform his work with ordinary care but to use the skill, prudence, and diligence commonly exercised by practitioners of his profession. If he further specializes within the profession, he must meet the standards of knowledge and skill of such specialists.
>
> Corollary to this expertise is the inability of the layman to detect its misapplication; the client may not recognize the negligence of the professional when he sees it. He cannot be expected to know … the various legal exceptions to the hearsay rule. If he must ascertain malpractice at the moment of its incidence, the client must hire a second professional to observe the work of the first, an expensive and impractical duplication, clearly destructive of the confidential relationship between the practitioner and his client.

> In the second place, not only may the client fail to recognize negligence when he sees it, but often he will lack any opportunity to see it. The doctor operates on an unconscious patient; although the attorney … serves the conscious client, much of their work must be performed out of the client's view. In the legal field, the injury may lie concealed within the obtuse terminology of a will or contract ….
>
> Finally, the dealings between practitioner and client frame a fiduciary relationship. The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests. …
>
> Thus the fact that a client lacks awareness of a practitioner's malpractice implies, in many cases, a second breach of duty by the fiduciary, namely a failure to disclose material facts to his client. Postponement of accrual of the cause of action until the client discovers, or should discover, the material facts in issue vindicates the fiduciary duty of full disclosure; it prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure.

6 Cal. 3d at 187-89 (footnotes omitted).

As in *Lucas*, the Court recognized that its ruling would "impose an increased burden upon the legal profession." *Id*. at 192. It acknowledged that "[a]n 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*." *Id*. (emphasis added). The Court pointed out, however, that "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." *Id*.

The Court "realize[d] the possible desirability of the imposition of some outer limit upon the delayed accrual of actions for legal malpractice." *Id*. It specifically referred to the statute governing medical malpractice, which established a one-year-from-discovery limitations period, but also set what the Court referred to as a four-year "absolute limit." *Id*. The Court suggested that a similar, but possibly longer, absolute limit "may be desirable in actions for legal malpractice." *Id*.

A few years later, the Legislature codified the discovery rule by enacting Section 340.6 in its present form. The statute's alternate limitations periods — one-year-from-discovery and four-years-from-occurrence — could be viewed

as an attempt to implement the Court's suggestion regarding an "absolute limit" on an action for legal malpractice.

Due to the tolling provisions of the statute, however, in some cases much more than four years can elapse before the limitations period even begins to run. That is particularly likely in the estate planning context, because the limitations period is tolled until there is "actual injury" and "actual injury" from estate planning malpractice typically does not occur until the client dies and the estate is distributed. *See Heyer v. Flaig*, 70 Cal. 2d 223, 230-34, 449 P.2d 161, 74 Cal. Rptr. 225 (1969). Consequently, a claim for estate planning malpractice may be brought decades after the alleged malpractice occurs. As a result of this tolling rule and the other developments described above, litigation for estate planning malpractice has dramatically increased in recent years. *See* M. Begleiter, *First Let's Sue All the Lawyers — What Will We Get: Damages for Estate Planning Malpractice*, 51 Hastings L.J. 325, 326-28 (2000); M. Begleiter, *Attorney Malpractice in Estate Planning — You've Got to Know When to Hold Up, Know When to Fold Up*, 38 U. Kan. L. Rev. at 193-212.

PROPOSAL OF THE TRUSTS AND ESTATES SECTION

The Trusts and Estates Section of the State Bar maintains that the lengthy period of exposure to claims of estate planning malpractice is unfair and unworkable. It proposed to address these problems by permitting an estate planning attorney to send a notice to a client that would limit the period in which the attorney could be sued for malpractice. Specifically, the group proposed to add the following provision to the Code of Civil Procedure:

> 340.8. An attorney may end the tolling of the statute of limitations as provided under subparagraph (1) of paragraph (a) of Section 340.6 by sending the notice set forth in this section and if available to the counsel giving the notice by tendering the client's file and original documents in the possession of the attorney to the client. The notice shall be sent to the client at the client's last known address by certified mail, return receipt requested. The notice shall be deemed as effective to commence the statute of limitations to run at such time that the notice has been deposited in the United States mail whether or not the notice reaches the client.
>
> (b) The notice shall be in at least 10 point bold type and shall state the following:

NOTICE OF TERMINATION OF ATTORNEY CLIENT
RELATIONSHIP FOR ESTATE PLANNING MATTERS
AND TENDER OF FILE AND ORIGINAL DOCUMENTS

> The undersigned as your attorney will no longer take responsibility for your estate planning file. By this notice, you are hereby notified that your attorney is tendering to you your file and all documents in the undersigned's possession, available to the undersigned, if any. Since the undersigned as your attorney is no longer taking any further responsibility for your file, you are encouraged to seek the advice of new counsel and to review the estate plan for any corrections that may need to be made to fit your current family situation or any mistakes that may have occurred during the undersigned's representation of you as your attorney for this estate planning matter. Further, even if mistakes exist in your estate planning documents, the undersigned as your attorney will no longer be liable to you or to any person taking under or seeking to enforce your estate planning documents on the fourth anniversary of the mailing of this notice and tender of your estate planning documents.

A conforming revision would be made in Section 340.6. See Memorandum 2002-13, Exhibit pp. 3-5.

The State Bar Board of Governors decided to defer consideration of this proposal (hereafter, the "Notice of Termination Proposal") until the Commission had an opportunity to study it. The Board noted that "issues relating to the potentially very long statute of limitations now applicable to estate planning matters are worthy of further study." First Supplement to Memorandum 2000-61, Exhibit p. 1. The Board encouraged the Commission to study these issues as part of its comprehensive review of the statute of limitations for legal malpractice. *Id.*

COMMISSION ACTION

The Notice of Termination Proposal is discussed in detail in Memorandum 2000-61 and its First Supplement, and at pages 8-20 of Memorandum 2002-13. The Commission considered the proposal and related concerns in December 2000 and again in May 2002 (work was interrupted due to the legislatively mandated project on trial court restructuring). The Commission expressed tentative interest in the concerns raised by the State Bar Trusts and Estates Section, and directed the staff to conduct further research and analysis relating

to those concerns. Minutes (Dec. 14-15, 2000), pp. 6-7; Minutes (May 16-17, 2002), p. 9. In particular, the Commission asked the staff to explore areas such as:

- Malpractice insurance rates and availability, particularly for post-retirement coverage
- Use of statutes of repose in California
- Limitations periods and statutes of repose for legal malpractice in other jurisdictions
- Whether and to what extent an estate planning attorney owes a duty to clients to inform them of changes in the law that might affect their estate plans
- Contexts in which the period of exposure to a malpractice claim is comparable to the exposure to estate planning malpractice
- Practical implications of trying a malpractice case long after the alleged malpractice occurred
- Alternatives to the Notice of Termination Proposal
- Constitutional constraints

Minutes (May 16-17, 2002), pp. 9-10. The State Bar Trusts and Estates Section agreed to assist by providing information regarding malpractice insurance rates, availability of insurance, and incidence of litigation. *Id*. at 10.

We have now received extensive input from members of the State Bar Trusts and Estates Section, most of which appears to have been generated in response to an email message sent in late March by the Executive Committee to members of the Section (which was attached to a communication we received from attorney Ronald Champoux). The comments we received as a result of the letter-writing campaign are discussed below, along with a few comments that arrived earlier.

COMMENTS OF ESTATE PLANNING ATTORNEYS

The comments from estate planning attorneys provide information on their general concerns regarding malpractice liability, the availability of insurance coverage for estate planning malpractice, the difficulty of defending a malpractice claim brought long after preparation of the estate plan in question, the challenge of persuading a client to update an estate plan as needed so as to avoid a situation leading to a malpractice claim, the impact of the long period of malpractice exposure on the availability of estate planning services and on

consumers, the uniqueness of the problem to the estate planning area, the frustration of estate planning attorneys with the situation, and possible solutions to their concerns.

General Concerns

Attorneys practicing in the estate planning area are clearly concerned about potential exposure to a malpractice claim brought many years after completion of work on an estate plan. For example, Alan Silver (a certified specialist in estate planning, probate, and trust law) writes that "we have no rational framework of limitations within which our industry can operate, and the open-ended nature of the claims potential represents a serious risk for which malpractice carriers must be compensated." Exhibit p. 67. Consequently, "coverage availability fluctuates as do the rate structures." *Id*. Mr. Silver "feel[s] more uncomfortable by the week with this situation unresolved." *Id*. In his opinion, we "need certainty in this area." *Id*.

Similarly, Robert Goodwin is a solo practitioner approaching retirement age, who devotes about 25% of his time to estate planning. He is greatly concerned about having to continue to pay expensive malpractice premiums and perhaps having to defend himself against a claim as he grows older "and may be less able to do so effectively." Exhibit p. 28.

Attorney Dwight Griffith considers it almost inevitable that he will be sued for estate planning malpractice in the future, despite exercising care in his work:

> While I have drafted hundreds of estate plans over the years and while I have taken charge from a now deceased prior partner several hundred more of his files, thus far I have been lucky enough to not yet have a malpractice claim made against me.
>
> I say that it is luck, not because there is any lack of diligence on my part. Instead, given the proliferation of resources for client self help in terms of amending or distorting their plans (or over-riding plans by beneficiary designations for IRA's and the like), the never ending change in applicable law, and the nasty habit of clients ignoring recommendations to return for the review and updating of their plans, it would seem to me only a matter of time before such a claim is made.

Exhibit p. 29. Mr. Griffith hopes that he will have insurance coverage if such a claim is made, but he is pessimistic about being able to maintain such coverage. *Id*.

Attorney Kelley Carroll voices similar concern about the prospect of being sued for estate planning malpractice:

> Even with careful client management via engagement and termination letters, many clients (and their families) believe that my firm is under some type of duty to keep them informed of changes in any of the laws that impact estate planning. While I have fortunately not yet been named as a defendant in any action of this type, that risk is real under current law. Similarly, my firm remains at risk for documents drafted by attorneys long departed, for which we have little ability to take preventative measures.

Exhibit p. 8.

Insurance Coverage for Estate Planning Malpractice

Numerous attorneys express concern regarding the difficulty of obtaining adequate insurance to cover their exposure to claims of estate planning malpractice in the distant past. The Commission is also fortunate to have received (at the urging of estate planning attorney James Cowley) a detailed memorandum on this subject from Robby Savitch, an established broker of legal malpractice insurance. Exhibit pp. 56-60. Mr. Savitch is Vice President of Driver Alliant Insurance Services, Inc., the largest privately held insurance brokerage operation in California, which "will transact more that $1 billion in premium this year and generate revenues in excess of $125 million." *Id.* at 56. The firm is "a significant provider of malpractice insurance to California attorneys, many of whom practice in the Estate Planning arena." *Id.* Mr. Savitch oversees the firm's professional liability division and has been in the business for over 23 years. *Id.*

Background on Legal Malpractice Insurance

There are approximately 25 insurance carriers currently writing malpractice coverage in California. *Id.* at 57. "Each has its own set of underwriting guidelines, policy terms, pricing structure, and appetite for risk." *Id.*

It is standard practice, however, that "legal malpractice policies today, unlike other forms of liability insurance, are written on a 'claims-made' basis rather than an 'occurrence' basis." *Id.* This has been true since the early 1980's. *Id.*

"Under an 'occurrence' policy, the *date* of the negligent act determines which policy responds to the claim." *Id*. (emphasis in original). In contrast, under a "claims-made" policy, "the date the error is *discovered and reported* determines which carrier responds." *Id*. (emphasis in original).

For example, suppose a negligent act occurred in 1998 but was not discovered until this year. Under an "occurrence" policy, "the matter would be reported to the carrier who wrote the policy during 1998." *Id*. Under a "claims-made" policy, the matter would be reported to the attorney's current malpractice carrier instead. *Id*.

As long a law firm maintains continuous "claims-made" policies with appropriate coverage for prior acts, any claim for a prior act would be covered under the policy currently in force. *Id*. In contrast, "an 'occurrence' policy is 'alive' forever." *Id*.

Cost, Availability, and Coverage of Insurance for Estate Planning Malpractice Before Retirement or Other Separation from a Firm

Mr. Savitch reports that the malpractice insurance industry in California "is undergoing massive changes." *Id*. "The September 11th terrorist attacks, while causing unprecedented insurable losses, further exacerbated the financial problems of an insurance industry already reeling (and continuing to reel) from a decade of unprofitable underwriting, a weakened economy, a volatile stock market, depressed interest rates, a lack of tort reform, numerous corporate scandals, and reduced returns on fixed income and equity investments." *Id*. As a result, insurance companies "are not only far more selective about the law firms they wish to insure, but are raising premiums, providing less coverage, lowering limits, increasing deductibles, and imposing policy restrictions." *Id*. In other words, insurance companies are "becoming risk averse." *Id*. Mr. Savitch warns that this environment "will likely be with us for some time." *Id*.

Under these adverse circumstances, according to Mr. Savitch "many law firms are flat out struggling to keep coverage in place." *Id.* That is particularly true in the estate planning area. As Mr. Savitch explains:

> [A] key component of a malpractice policy is its ability to respond to claims arising from past acts. …Many of the carriers listed on the attached list *will not offer coverage to firms practicing in the estate planning arena.* If coverage is offered *the price is often significantly higher* than if the firm practices in other areas.

> Insurers primarily willing to offer coverage are Lloyd's of London, Carolina Casualty, Admiral Insurance Company, Hartford, Lawyers Mutual, CNA, and Arch. All will charge extra for the risk. While certain others on the list may offer terms, they will do so only if the firm's estate planning practice amounts to a small portion of the overall practice. In addition, some of the carriers willingly offer terms on an excess basis. That is, they will only provide limits over and above another carrier's primary layer of liability.

Id. at 58 (emphasis added).

Comments from attorneys buttress Mr. Savitch's observations. For example, Irwin Goldring reports that in conversations with various insurance agents and representatives over many years, he has been advised that malpractice coverage for persons practicing in the estate planning area (particularly trust preparation) is "among those least favored by the insurers because of the extended time over which an occurrence of malpractice can occur." Exhibit p. 25. He explains that by "the very nature of what estate planners do, their potential exposure can be for several generations which is exacerbated by the fact that many of those affected are not yet born or are otherwise not known." *Id*. Consequently, "premiums, if coverage is available, are very substantial compared to other areas of practice where the normal statute of limitations period would run." *Id*.

Similarly, estate planner Sandra Locke says that she pays "astronomical prices for malpractice insurance, largely due to the lack of a [statute of limitations]." Exhibit p. 40. Daniel Crabtree reports that over the past year his insurance rates "went up 50% due in part to this statute of limitation issue for estate planning legal malpractice." Exhibit p. 13. Hugh Verano, who has practiced estate planning with his wife for 22 years, states that their malpractice premiums "have nearly doubled this year, even though we have never been sued." Exhibit p. 75. Lon Showley comments that "[t]his year alone the projected annual premium for [estate planning] insurance is expected to increase one hundred percent (100%) from last year's cost." Exhibit p. 66.

Donald Gary, Jr., discloses that his malpractice insurance rate recently *tripled* despite the lack of any claim against him:

> I have been practicing estate planning since 1992. In addition, I have held a CPA license since 1980. During that entire time, I have worked with estate and trust issues. No claims have ever

> been made against me and I have not been the subject of a disciplinary investigation. In fact, I have never been notified that a claim might be forthcoming. Yet, for the policy year commencing 3/15/2003, *my professional liability premiums tripled from the previous year.* Several carriers refused to cover "prior acts" although the premium remained at approximately triple the rate paid last year.

Exhibit p. 22 (emphasis added). "The reason provided for the severe increase in the premium was the increased incidence in claims against estate planning attorneys; particularly claims from work performed in prior years." *Id*.

John Dundas II had the same experience:

> My practice is, and has been for many years, entirely in the area of estates, trusts and probate, including estate planning. I have never had a malpractice claim filed against me. For at least 5 years, my malpractice coverage has shifted each year from one company to another, because in each case the company ceased writing coverage in California during the policy period.
>
> My policy is now up for renewal. My broker advises me that *only two companies* are willing to offer me coverage this year. The offered premium is *three times* the premium for last year (and last year's was double what it was 2 years ago).

Exhibit p. 15 (emphasis in original). A letter from his broker lists seven insurance companies that would not provide him coverage. *Id.* at 16-17.

Estate planner James Walker IV likewise had difficulty obtaining quotes from insurers, and one quote was *almost 600%* more than his firm's premium for the previous year:

> Recently I found as my firm's E &O insurance came up for renewal that there were several insurance companies that would not quote small firms that do any significant amount of estate planning work. One company that ("grudgingly" according to my insurance agent) provided a quote, quote[d] a premium that was nearly 600% over my firm's premium for last year. I was told it was because of the estate planning element of my practice and the unlimited statute of limitations on claims.
>
> Although I was solicited by the LA Bar-affiliated carrier to seek a quote, no quote was given, due (according to my insurance agent) to the estate planning element of our practice and thus claim exposure.

Exhibit p. 77.

Other attorneys also point to "the rapid departure of many insurance carriers from the California market," which is making it increasingly difficult and expensive to maintain insurance coverage. Exhibit p. 41 (Robert Mallek); see also Exhibit p. 2 (Joel Biatch). W. Edward Dean writes:

> Our premiums have risen from less than $12,000 in 2001 to more than $20,000 in 2002 to more than $27,000 this year while our former carrier has withdrawn from doing business in California. To make matters worse, our carrier in 2002 is going out of business in California due to the post-911 shakeout in the insurance industry. *We now have to pay another company to provide less coverage at a higher premium.*

Exhibit p. 14 (emphasis added). Marshal Oldman's comments are similar:

> My malpractice insurance renewed last year with an increase from $22,000 to $55,000 for … my firm. The number of lawyers insured remained unchanged but my broker informed me that only nine carriers were in the California market and that two of them were refusing to insure law firms that did estate planning. My broker also informed me that the remaining carriers were quoting hi[gh]er premiums for estate planning because of the lack of an effective statute of limitations.

Exhibit p. 47.

Tom Garrett remarks that when he started in business 25 years ago, "there was a maxim that you could insure for anything." Exhibit p. 21. He is "not sure that is true any more." *Id*. For the first time in 25 years, his AV rated firm "had great difficulty being able to obtain any coverage and the coverage [they] finally were able to obtain … was not with the desired limits of liability." He cautions that "[i]n this increasingly uncertain time, there is no assurance that there will always be malpractice insurance coverage from a major insurance company." *Id*.

In fact, some attorneys already lack malpractice insurance, despite efforts to obtain it. For example, James Mellos III reports that he is "one of those whose malpractice insurance was not renewed this past year, and [he is] still without malpractice insurance." Exhibit p. 43. He has "spoken with numerous insurance brokers, as well as agents for some of the insurance companies, and [has] been informed that one of the reasons for their pulling out of the market, is the 'unlimited statute of limitations for estate planners.'" *Id*.

Tail Coverage and Retirement or Other Separation from a Firm

Another concern raised by estate planners was the difficulty in obtaining malpractice insurance following retirement or other separation from a firm. This type of insurance is known as extended reporting period (ERP) or tail coverage. According to Mr. Savitch, "an insured typically has the right to purchase ERP in the event the carrier or the insured cancels or non-renews a malpractice policy." Exhibit p. 58. Until about two years ago, "most carriers made 'tail' available for periods ranging from about 12 months to unlimited." *Id*. Mr. Savitch reports, however, that now "only a handful of carriers in California will offer an unlimited ERP option [and] the average cost of this unlimited ERP can be as high as 300% of the expiring premium." *Id*.

The situation is even more serious in the estate planning area. "Among the carriers with an appetite for insuring estate planning law firms, only two currently offer the unlimited ERP." *Id*. "The longest term available from the others is five years and, in several instances, only one year is offered." *Id*.

Mr. Savitch warns that if "the statute of limitations is not modified, and if insurance conditions continue to deteriorate, there will eventually be no way for retired attorneys to fund a defense or pay damages years after they retire, other than out of their own pocket." *Id*. "Law firms facing merger, dissolution, or the complete loss of their insurance placement, will have to confront this situation as well." *Id*.

Again, comments of estate planning attorneys reinforce the description provided by Mr. Savitch. Robert Briskin writes that "tail insurance for more than two or three years is cost prohibitive when an attorney retires." Exhibit p. 6. Charles Scott expresses concern about the prospect of trying to obtain tail coverage for his former law firm, "at high expense and questionable availability." Exhibit p. 64. Maxine Barton discloses that when she retired in 1996, her tail coverage cost $14,000. Exhibit p. 1. Paula Matos comments:

> Back in the early eighties I paid more than $4,000 for tail coverage for my first three years of law practice with a law firm that no longer exists and had no tail coverage. Now that carrier is out of business and cannot be located. Thus, after paying a huge amount for … such a short period of coverage, I am "bare" for those years. That would be irrelevant to anyone other than an estate planning attorney, but twenty years later I still have to worry about the hundred or so estate plans I worked on as a

> fledgling associate! And, unless you do something about it, I will have to worry about it twenty years hence!

Exhibit p. 42.

Daniel Crabtree cautions that "unless this statute of limitations for legal malpractice in the Estate Planning field is limited, those Attorneys who retire from the practice of law will continue to be forced to spend thousands of dollars on malpractice coverage because it is certainly possible 20 or more years after they retire that some issue might arise from work they had done 20 years prior." Exhibit p. 13. He also poses the specter of "a retired estate planning attorney who passes away and potentially has his estate or his heirs sued 20 years after his or her passing because of the statute of limitations for malpractice in the estate planning area has not lapsed." *Id*. That is not a realistic concern, because any claim against the attorney's estate must be brought within one year of the attorney's death. Section 366.2.

A legitimate concern, however, is the problem of an attorney who wishes to retire but fears to do so because of inability to obtain effective malpractice insurance. Thomas Johnson graphically describes the dilemma facing one of his colleagues, who

> is an attorney who has practiced for 40 years in California. He has wanted to retire, but cannot without keeping malpractice coverage. And, to keep malpractice coverage, he is required to work a certain number of hours each week. For now, this is workable, but what would happen if he were to begin to exhibit the symptoms of dementia or Alzheimer's? If he stopped practicing, it would jeopardize his coverage, and thus his estate. But, to continue practicing would jeopardize the public.

Exhibit p. 37.

Similarly, James Walker IV came to the conclusion that unlimited tail coverage was not available to him:

> As I investigated the tail coverage aspects of the insurance I was buying, I learned that there are no companies presently in California who are selling unlimited tail coverage. The best most will offer is 3 years coverage. Yet I have to face an unlimited statute of limitations.

Exhibit p. 77. Because of this he has decided that "I cannot retire, ever, as I cannot leave my wife fully exposed to claims that may arise long after I am out of practice." *Id*. He also feels compelled to "either leave California or start

making sure my assets are re-positioned (out of my name) if I desire to leave any legacy for my surviving spouse or children." *Id*.

Difficulty Litigating a Stale Claim Brought By a Non-Client After the Client's Death

Estate planning attorneys also express concern about how difficult it would be to defend a malpractice claim brought long after completion of an estate plan. William Soskin points out that trying to recall client conversations and directions 30 or 40 years after the fact is virtually impossible." Exhibit p. 72. W. Edward Dean notes the obvious fact that an attorney's heir has no way of recalling such conversations. Exhibit p. 14. And as W. Scott Williams observes, it is "almost impossible to document for the file every conversation with a client during the course of an estate planning engagement." Exhibit p. 80.

Further, Carol Veres Reed explains that the client for whom work was performed "is usually deceased" when a malpractice claim is asserted. Exhibit p. 54. Thus the client is "unable to provide testimony as to the scope and background for a particular estate plan." Exhibit p. 75. As Edward Brennan notes, the beneficiaries "may have no understanding of the wishes and goals of the client nor of the true relationship of the client and the attorney." Exhibit p. 17. Hugh Verano says that this problem, coupled with the passage of time, "will put us in a nearly impossible situation." *Id*. Similarly, Carol Veres Reed asserts that the situation "creates an inherent unfairness for the defendant attorney." Exhibit p. 54.

Bruce Givner provides a real life example of the problem:

> I was sued about 10 years after I met with a client. Happily my malpractice insurance covers it. But, unhappily, I can barely remember any of the details. The old law firm is gone. The records were destroyed in the 1994 Northridge earthquake ….

Exhibit p. 24.

Charles Scott observes that the estate planning context is a hotbed for claims of malpractice. He thinks that "the most common problem comes not from real errors in drafting, but rather from dissatisfied heirs that don't like the provisions of someone's will and are looking for a 'deep pocket' to go after." Exhibit p. 65. As he points out, the drafting attorney "presents an easy target." *Id*. According to Kim Marie Herold, "frivolous actions arise against estate planning attorneys from beneficiaries that are not pleased with the

distribution that they are to receive (or not receive) under the document in question even if such dispositive plan was correctly drafted." Exhibit p. 33.

Robert Briskin echoes these sentiments and maintains that the situation is unfair to attorneys:

> Attorneys in California are currently being exposed to claims by disgruntled heirs who the attorney never has had any contact with nor rendered any legal advice to. In California today, with the high incidence of divorce and clients' multiple marriages, it is common at a client's death that tensions erupt between a client's surviving spouse and children from prior marriages. Invariably one family member or another is disappointed as to the amount of assets that the deceased client left to them. In response, these disgruntled heirs make assertions against the attorney, such as claiming that the attorney did not carry forth the client's wishes or that the attorney should have had the client better protect himself against another heir by other agreements. All of these assertions are made by persons the attorney rendered no legal advice to, nor in many cases even met.
>
> Attorneys representing deceased clients' interests become subject to these claims 5, 10, or even 30 years after the attorney prepared the Will or trust. …It is unfair for estate planning attorneys to be subject to claims 20 or 30 years after preparing a Will or trust.

Exhibit pp. 5-6.

Need for Updating Estate Plans

A number of attorneys emphasize the importance of updating estate plans and the unreasonableness of expecting an estate plan to remain appropriate for a lengthy period. For example, Joel Biatch says that "the tax, trust, probate and estate planning rules change too frequently to reasonably permit our state's citizens to assume that a will or trust or other instrument drafted more than 5 years ago would still bring about exactly the originally desired result." Exhibit p. 2. He also points out that the current tax rules make for such gargantuan changes in 2010 and 2011 that the vast majority of the most highly respected estate planning attorneys are openly stating that they simply have no reasonable idea how to draft documents today which will achieve their clients' desired goals if those clients should fail to make further changes in another 5 or more years." *Id*.

Similarly, Tucker Cheadle states that it "may be possible to plan for 5 to 7 years; but, given the changes in asset values and family situations it is impossible to see farther." Exhibit p. 10. He also explains that it is difficult, if not impossible, to recommend irrevocable trusts with assets that may fluctuate in value or need to be sold for diversification purposes." *Id*.

Because of such changing circumstances, Robert Goodwin's practice is "to advise estate planning clients, in writing, that they should have their documents reviewed by [him] or by some other attorney at least once every five years and sooner if their family or financial circumstances change." Exhibit p. 28. But A. Mari Miller reports that many clients "fail to follow the advice of attorneys to review their estate plan periodically with the attorney …." Exhibit p. 44. Hugh Verano has found the same thing: "[M]any former clients move out of the area, find new attorneys, or simply do not want to think about their estate planning or incur the cost to have it updated from time to time." Exhibit p. 75.

As a result, a significant number of estate plans may lead to disappointing results. This probably contributes to the likelihood of a malpractice claim against an estate planning attorney.

Impact on Availability of Estate Planning Services

The threat of extended exposure to malpractice claims is prompting attorneys to refrain from estate planning. Maxine Barton reports that "[m]any attorneys do not choose to practice estate planning because of the cost of malpractice insurance and the continued threat of lawsuits." Exhibit p. 1. Michael Simon says that in Orange County "there are very few young attorneys who practice in the estate planning area and it is my feeling that this concept of lifetime liability may be a factor." Exhibit p. 69. As a new estate planning attorney, he is giving serious consideration to changing [his] area of practice because of this potential for lifetime liability." *Id*. For the same reason, Christopher Enge is also having "second thoughts about providing estate planning services." Exhibit p. 18. Tucker Cheadle states that "[g]iven the open ended statute of limitations there are a number of estate plans that I will not work on especially if the families have had second marriages or complex business affairs." Exhibit p. 10.

Similarly, Marion Cantor of Cantor & Company discloses that "[w]e are currently discouraging many attorneys from practicing in this [estate

planning] area because of the prolonged exposure to potential professional liability claims." Exhibit p. 7. He believes that "those disreputable non attorney trust mills will continue to flourish because we lack sufficient numbers of well trained estate attorneys willing to take on the work for fear of being sued long after the fact because there is no reasonable statute of limitations period." *Id*.

James Cowley says that the unreasonable risk of being sued for estate planning malpractice "explains why so many of the major law firms have terminated their estate and trust groups." Exhibit p. 11. For example, Latham & Watkins (Mr. Cowley's former firm) was "once a major player in estate planning, [but now] has one token estate planning lawyer out of about 1600 lawyers and is not developing any new partners in that area." *Id*. Gibson, Dunn & Crutcher completely "closed its estate planning practice in the past couple of months, sending letters to all estate planning clients telling them to find other counsel." *Id*. Mr. Cowley reports that in taking this step, Gibson, Dunn & Crutcher "joined many other large firms." *Id*.

Impact on Consumers

According to some attorneys, the extended period for bringing a claim of estate planning malpractice not only creates problems for attorneys but also harms consumers. As Maxine Barton puts it, "[t]he current 'unlimited' statute of limitations period is more of a threat to the public than a benefit," because it discourages attorneys from practicing estate planning. Exhibit p. 1. Thomas O'Keefe says that the current situation "will make it even harder to obtain insurance and will serve to discourage qualified people from entering the field ultimately harmin[g] the consumer." Exhibit p. 47.

Mr. Cowley explains that the lack of estate planning attorneys at major law firms impedes effective service to clients involved in complex business transactions:

> For major "full service" firms to feel compelled not to offer this most personal and important of services to their good clients is certainly a disservice to California consumers of legal services. Ideally, many business transactions should be coordinated with estate planning objectives of the principals. Sadly, this happens less and less.

Exhibit p. 11.

Rising malpractice premiums also mean increased fees for estate planning services. Christopher Enge notes that his malpractice rates "spiral upwards on a yearly basis." Exhibit p. 18. "The clients, of course, have to pay for this insurance with higher rates reflecting higher costs." *Id*. Michael Simon warns that if malpractice insurance "is even available, the cost will be borne by the estate planning consumer until estate planning just becomes so expensive that many clients who are already reluctant to take the necessary steps to plan their estate will simpl[y] give up on the process altogether." Exhibit p. 69.

A number of attorneys voiced concern about whether they would be able to continue offering affordable services to clients of modest means, given the rising cost of malpractice insurance. Exhibit pp. 22 (Donald Gary, Jr.), 35 (Richard Hooker). As Carol Veres Reed comments, estate planning "should be available at moderate rates to everyone." Exhibit p. 54. But Susan Widule, who has served moderate income clients in Oakland for the past seven years, plans to close her practice because she can no longer afford malpractice insurance:

> I am a solo practitioner in the Oakland area, with an emphasis in probate and estate planning. I have been in practice for myself for the last seven years. My practice is less than full time (I am also raising my three children) and focuses on moderate income families. I keep a low overhead by keeping a home office and limited staff. Unfortunately, the cost of my malpractice insurance has skyrocketed — nearly 100% jump in the last two years. Given my client base, and competition from "trust mills," I am not able to substantially raise my rates for doing estate plans. Due to a large extent to this insurance premium increase, I am at this point planning to phase out my practice over the next year.

Exhibit p. 79. This saddens her, because she has enjoyed being an attorney and she believes her "moderate fees have allowed numerous middle class families to get a customized and well-crafted estate plan to protect their children and their assets." *Id*. Steven Penrose cautions that circumstances such as Ms. Widule's "will deny effective representation and encourage clients to turn to trust mills and non-lawyer scam artists." Exhibit p. 49.

Another consequence of the rising cost and decreased availability of insurance is that some attorneys may elect to practice without insurance coverage. For example, William Soskin states that "after practicing for 30 years, my potential exposure is far beyond any insurance policy I can afford."

Exhibit p. 72. James Mellos III also lacks insurance, and John Dundas II says that "[i]f the situation does not improve next year, I will seriously consider having to terminate coverage." Exhibit pp. 15, 43. Scott Richmond comments that "[o]pen ended liability makes the costs of E&O insurance almost prohibitive" for estate planners. Exhibit p. 55. He describes a capable attorney who "notifies his clients up front that because of the costs he does not carry any errors and omissions insurance." *Id*. Mr. Richmond explains that the attorney provides such notice so that the clients "have an option to look for an attorney who does carry such insurance." *Id*. In Mr. Richmond's words, this "is not the protection we all want for the consumers in California." *Id*.

He is correct, of course, that a client may suffer if an attorney lacks insurance. A judgment for estate planning malpractice might easily exceed the attorney's assets. That would not only leave the attorney destitute, but since there would be no insurance to cover the loss, the consumer would not be able to recover from any source despite having a meritorious malpractice claim.

Level of Concern

Estate planning attorneys are not just concerned about their extended exposure to malpractice claims, they are very upset and worried about the situation. William Soskin writes that even though he has never been sued for malpractice, "knowing that there is the possibility that years from now I can be sued for work I did 30 years ago is extremely upsetting to me and my family, particularly as I approach retirement years." Exhibit p. 72. Paula Matos comments that the "specter of that Sword of Damocles still hanging over my gray and trembling head twenty years from now is not pleasant." Exhibit p. 42. Marion Cantor explains that without "some reasonable limitation to the claims filing period, an attorney is not able to plan ahead for the reasonable contingencies that may affect his or her own family or business." Exhibit p. 7. He says that "[n]o one should have to run a business with such uncertainty." *Id*.

Several attorneys voiced concern about inability to conduct a profitable business, given the cost of malpractice insurance. Steven Nelson states that he "cannot charge the client enough for this risk nor build in many years of malpractice premiums." Exhibit p. 45. In his estimation, an "attempt to do so would result in estate planning fees no client would pay." *Id*. Similarly W. Edward Dean says that estate planning attorneys "cannot maintain a decently

profitable practice when malpractice insurance rises this rapidly or enjoy a secure retirement with an unlimited statute of limitations." Exhibit p. 14; see also Exhibit p. 71 (Lemoine Skinner III).

Other attorneys emphasized the stress that the situation puts on an estate planning attorney. For example, Sandra Locke states that in California she is "almost afraid to do anything because of the malpractice issue hanging over [her] head." Exhibit p. 40. She says that a change in the law would

> give me some comfort, [but] it would not change my practice at all in how carefully I prepare documents for my clients. It would just give me a little less to worry about at night knowing that something I did 30 years ago wasn't still hanging over my head or could cause my family harm even after I'm dead.

Id. Similarly, Lynn Stutz notes that "all working folk look forward to retirement as a time when the stresses of their careers are over and they can wake each day without concern for the ever present possibilities of making an error that impacts others." Exhibit p. 73. In his view, estate planning attorneys "have no hope of such a time." *Id*. He explains:

> All of the onus is on the attorney. He must, of course, try to do the job correctly in the first place (well, I think we all try our best to do so). He must fix any errors he does find (becoming aware of the mistake either through a later review of the documents or through further education). And by then the attorney may have lost track of the client. But the clients and their families can wait as long as they like to search for and find a mistake. They can wait until the lawyer is no longer able to fix the problem, which is discovered sooner could be remedied. They can wait until the only "fix" is money — money earned by the lawyer in good faith and earmarked for the lawyer's family or for his own retirement and medical care.
>
> *There is no closure, no retirement, no true peace for the estate planning attorney.*

Id. (emphasis added).

Proposed Solutions

Estate planning attorneys provided a variety of comments on means of addressing their concerns. For some reason, the Executive Committee message soliciting input from members of the State Bar Trusts and Estate Section stated in part that the Commission was considering two proposals: (1) requiring an

estate planning lawyer to send a notice to the client of the completion of work, together with the information that a claim would need to be asserted by the client or the beneficiaries within 5-7 years, and (2) establishing a statute of repose that would terminate liability 7-10 years after completion of an estate planning project. We are not sure why these particular proposals were mentioned in the message. The discussion below describes the comments that the Commission received on these and other possible approaches. We do not attempt to analyze the approaches here, only to report the views expressed in the comments.

General Pleas for Reform

Numerous attorneys simply urge the Commission to develop a solution to the problem of extended exposure to claims of estate planning malpractice. For example, Diane Cash (a certified specialist in estate planning) asks the Commission to "[p]lease work to fairly limit estate planners' exposure to malpractice claims by limiting the statute of limitations on such actions." Exhibit p. 9. Marion Cantor, Ronald Champoux, John Dundas II, Tom Garrett, Robert Hewitt, Dennis Kelly, James Mellos III, Rodney Pinks, Scott Richmond, Nicholas Schneider, Lon Showley, Robert Silverman, and Theodore Wallace, Jr., make similarly nonspecific requests or recommendations for reform. Exhibit pp. 7, 9, 15, 21, 34, 38, 43, 53, 55, 61, 66, 68, 78.

Like these attorneys, MaryClare Lawrence urges the Commission to "[p]lease impose a reasonable statute of limitations on estate planning errors." Exhibit p. 39. She comments that such a limitation might result in "a new cottage industry for lawyers of offering free reviews of other attorneys' work to detect errors in time to correct them." *Id*. She believes that this would be beneficial:

> I suppose this might actually result in MORE claims against lawyers, but frankly, I can't see anyone but lawyers losing any sleep over that.
>
> The important thing is that errors would be caught and corrected BEFORE some dies and it's too late.

Id. (emphasis in original).

A few attorneys voice support for either of the alternatives mentioned by the Executive Committee. For example, Marvin Goodson thinks it is "immaterial whether the goal is accomplished by means of a statute of repose

or by sending a notice to the client that all claims must be filed within a certain time period." Exhibit p. 27. Kim Herold "support[s] either proposal." Exhibit p. 32. Maxine Barton asks the Commission to please "consider either the letter limiting the time a claim could be asserted or a 'statute of repose' 7 to 10 years following completion of the estate planning project." Exhibit p. 1; see also Exhibit p. 2 (Joel Biatch) (endorsing either approach, but with a 5 year limit).

Notice of Termination Proposal

Some attorneys wrote in favor of the Notice of Termination Proposal developed by the State Bar Trusts and Estates Section (see "Proposal of the Trusts and Estates Section" *supra*), which would give an attorney the option of sending a client a notice terminating the attorney-client relationship and triggering a four year period to commence suit for malpractice. Lowell Orren comments that this proposal "is a fair way to cut off the now virtually open-ended malpractice exposure for attorneys." Exhibit p. 48. Christopher Johnson, J Niswonger, and Richard Pershing "support this legislation as a long overdue and much needed solution to an unconscionable deficit in California law." Exhibit pp. 36, 46, 52. Daniel Crabtree expresses similar sentiments. Exhibit p. 12.

Edward Brennan also supports the proposal. He has practiced estate planning, trust, and probate law in California for over 35 years. He has served as a probate referee, testified in legal malpractice cases for both defendants and plaintiffs, been a member of the Executive Committee of the State Bar Trusts and Estates Section, taught CEB programs on legal malpractice, and published on the subject. He also "attended most of the meetings of the Law Revision Commission throughout the period of time in the 1980's when the Probate Code was completely revised." Exhibit p. 3. He writes that the proposal "is an important one." *Id*. "By allowing a client to have notice of an attorney's withdrawal, the client, who is the person to whom the attorney owes a duty of undivided loyalty, may take whatever action is in the client's best interest." *Id*.

Michael Simon states that the proposal that attorneys be given the option to send a Notice of Termination "is a good starting point." Exhibit p. 69. He recommends, however, that such notice be mandatory rather than optional. *Id*. "This would eliminate the potential for any abuse of the optional method." *Id*. Mr. Simon does not explain what type of abuse he fears would occur.

Notice That Work Has Been Completed and That a Malpractice Claim Must Be Asserted Within 5-7 Years

Other attorneys express support for the notice-triggered approach mentioned by the Executive Committee in its message soliciting input. That approach differs from the Notice of Termination Proposal in that the limitation period would be 5-7 years (not four years) and the period would run from the date of a notice sent to the client on completion of an estate planning project, which would inform the client of the project's completion and the deadline for filing a malpractice claim.

Thomas Johnson is "strongly in favor" of this proposal. Exhibit p. 37. Maxine Barton and Carol Veres Reed also support the proposal. Exhibit pp. 1, 54. Hugh Verano comments that a "notice provision starting a 5 to 7 year statute of limitations period would be fair both to us and to the former clients, particularly when a former client for whatever reason elects not to communicate with us." Exhibit p. 75. W. Scott Williams observes that "despite advice to clients to have their estate planning documents reviewed and updated from time to time, most do not, sometimes with negative results to them, their estates, and their intended beneficiaries." Exhibit p. 80. It seems to him that "if clients are notified at the conclusion of an engagement that a finite statute of limitations applies, they may pay more attention to our advice that they have the estate planning reviewed periodically." *Id*. Kelley Carroll likewise mentions the possibility that the proposed change will prompt clients to update their estate plans as needed:

> I want to voice my strong support for the proposed revision to the limitations period for bringing malpractice actions for purported errors made in estate planning documents.…The proposed changes provide enough time to allow many aggrieved clients to seek legal remedy for actual drafting errors. The proposed changes may also provide additional incentive for clients to keep their estate plans current, which is often counseled but not as often followed.

Exhibit p. 8.

None of these comments compares or contrasts the proposal with the Notice of Termination Proposal, or even mentions that alternative. But Steven Penrose clearly opposes the notion of having to send a warning notice to a client at the time of completing an estate planning project:

> One [proposal] would require an estate planning lawyer such as myself to send a notice to the client that the estate planning work has been completed and that any claim must be asserted by the client or the beneficiaries within 5 to 7 years. I think most clients would find it extremely unsettling to receive from their attorney, as soon as he or she has finished the estate plan, this type of notice.

Exhibit p. 49. In his opinion, such a notice "would do damage to the attorney-client relationship." *Id*.

Charles Scott considers both notice-triggered proposals unworkable. Like most estate planning attorneys, he has "drawers of files" where he has not heard from the clients for decades and has no way of contacting them. Exhibit pp. 64-65. He believes that "it would be impossible to try to go back and give notice to the clients or beneficiaries for wills that were drafted 20 or 30 years ago." *Id*. at 64.

Kim Herold is more optimistic. She states that "notification under the current proposal would not be difficult …." Exhibit p. 32. She cautions, however, that "practitioners would need to provide that notification every time an estate planning document is amended or updated." Exhibit p. 32.

Notice in the Text of Every Will or Trust

Dwight Griffith suggests a slightly different notification approach, in which a five year time limit would apply to a claim for estate planning malpractice, and every will and trust agreement would include prominent notice that the estate plan should be reviewed at least once every five years:

> I would suggest that a reasonable time limit must be placed upon the bringing of claims of this type to allow some certainty and fairness for the drafting attorney (for instance 5 years). At the same time, to provide reasonable protection for the client, I would suggest that as a matter of law, every will and trust agreement that is prepared be required to display immediately above the signature line of the client a recitation/admonition in 10 pt. bold type that the testator/settlor should review the foregoing document with a qualified legal advisor periodically and at least once before the passage of 5 years after the date of adoption. By so doing, I would hope that the client would effectively be protected by more likely having the benefit of a review (by the drafting attorney or some other attorney who may detect and eliminate any prior error), and the further benefit of re-setting the 5 year statute of limitations. At the same time, if

> a client failed to follow that legislatively mandated advice, they would be taking their chances that their plan is not current with the law or with their present (or past) intent.

Exhibit p. 29. Mr. Griffith favors this approach because it would require the client to act responsibly with regard to updating the estate plan, just as a patient seeking to avoid physical maladies has the obligation to schedule periodic physical exams. *Id*.

Statute of Repose Running from Completion of Estate Plan

Numerous attorneys advocate establishing a statute of repose that would terminate liability a specified number of years after completion of an estate planning project. Some of these attorneys do not specify how long the time period should be. See, e.g., Exhibit p. 77 (James Walker IV). Ralph Gaarde suggests a 15 year limit, which is the longest limit any of the commentators propose. Exhibit p. 19. The shortest suggested limit is two years, proposed by Marion Cantor. Exhibit p. 7.

A number of attorneys would support a limit in the 7-10 year range, as mentioned by the Executive Committee in its message soliciting input. Exhibit pp. 1 (Maxine Barton), 18 (Christopher Enge), 32 (Kim Herold), 49 (Steven Penrose). Mr. Penrose predicts that a 7-10 year statute of repose would "provide a level of actuarial comfort to the E&O insurance community that would result in a significant impact on insurance rates and a corresponding benefit to clients who will continue to find estate planning attorneys able to serve their needs for reasonable rates." Exhibit p. 49. Mr. Enge says that a side benefit of such an approach "would be that the clients would be motivated to have their plans updated, to restart the statute of limitations." Exhibit p. 18. In his opinion, between "changes in the law and changes in families, most people should have their estate plans updated within 10 years as a maximum." *Id*. Updating plans "would presumably avoid some of the malpractice traps that trigger suits in the first place." *Id*.

Other attorneys propose a 5-7 year statute of repose. Robert Mallek, Jr., writes that as compared to the current situation, a "5-7 year period seems much more reasonable in light of the present difficulty in obtaining consistent and reasonable insurance coverage." Exhibit p. 41. Irwin Goldring believes that "some shorter period than 'forever' should be instituted as a limitation, perhaps five to seven years." Exhibit p. 25. Robert Briskin says that there

"should be a point of finality (such as five or seven years) after an estate planning document is drafted where the attorney is no longer subject to claims of the client and the client's family members." Exhibit p. 6; see also Exhibit p. 74 (Pamela Topa).

Still other estate planners urge the Commission to endorse a five year statute of repose. Exhibit pp. 2 (Joel Biatch), 14 (W. Edward Dean), 29 (Dwight Griffith), 30 (Michael Hanks), 35 (Richard Hooker), 65 (Charles Scott). Thomas O'Keefe suggests a limit in the range of three to five years. He explains that the limit should be no longer than that, because clients "are advised to at least have their estate plan documents reviewed every three to five years." Exhibit p. 47.

None of the comments provides a detailed analysis of why the particular time limit proposed would be preferable to other possible limits. But Irwin Goldring raises an important point regarding commencement of the period of repose:

> Within any legislation there must be some definition of from when the statute begins to run. Perhaps this might be the execution of a set of estate planning documents. The problem is that typically the services of an estate planning attorney continue with a person or family over an extended period of years. The usual estate planning client is not like a litigation client where when a trial is over the attorney-client relationship terminates.

Exhibit p. 25. Most of the comments appear to assume that the repose period would run from the date of execution of an estate planning document. In fact, Kim Herold writes that a statute of repose would be easier to enforce than a notice-triggered limitations period, "because the statute could run from the date the document is signed." Exhibit p. 32.

Statute of Repose Applying to Any Malpractice Claim Except One for a Clear Error on the Face of an Estate Planning Document

Attorney Charles Scott acknowledges that it might prove "impossible to pass a blanket statute of repose that is politically acceptable …." Exhibit p. 65. In that event, he suggests considering a statute of repose "that limits liability only to clear errors in drafting that appear on the face of the document, rather than claims of undue influence, incapacity, and things of that nature that are peculiarly difficult to prove or defend against many years later." *Id*. Under this approach, an attorney would only have to defend against a stale claim under

circumstances where the facts could be readily established and the passage of time would not affect the outcome of the case. Although Mr. Scott advances this concept, he "would much prefer to just see a simple Statute of Limitations saying that within a period such as five years from the completion of the estate planning work all claims are simply barred, as a matter of public policy." *Id*.

Limit of One Year After Death of First Settlor to Die

Rather than suggesting a statute of repose running from completion of an estate plan, 40-year veteran estate planner David Schwartz proposes a different approach with regard to a husband and wife trust. He notes that after clients create such a trust, usually they "merely put the documents away for safekeeping until a definitive event occurs." Exhibit p. 62. "Undoubtedly the most definitive event is the death of the first settlor to die." *Id*. At that time, the surviving settlor "will likely see an attorney to prepare a Federal Estate Tax return (706), an affidavit of Surviving Trustee, etc." *Id*.

Mr. Schwartz therefore believes that the statute of limitations for estate planning malpractice with regard to such a trust should be one year after the death of the first settlor to die. *Id*. He explains that it "is then that the Trust (in this situation of a husband and wife trust) becomes irrevocable as to the first settlor to die." *Id*. Before that time, "the trust can always be amended to correct any errors," and the damages to the client from any malpractice would only be the attorney's costs of amending the trust, which should be nominal. *Id*. Mr. Schwartz offers to assist the Commission at no cost if it decides to pursue this approach. *Id*. at 63.

Scope of Reform

In general, the comments from estate planning attorneys appear to assume that any reform addressing their concerns would be limited to the estate planning area. When it discussed this study last year, however, the Commission expressed interest in whether there are other contexts in which the length of malpractice exposure is comparable to the period for estate planning malpractice. Minutes (May 16-17, 2002), pp. 9-10. None of the comments address this issue in any depth.

Several attorneys unequivocally claim that the situation is unique to estate planning. For example, MaryClare Lawrence says that estate planning "is the *only* attorney activity with potential liability for mistakes extending years or

even decades." Exhibit p. 39 (emphasis added). According to Steven Nelson, the fact that an "estate planning attorney must be exposed to malpractice claims until death, and the attorney's assets exposed until a year afterward *is a unique and unfair situation in the law*." Exhibit p. 45 (emphasis added). Attorneys Michael Hanks and Robert Hewitt make similar statements. Exhibit pp. 30, 34. Several other attorneys comment that as estate planners, they "find it disturbing that reasonable good faith limits are imposed by law on virtually every aspect of law, except murder and estate planning." Exhibit pp. 36 (Christopher Johnson), 46 (J Niswonger), 52 (Richard Pershing).

Attorney Charles Scott has a different perspective. He says that while "it is difficult to know in advance of someone's death whether or not a document is defective, the same is true of many contracts and other documents that may not be subjected to judicial scrutiny for many years." Exhibit p. 64. He does not elaborate on this, and the staff has not had time to look into the matter. At Commission meetings, however, Terence Nunan (representing the State Bar Trusts and Estates Section) has mentioned several contexts in which there can be long term exposure to a claim of legal malpractice — i.e., with regard to a structured settlement, a long term lease, or a marital dissolution. We encourage further input on this point, because it would be useful in determining whether any reform should be limited to estate planning, or should also extend to other types of legal malpractice.

Arguably, estate planning malpractice poses special considerations even as compared to other contexts of long malpractice exposure. Not only is the evidence stale, but also the key witness (the client) is typically dead, making it especially hard to determine the merits of a claim. In addition, disgruntlement among heirs about their inheritances (or lack thereof) is common and can readily manifest in anger at the attorney who helped draft the offending estate plan. Whether these considerations warrant special treatment for estate planning malpractice is debatable.

If a special rule was established for estate planning malpractice, however, care would be necessary in defining what constitutes estate planning. As Ralph Gaarde explains:

> Caution should … be exercised in any statutory language dealing with "estate planning." The practice of law in this area often involves preparation of leases, deeds, stock certificates, and other business related activities that are not commonly thought

> of as "estate planning." Nonetheless, they are often essential to proper and complete preparation of an estate plan. Any legislative changes should not be solely limited to "preparation of a Will or a Trust" unless such definitions are broad enough to include these other essential activities.

Exhibit p. 19.

Other Input on How to Proceed

Only one of the attorneys who submitted a comment maintains that the existing limitations period for estate planning malpractice is satisfactory. That individual is John Perrott, who writes:

> You probably expect that I, as an attorney, will argue that estate planning attorneys should have a shorter statute of limitations when they draft a will or trust. I will not.
>
> I just want you to be reminded that any revision MUST not cut off a cause of action for fraud or other intentional tort when a will or trust is drafted. If you revise a statute, please include explicit language keeping the drafting attorney liable for fraud or other intentional tort.

Exhibit p. 50 (emphasis in original).

Mr. Perrott suggests reforming the probate system instead of shortening the limitations period for estate planning malpractice. "Some form of accelerated probate, just for trusts, which would give beneficiaries the possibility of their day in court, and which would not entail the huge costs and delays of the ordinary (byzantine) probate system, is needed." *Id*.

He is not convinced that there is a malpractice crisis requiring intervention on behalf of attorneys:

> Complaints that attorneys are not entering estate planning, or that malpractice insurance is too high, will simply lead to the cost of a trust rising. The customer will, ultimately, pay for all the costs associated with this product, just like any other. Lowering the standards to allow more people to afford estate planning is a bad idea, because it will really only protect the bad attorneys. The good attorneys will, in time, raise their rates to cover the costs.
>
> Please do not attempt to solve this problem with a band-aid. Keep attorneys liable, and thereby protect the reputation of the profession.

Id.

The staff has not yet researched all of the matters that the Commission expressed interest in when it discussed estate planning malpractice last year. We do, however, have some information and ideas that are worth considering at this time. These are discussed below.

Insurance for Other Types of Legal Malpractice

We have not made any systematic effort to obtain information regarding insurance rates and availability for legal malpractice generally. From the information we have, it appears that rates are rising substantially not just in the estate planning area, but in other areas as well.

For instance, a September 2002 article in the *California Bar Journal* reports that "[m]alpractice insurance premiums have soared in recent months and underwriters often have restricted special coverage." *Bar switches carriers for its malpractice program*, Cal. Bar J. (Sept. 2002). A July 2002 article in the same publication says that a "harder market and the departure of at least nine underwriters in the last nine months have placed many California attorneys in an expensive bind, facing increases in their malpractice coverage of anywhere from 20 to 400 percent." *Malpractice premiums skyrocket*, Cal. Bar J. (July 2002). The article describes a number of specific situations in which attorneys experienced dramatic rate increases when renewing their policies (e.g., from $8,000 per year to $30,000 per year; from $60,000 per year to $95,000 per year with a substantial reduction in coverage). A February 2003 article in *California Lawyer* states that malpractice insurance experts "have been forecasting rising rates for a couple years now, and it is safe to say the storm has hit full force." L. Hwang, G. Mariano & D. Rosenthal, *Malpractice Insurance Report*, Cal. Lawyer 23 (Feb. 2003). According to the article, it is "not unusual for attorneys renewing their policies this year to find their premiums have risen by 50 percent or more." *Id.* Some attorneys "are having problems finding coverage at any price." *Id.*

In fact, a recent article in the *San Francisco Daily Journal* quotes an insurance broker who says that it is "a 'dirty secret' that 35 percent of California's lawyers aren't insured …." *Brobeck Partners Confront Liability*, S.F. Daily J. (2003). The article describes the difficulties experienced by Brobeck, Phleger & Harrison attorneys in obtaining insurance coverage following the dissolution of the firm. Stephen Snyder, chairman of the firm's liquidation committee, is

quoted as saying that "[e]very broker we've spoken to has said it is a very difficult market to get tail insurance." *Id.* The article also quotes an insurance broker who said "it's almost impossible for firms in Brobeck's position to purchase extended reporting period coverage on the open market." *Id.* He reports that insurance companies feel ERPS are a loser because there is no ongoing relationship with the firm. *Id.*

Two articles mention estate planning as an area in which it is particularly difficult to get affordable malpractice insurance. D. Rosenthal, *Every Lawyer's Nightmare*, Cal. Lawyer 23, 24 (Feb. 2002); *Malpractice premiums skyrocket*, Cal. Bar J. (July 2002). These articles also mention other difficult areas, however, including family law, plaintiffs' personal injury, securities, entertainment, real estate, environmental, and intellectual property. See also L. Hwang, G. Mariano & D. Rosenthal, *supra*, at 23 ("Some attorneys, particularly those practicing intellectual property law, are having trouble finding any coverage at all.").

One article reports that industry observers regard the rising rates and decreased insurance availability as a correction of artificially low market conditions:

> Industry observers say the insurance market's current conditions should probably be viewed as a correction of a 10-to-13-year period when some attorneys obtained policies at artificially low rates. During that time, new carriers flooded the state, writing dirt-cheap policies just to acquire premiums that they then pumped into the booming stock market. When the market tanked, so did those companies, which withdrew from the state or from the business of insuring attorneys.

Malpractice Insurance Report, Cal. Lawyer 23 (Feb. 2003). The same article quotes an insurance broker as stating that in reality "rates are not that much higher than they were a decade ago …." *Id.* We do not have data that would permit us to confirm or dispel that conclusion.

Need for Balanced Input

It is also worth mentioning that the input the Commission has received thus far does not reflect a balanced spectrum of the interests at stake with regard to estate planning malpractice. We have not yet made a concerted effort to obtain input from sources representing client interests, judicial considerations, or the insurance community.

Assuming that the Commission decides to pursue this matter further, we plan to make such an effort now that we have obtained extensive comments from estate planning attorneys. Sources we intend to contact include Consumers Union, CALPIRG, the Consumer Attorneys of California, Public Citizen, the California Judges Association, the Judicial Council, and a number of specific probate judges. We welcome suggestions regarding other groups or individuals to contact.

Anti-Attorney Sentiment

In deciding whether to propose a reform addressing the concerns raised by estate planning attorneys, it is important to consider how the public (and thus the Legislature) will receive a reform favoring attorneys. Despite efforts to improve public opinion of attorneys, much anti-attorney sentiment persists. This may impede efforts to enact a reform along the lines suggested by the estate planners.

Such problems arose when the bill proposing Section 340.6 was pending in the Legislature in 1977. For example, a doctor argued that the governor should veto the bill because it protected lawyers without providing similar protection to other professionals. He wrote that "[w]ith this proposed special interest legislation, lawyers are announcing to the people of California that, while they wish to retain the freedom to sue everyone else, they want immunity from the legal process for themselves." Letter from Martin Rosenblatt, M.D., to the Editor of the *Los Angeles Times* (Aug. 29, 1977) (on file at State Archives). Similarly, a retired forester urged Governor Brown to veto the bill, intimating that "it mainly serve[s] the self-interest of lawyers." He bluntly remarked that "[t]here are too damn many lawyers & lawyer-legislators!" Letter from John S. Hall to Governor Brown (May 25, 1977) (on file at State Archives).

Regardless of whether such sentiments are deserved, any effort to shorten an attorney's exposure to a claim of legal malpractice is likely to encounter such resistance. The State Bar Litigation Section warned of this when it considered the Notice of Termination Proposal in August 2000. Specifically, the group questioned whether it was an appropriate time to introduce anti-client legislation "in light of the difficult times the State Bar has endured before the Legislature in the last five years …." First Supplement to Memorandum 2000-61, Exhibit p. 4.

The Commission should bear this in mind as it weighs the concerns of the estate planners. In particular, the Commission should consider whether it will be able to find an effective author for whatever proposal it might develop. Because legislators can only introduce a certain number of bills each year, they are selective about which bills they choose, and are likely to avoid ones that will be unpopular with their constituents.

Fairness to the Client

The estate planning attorneys who submitted comments did not speak in any detail regarding how fair it would be to establish a statute of repose or notice-triggered time limit and thus deprive a client (or client's beneficiary) of a malpractice cause of action before actual injury occurs or the client discovers the facts constituting malpractice. John Perrott contends, however, that such a reform might violate the due process requirement of fundamental fairness:

> Remember, the beneficiaries of a trust may not even know they are beneficiaries (or even exist) when it is drafted, and hence, any statute limiting the drafter's liability also necessarily runs into Federal Constitutional problems: everyone is supposed to get notice and an opportunity to be heard, at a minimum, under the Due Process Clause of our 14th Amendment.

Exhibit p. 50.

Although we have not thoroughly researched the matter, the staff is skeptical that courts would regard such a reform as a due process violation. See Memorandum 2002-13, pp. 15-17. But fairness concerns such as the ones Mr. Perrott raises are legitimate even if they do not rise to the level of a due process violation. In fact, concern for the welfare of clients and beneficiaries was the impetus for the California Supreme Court's decisions in *Lucas* and *Neel*, which overturned the privity defense and the occurrence rule, respectively (see "Application of the Statute to Estate Planning Malpractice" *supra*). Certainly, any reform is likely to be more enthusiastically received if it does not cause innocent clients and beneficiaries to go uncompensated for serious harm caused by a careless attorney. At a minimum, the Commission should consider coupling any reform favoring estate planning attorneys with one or more reforms favoring clients, such as the equitable tolling concept that the Commission has been exploring (see Memorandum 2002-13, pp. 3-6).

Attorney MaryClare Lawrence contends that it is untrue "that people can't know about a mistake until someone dies." Exhibit p. 39. She maintains that "[m]ost estate planning error claims concern obvious problems (wrong heir, etc.), which should be discovered within a reasonable time." *Id*. What she overlooks, however, is that such problems may be obvious to an estate planner, but may not be obvious to a layperson. See *Neel*, 6 Cal. 3d at 187-89. Moreover, it may not be fair or realistic to assume that every client who seeks estate planning services is able to obtain professional review of the estate plan on a regular basis. Estate planning services are costly, clients' financial resources may fluctuate, and clients may stretch to afford estate planning assistance on one occasion without having the wherewithal to repeat that step. Clients who do not have their estate plans periodically updated may run the risk of a change in circumstances that negatively affects their plan, but that does not mean that it would be fair to make them bear the brunt of an attorney's error if the plan was incorrectly drafted in the first place.

Client Security Fund

One model for protecting clients from attorney misfeasance is the Client Security Fund, which was established 30 years ago. The purpose of the fund is to reimburse clients for monetary loss resulting from a lawyer's theft or other intentional dishonesty. The fund cannot be used to cover losses caused by legal malpractice. Any payment from the fund is at the discretion of the Client Security Fund Commission and may not exceed $50,000. Bus. & Prof. Code § 6140.5; Rule 4 of Rules of Procedure, Client Security Fund Matters. The fund is financed by a $35 per year mandatory contribution from each member of the bar. Any attorney whose dishonest conduct causes a disbursement from the fund must reimburse that amount as a condition of continuing to practice law.

As of this year, the Client Security Fund "has reimbursed some $50 million to thousands of attorney theft victims." *Client Security Fund comes to the rescue when "bad apples" steal from clients*, Cal. Bar J. (Aug. 2002). In 2001 alone, "609 victimized clients received more than $4.4 million in reimbursement." *Id*. According to Bill Ricker, president of the National Client Protection Organization, the State of California "has the absolute right to be proud" of what its lawyers are doing in terms of client protection. *Id*. The director of the fund reports that it is a cost-effective way of covering theft, and a strong statement that the legal profession is not going to tolerate bad apples. *Id*. The

fund has been criticized for forcing honest lawyers to pay for the dishonest behavior of a few bad attorneys. *Id.* But defenders of the fund explain that it helps to maintain the integrity of the profession and to "mak[e] all lawyers look better because they're chipping into this fund." *Id.*

If a statute of repose or similar time limit for estate planning malpractice is considered necessary, perhaps such a reform could be coupled with establishment of a new fund, similar to the Client Security Fund, which would be used to reimburse clients who have been injured by estate planning malpractice but are unable to recover from their attorney due to the statute of repose. Contributions to the fund would be voluntary, but the statute of repose would apply only to attorneys who contribute. It might be possible to establish a sliding scale of contributions, such that an attorney who does only a little estate planning work would not have to contribute as much as an attorney whose entire practice is estate planning. As with the Client Security Fund, disbursements to clients should be discretionary but perhaps attorneys should not be required to reimburse the fund for payments made due to their malpractice. Unlike theft, malpractice is unintentional and the concept of restitution does not apply. This is just a tentative idea but the staff could more thoroughly investigate the Client Security Fund (and similar funds in other jurisdictions) if the Commission is interested.

Statutes of Repose in California

When it last discussed this study, one of the points the Commission wanted to explore was the use of statutes of repose (as opposed to statutes of limitation) in California. While a statute of limitations "normally sets the time within which proceedings must be commenced once a cause of action accrues, the statute of repose limits the time within which an action may be brought and is not related to accrual." *Giest v. Sequoia Ventures, Inc.*, 83 Cal. App. 4th 300, 99 Cal. Rptr. 2d 476, 479 (2000). In other words, a statute of repose establishes an absolute deadline for initiation of a lawsuit, running from the time of a certain event (e.g., the execution of a document or completion of a work of construction), regardless of when a negligent act is discoverable, when harm occurs, or other such matters.

The staff has not had time to do its own work on California statutes of repose, but Stanford Law School student Ellen Nudelman did prepare a memorandum on it for the Commission last summer. Exhibit p. 81. A few new

statutes of repose have been enacted in the construction defect context since then. See 2002 Cal. Stat. ch. 722 (SB 800 (Burton)). Even with these additions, however, statutes of repose do not appear to be widely used in this state. This does not bode well for enactment of a statute of repose governing estate planning malpractice.

Statutes of Repose for Legal Malpractice in Other Jurisdictions

Ellen Nudelman also prepared a memorandum for the Commission on statutes of repose for malpractice in other jurisdictions. Exhibit pp. 82-96. She found that at least seven states have statutes of repose applicable to legal malpractice: Alabama (4 years), Connecticut (3 years; general tort provision), Illinois (6 years; inapplicable to an injury that does not occur until the client's death), Louisiana (3 years), Montana (10 years), North Carolina (4 years; professional malpractice provision), and South Dakota (3 years). We will investigate this area further if time permits and the Commission so directs.

Retroactivity of Statute of Repose or Other Limitation on Liability

If the Commission decides to propose a statute of repose or similar limitation, an important issue will be whether that limitation should apply retroactively, or only to malpractice occurring after the limitation is enacted. Charles Scott "feel[s] strongly that any such legislation should apply to existing work, rather than just prospectively …." Exhibit p. 65.

Retroactive application would raise constitutional issues, however, which would need to be carefully researched and considered. *See, e.g.*, *In re Marriage of Bouquet*, 16 Cal. 3d 583, 591-92, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976); *Souders v. Philip Morris, Inc.*, 104 Cal. App. 4th 15, 127 Cal. Rptr. 2d 748 (2002); *Carlson v. Blatt*, 87 Cal. App. 4th 646, 105 Cal. Rptr. 2d 42 (2001). We will look into this matter if the Commission decides to propose a statute of repose (or similar time limit) and is inclined to make the rule retroactive.

Standard for Establishing Legal Malpractice in a Transactional Setting

Another factor to consider relates to a case pending in the California Supreme Court, *Viner v. Sweet* (No. S101964). At issue is the standard for establishing causation in a case of transactional malpractice: Is it necessary to show that the client would have gotten a better result in the transaction "but for" the negligence of the attorney, or does a less stringent standard apply?

In 2001, the Second District Court of Appeal ruled that the "but for" test used for litigation malpractice does not apply to transactional malpractice. That has been characterized as a "terrible decision for transactional lawyers." *BASF to Weigh an Easy, Fill-In-the-Blanks Amicus Brief*, S.F. Daily J. (May 22, 2002). The threat of such a lowered standard might be partially responsible for the increases in insurance rates and contraction of the insurance market that estate planning attorneys have recently experienced.

Certainly, whatever the Supreme Court decides on this matter is likely to affect the cost and availability of malpractice insurance for transactional lawyers such as estate planners. The case has been briefed and argued, and is now under submission. A decision is due by the end of June.

Commission Resources

A further point to consider is the limited resources of the Commission. As the Commissioners are well aware, the Commission is currently engaged in numerous important and demanding studies (e.g., financial privacy, trial court restructuring, CIDs, mechanic's liens), yet the Commission's staff and other resources are dwindling due to the state budget crisis. The Commission must be careful in deciding where it devotes its remaining resources.

ANALYSIS AND RECOMMENDATION

A key first step in addressing a problem is documenting that the problem exists. The members of the State Bar Trusts and Estates Section have made significant progress in that regard. The communications submitted to the Commission suggest that more is going on than normal griping about increased rates for insurance malpractice. The staff is particularly struck by the evidence that many insurance carriers are leaving the legal malpractice market in California (and especially the estate planning area), the examples of dramatic increases in insurance rates from one year to the next (as much as 600%), the dearth of estate planning attorneys in major law firms, the number of attorneys who are discontinuing estate planning practices or seriously considering that step, and the unfortunate circumstance that some attorneys are going without malpractice coverage. Further confirmation of these or other problems would of course be appreciated.

In light of the input received, we are inclined to investigate this matter further. In particular, we recommend taking steps to obtain information from

the perspectives of clients, beneficiaries, courts, insurance companies, and other parties who would be affected by the reforms under consideration. We feel cautious, however, about whether this is really an area that the Commission can address effectively. There is a risk that the Commission could invest a lot of resources in developing a proposal and presenting it to the Legislature, only to have the proposal defeated due to anti-attorney sentiment and other factors.

It seems premature to propose a tentative solution to the concerns of the estate planners, or even to decide whether to take that step later in this study. At a minimum, we recommend waiting until *Viner v. Sweet* is decided and the Commission obtains broader input before taking such steps.

As a possible solution in addition to the ones already mentioned, however, the Commission should perhaps consider a multi-faceted approach such as the following:

- Adopt a statute of repose somewhere in 5-10 year range, applicable to estate planning malpractice (running from execution of the estate planning documents).
- Apply the statute of repose only to attorneys who contribute annually to a fund that covers client losses for which recovery from the errant attorney is barred due to the statute of repose.
- Require an estate planning attorney to notify the client in writing, at the time the estate planning documents are executed, regarding the statute of repose and the need to have an estate plan updated approximately every 5 years or sooner if client's circumstances change (e.g., the client gets divorced). Direct the State Bar to determine the consequences for violation of these requirements. So as to avoid injecting in a malpractice suit issues regarding whether notice was or was not provided, failure to provide the required notice should not affect running of the statute of repose.
- Couple these changes with one or more reforms favoring the client, such as the equitable tolling concept that the Commission has been considering.

We are not recommending this approach at this time, only adding it to the mix of ideas under consideration.

In closing, it is interesting to note the comments of the State Bar regarding enactment of Section 340.6 in 1977. The Bar supported the reform, but with reservations. In particular, the Bar warned that "the phrase 'actual injury' is

unnecessarily confusing and could well result in a great deal of litigation in order to clarify its meaning." Letter from Edwin Rubin, President, State Bar of California, to Governor Brown (Sept. 13, 1977) (on file at State Archives). Unfortunately, that comment has proved remarkably prescient.

Respectfully submitted,

Barbara Gaal
Staff Counsel

COMMENTS OF MAXINE B. BARTON

Date: April 2, 2003
To: bgaal@clrc.ca.gov
From: bartbaum <bartbaum@earthlink.net>
Subject: Statute of Limitations for Legal Malpractice

I support the current proposal before you that would require a lawyer to send a notice to the client on the completion of the work with information that a claim would need to be asserted by the client or the beneficiaries within 5 to 7 years.

I was an estate planning solo practitioner. During my years in practice, I continued to advise all current and former clients when the law changed that their estate planning documents should be reviewed and updated.

When I retired in l996, the fee for my tail was $l4,000. I carried malpractice during all the years of practicing at a great expense. The burden of worrying about being sued by a beneficiary still concerns me.

Since my retirement from active practice, I have continued to volunteer my time serving as a pro tem, a pro bono court appointed mediator and in our community's outreach program for the poor.

The current "unlimited" statute of limitations period is more of a threat to the public than a benefit. Many attorneys do not choose to practice estate planning because of the cost of malpractice insurance and the continued threat of lawsuits.

Please consider either the letter limiting the time a claim could be asserted or a "statute of repose" 7 to l0 years following completion of the estate planning project.

Thank you.

Maxine B. Barton, Esq.

COMMENTS OF JOEL A. BIATCH

Date: March 25, 2003
To: bgaal@clrc.ca.gov
From: Joel A. Biatch <biatch@oaklaw.com>
Subject: Statute of Limitation for Legal Malpractice

Dear Sir or Madam,

I am writing in support of the Executive Committee of the Trust & Estate Section of the State Bar in its efforts to urge the legislature to enact a statute of limitation or statute of repose that would apply to unaccrued claims of errors and omissions with respect to estate planning. Frankly, the tax, trust, probate and estate planning rules change too frequently to reasonably permit our state's citizens to assume that a will or trust or other instrument drafted more than 5 years ago would still bring about exactly the originally desired result. In addition, the current tax rules make for such gargantuan changes in 2010 and 2011 that the vast majority of the most highly respected estate planning attorneys are openly stating that they simply have no reasonable idea how to draft documents today which will achieve their clients' desired goals if those clients should fail to make further changes in another 5 or more years.

Moreover, with the recent 11 carriers that I understand have withdrawn from the California malpractice insurance market, it is hard for any of us to know whether our respective carriers will still be in existence or will be writing professional liability policies when either we want to renew or when claims might some day be made against the policies.

It is for these reasons that I urge you to limit the period of time in which an estate planning attorney will be liable for an erroneously drafted will or trust. Either a 5 year statute of repose, or a notice statute which would require that the lawyer notify the client upon completion of work with the information that a claim would need to be asserted by the client or the beneficiaries within 5 years would be the appropriate response.

Very truly yours,

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April 8, 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94353-4739

Attention: Barbara Gaal

Re: Statute of Limitations for Legal Malpractice

Dear Commission Members:

I have practiced estate planning, trust and probate law in California for over 35 years. I served as a Probate Referee for 12 years and attended most of the meetings of the Law Revision Commission throughout the period of time in the 1980's when the Probate Code was completely revised.

I also served on the Executive Committee of the Estate Planning, Trust & Probate Section, now the Trust & Estate Section, of the State Bar for seven years.

In recent years, I have served as an expert witness both for the plaintiffs and the defendants in a number of cases involving legal malpractice and have been involved in mediations where the issue has been an important one.

I have also given CEB programs on the issue of legal malpractice and ethics and have published articles on these subjects.

The current proposals for limitations on the statute of limitations for trusts and estates attorneys is an important one. By allowing a client to have notice of an attorney's withdrawal, the client, who is the person to whom the attorney owes a duty of undivided loyalty, may take whatever action is in the client's best interest.

By not having such a statute of repose, the attorney is subject to unreasonable risks not from his or her client, but from unhappy beneficiaries who may have no understanding of the wishes and goals of the client nor of the true relationship of the client and the attorney.

I urge the Commission to give serious consideration to a reasonable limitation period applicable to estate planning lawyers.

Thank you for your consideration.

Very truly yours,

Edward V. Brennan

EVB/dg
cc: Randolph B. Godshall, Esq.
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CERTIFIED SPECIALIST - TAXATION LAW
THE STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

E-MAIL: rbriskin@rablegal.com
OUR FILE NO.:

March 11, 2003

File: J-1M

California Law Revision Commission
4000 Middlefield Road
Room D-1
Palo Alto, California 94303-4739

Attn: Barbara S. Gaal

Re: Law Revision Commission Study of the Statute of Limitations for Legal Malpractice for Estate Planning

Ladies/Gentlemen:

The California Law Revision Commission is currently considering a statute of limitations for estate planning malpractice. As an attorney who has prepared estate plans, Wills and trusts for over 20 years, I wanted to share some observations with the Commission for its consideration.

Attorneys in California are currently being exposed to claims by disgruntled heirs who the attorney never has had any contact with nor rendered any legal advice to. In California today, with the high incidence of divorce and clients' multiple marriages, it is common at a client's death that tensions erupt between a client's surviving spouse and children from prior marriages. Invariably one family member or another is disappointed as to the amount of assets that the deceased client left to them. In response, these disgruntled heirs make assertions against the attorney, such as claiming that the attorney did not carry forth the client's wishes or that the attorney should have had the client better protect himself against another heir by other agreements. All of these assertions are made by persons the attorney rendered no legal advice to, nor in many cases even met.

Attorneys representing deceased clients' interests become subject to these claims 5, 10, or even 30 years after the attorney prepared the Will or trust. Other businesses in California have statutes of limitations for making claims. For example, there are even statutes of limitations for latent defects in construction

LAW OFFICES OF
ROBERT A. BRISKIN
A PROFESSIONAL CORPORATION

projects. It is unfair for estate planning attorneys to be subject to claims 20 or 30 years after preparing a Will or trust. These claims expose attorneys and their life savings (and their family's assets) to such liabilities.

Malpractice insurance is not a solution in most cases. Not only is insurance very expensive, tail insurance for more than two or three years is cost prohibitive when an attorney retires. Attorneys retiring after practicing law for 30 years should not be subject to these unfair claims for Wills and trusts prepared many years before.

The lack of an adequate statute of limitations in California subjects estate planning attorneys and their families' assets to these unfair claims. There should be a point of finality (such as five or seven years) after an estate planning document is drafted where the attorney is no longer subject to claims of the client and the client's family members. California should be progressive in allowing estate planning attorneys to have the same statute of limitation protection afforded other industries.

Thank you for your consideration. If you have any questions or require additional information, please do not hesitate to contact me.

Very truly yours,

ROBERT A. BRISKIN,
A PROFESSIONAL CORPORATION

ROBERT A. BRISKIN

RAB:ej

cc: Terence S. Nunan, Esq.
Randolph B. Godshall, Esq., Vice Chair
Trusts & Estates Section

COMMENTS OF MARION L. CANTOR

Date: April 2, 2003
To: bgaal@clrc.ca.gov
From: Marion L. Cantor <mcantor@cantorlaw.us>
Subject Statute of Limitations on Attorney Liability for claims related to estate planning

To whom it may concern:

I understand that you may be considering supporting a new law to put a limit on the number of years an estate planning attorney is exposed to claims for potential errors or omissions. I strongly support the idea.

We are currently discouraging many attorneys from practicing in this area because of the prolonged exposure to potential professional liability claims. I am not aware of any other profession that lacks a definite statutory limit to the period for presentation of claims. This is true despite the potential for the occurence of substantial damages from medial or real estate or other areas of negligence. Why do we discriminate in the area of estate planning?

Without some reasonable limitation to the claims filing period, an attorney is not able to plan ahead for the reasonable contingencies that may affect his or her own family or business. No one should have to run a business with such uncertainty. While I am a strong advocate of providing professional liablity insurance as a sound business practice, I am absolutely opposed to the current lack of a limitations period.

Those claims may live one year longer than I do.

I am in favor of a statutory two year statute of limitations for the filing of claims by the clients or their successors in interest against the estate attorney for professional malpractice. In the absence of some such limitation, I believe those disreputable non attorney trust mills will continue to flourish because we lack sufficient numbers of well trained estate attorneys willing to take on the work for fear of being sued long after the fact because there is no reasonable statute of limitations period.

Please support the insertion of a statutory limitations period for the work of estate planning attorneys for a period of not more than two years.

I appreciate your giving me the opportunity to comment, and thank you for considering my response.

Marion L. Cantor, Esq.
Cantor & Company,
A Law Corporation

COMMENTS OF KELLEY R. CARROLL

Date: April 10, 2003
To: bgaal@clrc.ca.gov
From: Kelley Carroll <carroll@portersimon.com>
Subject: Statute of Limitations for Legal Malpractice

Dear CLRC,

As a practicing estate planning attorney, I want to voice my strong support for the proposed revision to the limitations period for bringing malpractice actions for purported errors made in estate planning documents. Even with careful client management via engagement and termination letters, many clients [and their families] believe that my firm is under some type of duty to keep them informed of changes in any of the laws that impact estate planning. While I have fortunately not yet been named as a defendant in any action of this type, that risk is real under current law. Similarly, my firm remains at risk for documents drafted by attorneys long departed, for which we have little ability to take preventative measures.

The proposed changes provide enough time to allow many aggrieved clients to seek legal remedy for actual drafting errors. The proposed changes may also provide additional incentive for clients to keep their estate plans current, which is often counseled but not as often followed.

Thank you.

KELLEY R. CARROLL
PORTER SIMON, P.C.
40200 TRUCKEE AIRPORT ROAD
TRUCKEE, CA 96161
[530] 587-2002 [T]
[530] 587-1316 [F]
www.portersimon.com

COMMENTS OF DIANE CASH

Date: March 26, 2003
To: bgaal@clrc.ca.gov
From: Diane R. Cash <dcash2@earthlink.net>
Subject: estate planners statute of limitations

Please work to fairly limit estate planners' exposure to malpractice claims by limiting the statute of limitations on such actions. Thank you.

Diane Cash
certified specialist in estate planning

COMMENTS OF RONALD E. CHAMPOUX

Date: March 25, 2003
To: bgaal@clrc.ca.gov
From: Ronald E. Champoux <rchampoux@a-1law.com>
Subject: Statute of Limitation for Legal Malpractice

I agree that a statute of limitation or statute of repose should be enacted to apply to unaccrued claims of errors and omissions with respect to estate planning. Thank you for your attention to this matter.

Ron Champoux
Law Offices of Ronald E. Champoux
1000 Fourth St., Ste. 600
San Rafael, CA 94901
rchampoux@a-1law.com
415-454-2344 phone
415-456-1921 fax
www.a-1law.com

COMMENTS OF TUCKER CHEADLE

Date: April 2, 2003
To: bgaal@clrc.ca.gov
From: Tucker Cheadle <TCheadle@cghllp.com>
Subject: Estate Planning Statute of Limitations

Gentlemen:

Given the open ended statute of limitations there are a number of estate plans that I will not work on especially if the families have had second marriages or complex business affairs. It may be possible to plan for 5 to 7 years; but, given the changes in asset values and the family situations it is impossible to see farther. Additionally it is difficult, if not impossible, to recommend irrevocable trusts with assets that may fluctuate in value or need to be sold for diversification purposes.

Tucker Cheadle

COMMENTS OF JAMES M. COWLEY

From: James M. Cowley <jcowley@cclaw.com>
To: Barbara Gaal <bgaal@clrc.ca.gov>
Subject: Statute of Limitations for Legal Malpractice
Date: May 15, 2003

Dear Barbara,

I just read Robby Savitch's memo and was very impressed with the clarity with which he analyzed, articulated and documented the almost insoluble risk management problems estate planners face — all deriving from the unreasonable state of current California law. The current situation is one in which the law is attempting to defy an economic equivalent of the law of gravity — insurers will not insure a risk unlimited in amount or duration.

I can confirm that our own firm's experience is exactly what Mr. Savitch has described. And that the unreasonable risk his memo describes explains why so many of the major law firms have terminated their estate and trust groups. You may not realize this, but Gibson Dunn & Crutcher closed its estate planning practice in the past couple of months, sending letters to all estate planning clients telling them to find other counsel. In doing this, GDC has joined many other large firms. My old law firm, Latham & Watkins, once a major player in estate planning, has one token estate planning lawyer out of about 1600 lawyers and is not developing any new partners in that area. For major "full service" firms to feel compelled not to offer this most personal and important of services to their good clients is certainly a disservice to California consumers of legal services. Ideally, many business transactions should be coordinated with estate planning objectives of the principals. Sadly, this happens less and less.

I appreciate the work you and the members of the commission are doing to try to find a way to remedy the very unfortunate way in which the California case law has developed. I look forward to a successful conclusion of that work.

James M. Cowley
Cowley & Chidester, LLP
Box 2329
Rancho Santa Fe, CA 92067-2329
858-756-4410
858-756-4386 (fax)

DANIEL B. CRABTREE
CERTIFIED LEGAL SPECIALIST
PROBATE, ESTATE PLANNING
& TRUST LAW

DANIEL B. CRABTREE
ATTORNEY AT LAW
3143 FOURTH AVENUE
SAN DIEGO, CALIFORNIA 92103-5802

TELEPHONE (619) 293-3403
FAX (619) 293-3405

October 28, 2002

Law Revision Commission
4000 Middle Field Road Rm. D-1
Palo Alto, CA 94303-4739

Re: Memorandum 2002-13
Study J-111 Proposed CCP 340.8

Dear Law Revision Commission:

I would like to weigh in on the side of reasonableness concerning the Code of Civil Procedure 340.6 and the proposed Section 340.8. I doubt most Attorneys realize the harshness of CCP 340.6, especially in the field of Wills and Trusts, knowing in essence there is almost an unlimited statute of limitations until actual injury occurs. There needs to be some way to cut off this limitation period when an Attorney retires which can be through an affirmative letter sent to past clients from the retiring Attorney and in that event, a new section similar to that proposed under CCP 340.8 as delineated in your memorandum 2002-13 should be passed so that Attorney in the Will and Trust area do not need to buy tail insurance coverage for the remainder of their lives after retiring.

Very truly yours,

Daniel B Crabtree

Daniel B. Crabtree

DBC/tml

DANIEL B. CRABTREE
CERTIFIED LEGAL SPECIALIST
PROBATE, ESTATE PLANNING
& TRUST LAW

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ATTORNEY AT LAW
3143 FOURTH AVENUE
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TELEPHONE (619) 293-3403
FAX (619) 293-3405

January 16, 2003

Ms. Barbara S. Gaal
Staff Counsel
Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: File No. J-111

Dear Ms. Gaal:

Thank you for your January 13, 2003, letter. I think your hopes to get anecdotes relating to difficulty in obtaining insurance coverage for estate planning malpractice is misplaced. The issue is not whether insurance is obtainable, but how much that insurance will cost and how long that insurance must be maintained after an Attorney retires from the practice of law. I know over the past year my insurance rates went up 50% due in part to this statute of limitation issue for estate planning legal malpractice. More importantly however unless this statue of limitations for legal malpractice in the Estate Planning field is limited, those Attorneys who retire from the practice of law will continue to be forced to spend thousands of dollars on malpractice coverage because it is certainly possible 20 or more years after they retire that some issue might arise from work they had done 20 years prior. What is worse is a retired estate planning attorney who passes away and potentially has his estate or his heirs sued 20 years after his or her passing because of the statute of limitations for malpractice in the estate planning area has not lapsed. I hope this answers your questions.

Very truly yours,

Daniel B Crabtree

Daniel B. Crabtree

DBC/tml

COMMENTS OF W. EDWARD DEAN

Date: April 2, 2003
To: bgaal@clrc.ca.gov
From: W. Edward Dean <edean@deanyuen.com>
Subject: Statute of Limitations for Estate Planning Malpractice Claims

Dear Ms. Gaal —

I am writing to encourage the Commission to include a five-year statute of limitation or statute of repose for claims against estate planning attorneys.

An statute that allows claims to be filed when we are well into our retirement years, or against our estates in the year following our deaths, requires us to defend actions taken many years before that we are unlikely to recall and that our heirs will have no way to recall, yet the cost of coverage is rising so quickly that it is harder and harder for us to afford it. Even if we retire, we must continue to pay premiums to protect our retirement assets and our estates.

Our own malpractice coverage is a case in point. Our premiums have risen from less than $12,000 in 2001 to more than $20,000 in 2002 to more than $27,000 this year while our former carrier has withdrawn from doing business in California. To make matters worse, our carrier in 2002 is going out of business in California due to the post-911 shakeout in the insurance industry. We now have to pay another company to provide less coverage at a higher premium.

We cannot maintain a decently profitable practice when malpractice insurance rises this rapidly or enjoy a secure retirement with an unlimited statute of limitations. The malpractice insurance problem will become worse as more companies withdraw from doing business in California.

— Ed

W. Edward Dean
Dean & Yuen, LLP
100 Spear Street, Suite 1630
San Francisco, CA 94105
edean@deanyuen.com
(415) 352-1440

LAW OFFICE OF
JOHN A. DUNDAS II

CERTIFIED SPECIALIST, ESTATE PLANNING, TRUST AND PROBATE LAW, THE STATE BAR OF CALIFORNIA BOARD OF LEGAL SPECIALIZATION

215 NORTH MARENGO AVENUE, SUITE 324
PASADENA, CALIFORNIA 91101

TELEPHONE
626-795-1073
FACSIMILE
626-795-8654
E-MAIL
JADLAW@ATT.NET

March 12, 2003

Barbara S. Gaal, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Road, D-1
Palo Alto CA 94303

Re: LRC study of Statute of Limitations for Legal Malpractice

Dear Ms. Gaal:

Terry Nunan has forwarded a copy of your letter to him of January 13, 2003, in which you indicate a lack of support and information from practitioners. This is to help fill that void.

My practice is, and has been for many years, entirely in the area of estates, trusts and probate, including estate planning. I have never had a malpractice claim filed against me. For at least the last 5 years, my malpractice coverage has shifted each year from one company to another, because in each case the company ceased writing coverage in California during the policy period.

My policy is now up for renewal. My broker advises me that **only two companies** are willing to offer me coverage this year. The offered premium is **three times** the premium for last year (and last year's was double what it was 2 year's ago). A copy of the broker's advice letter is enclosed. If the situation does not improve next year, I will seriously consider having to terminate coverage.

I most wholeheartedly support a realistic Statute of Limitations on legal malpractice, because it is clear to me that without it, premiums will become prohibitive, at least for a sole practitioner, and possibly will become totally unavailable at any price.

Sincerely yours,

JOHN A. DUNDAS II

cc: Terence S. Nunan, Esq.
Randy Godshall, Esq.

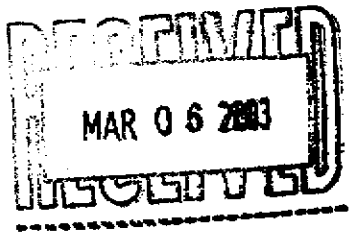
INSURANCE SERVICES

NARVER ASSOCIATES

March 6, 2003

VIA FAX 626-795-8654 AND U.S. MAIL

Law Office of John A Dundas
215 N. Marengo Avenue, Ste 324
Pasadena, CA 91101



Re: Lawyers Professional Liability Insurance Proposal
Effective Date: **03/20/2003**

Dear Mr. Dundas:

Narver Associates is pleased to enclose your proposal for Lawyers Professional Liability Insurance coverage. We have taken time and care to obtain the best possible options available to us.

You may already be aware that the insurance marketplace has become a "hard" market. A number of "A" rated admitted carriers have recently left the Lawyers Professional Liability arena. They have left for various reasons, including reduced availability of reinsurance and increased costs. The remaining carriers have implemented much more restrictive underwriting guidelines and significant premium increases.

Please know that we are here to answer any questions you may have regarding your proposal. To purchase coverage, please provide the following documents:

1) Signed quotation sheet;
2) A check made payable to Narver Associates;
3) Any signed and dated document(s) required on the quotation you choose.

Thank you for selecting Narver Associates as your broker on this important coverage.

Sincerely,

April Aguirre

April Aguirre
Account Manager

Enclosures

641 W. Las Tunas Drive, PO Box 1509
San Gabriel, California 91778-1509
626.943.7200 Fax 626.299.1010
Lic # 0555823 Email: info@narver.com

NARVER
ASSOCIATES

Law Office of John A Dundas
LAWYERS PROFESSIONAL LIABILITY INSURANCE
3/6/2003

In addition to the terms outlined, we have obtained the following:

Company: Lawyers Mutual Insurance – A.M. Best Rating: A; VII, admitted
Limits: [redacted]
Deductible:

The following companies cannot offer terms due to underwriting guidelines (i.e., firm size requirements, location of office, etc.)

- St. Paul Fire and Marine Insurance – A.M. Best Rating: A+; XIV, admitted
  (requires firm's practice to consist of at least 51% defense work)
- Carolina Casualty Insurance - A.M. Best Rating: A; VII, admitted
  (requires firm size of four (4) or more attorneys)
- Chubb Executive Risk Insurance - A.M. Best Rating: A+; XV, admitted
  (requires firm size of ten (10) or more attorneys)

The following insurers are not offering terms as they have left or will be leaving the LPL marketplace in California:

- American Equity Specialty Insurance - A.M. Best Rating: A+; IX, admitted
- Northland Insurance - A.M. Best Rating: A+; IX, admitted
- Insurance Company of the West - A.M. Best Rating: A; IX, admitted
- Philadelphia Insurance - A.M. Best Rating: A+; VIII, admitted

COMMENTS OF CHRISTOPHER J. ENGE

Date: April 2, 2003
To: bgaal@clrc.ca.gov
From: Chris Enge <chrisenge@attbi.com>
Subject: Estate Planning Statute of Limitations

To: Barbara Gall

Dear Ms. Gall:

I am writing to express my support for an earlier and better defined trigger date for the statute of limitations for estate planning malpractice.

The current regime makes many younger lawyers such as myself have second thoughts about providing estate planning services. My own malpractice insurance rates spiral upwards on a yearly basis. The clients, of course, have to pay for this insurance with higher rates reflecting higher costs.

In addition, if lawyers pull out of this field, there will be less competition, and higher fees. That hurts consumers.

I also handle construction defect litigation on occasion. In that context, there is a relatively short statute of limitations from the date of discovery. However, there is a ten year statute of limitations from the date of completion of a construction project. I suggest that a similar scheme would work in estate planning, where suit needs to be brought within 7-10 years of completion of the estate plan. That would allow attorneys, underwriters, and their families to sleep better at night.

A side benefit of a date of completion limitation would be that the clients would be motivated to have their plans updated, to restart the statute of limitations. Between changes in the law and changes in families, most people should have their estate plans updated within 10 years as a maximum. The updated plans would presumably avoid some of the malpractice traps that trigger suits in the first place.

Thanks for your time.

Sincerely, Chris Enge
Christopher J. Enge
Counselor at Law
1840 Gateway Drive, Suite 200
San Mateo, CA 94404
<http://www.sfolaw.com>www.sfolaw.com
650-378-1428

CURTIS & ARATA

A PROFESSIONAL CORPORATION

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NORIK G. NARAGHI
ANDREW S. PARK

**Also admitted in Tennessee
***Also admitted in Illinois

A.A.CARDOZO
(1909-1985)

Please Reply to:
Modesto Office

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1300 K STREET, SECOND FLOOR
POST OFFICE BOX 3030
MODESTO, CALIFORNIA 95353
TEL: (209) 521-1800 FAX: (209) 572-3501

SAN JOAQUIN COUNTY OFFICE
1429 STANISLAUS STREET, SUITE G
ESCALON, CALIFORNIA 95320
TEL: (209) 838-3676 FAX: (209) 572-3501

TUOLUMNE COUNTY OFFICE
11833 POWDERHOUSE ROAD
POST OFFICE BOX 608
GROVELAND, CALIFORNIA 95321
TEL: (209) 962-4084 FAX: (209) 572-3501

E-MAIL: rgaarde@curtis-arata.com
WEBSITE: www.curtis-arata.com

April 4, 2003

Barbara Gaal
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94353-4739

RE: Statute of Limitations for Legal Malpractice

Dear Members of the Commission:

I have been admitted to the practice of law in the State of California since December 1967. My current practice includes estate planning and probate/trust administration.

I wish to add my support to consideration by our Legislature of a Statute of Limitation or of Repose that would extend some protection to attorneys practicing estate planning.

To have "unlimited" exposure is unfair and unrealistic. Laws change, societal mores change, as well as judicial attitudes. As we know, law is a "living organism." It changes as the environment requires.

The argument that an attorney's error will not be discovered for possibly, many years, has to be tempered by these changes.

I understand there is support for a current proposal which deals with time limitations of five to ten years. Arguably, that may even be too limiting. A definite time line, i.e., fifteen years maximum would seem realistic.

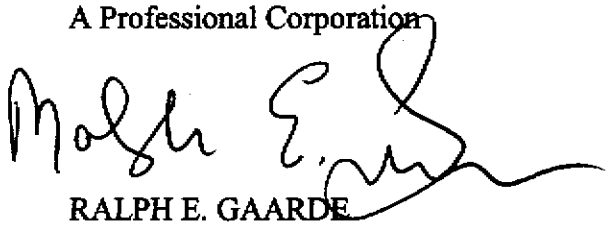
Caution should also be exercised in any statutory language dealing with "estate planning." The practice of law in this area often involves preparation of leases, deeds, stock certificates, and other business related activities that are not commonly thought of as "estate planning." Nonetheless, they are often essential to proper and complete preparation of an estate plan. Any legislative changes should not be solely limited to "preparation of a Will or a Trust" unless such definitions are broad enough to include these other essential activities.

I sincerely believe this is an area that is deserving of consideration and establishment of a reasonable time limit in favor of the attorney.

Thank you for considering my opinion.

Very truly yours,

CURTIS & ARATA
A Professional Corporation



RALPH E. GAARDE

REG:rhb
cc: Randy Godshall
Terence Nunan

COMMENTS OF TOM GARRETT

Date: April 15, 2003
To: bgaal@clrc.ca.gov
From: Tom Garrett <TGarrett@cghllp.com>
Subject: Statute of Limitation for Legal Malpractice

When I started in business 25 years ago at the age of 25 I thought that there was a maxim that you could insure for anything. For the first time in my career I am not sure that is true any more. We are seeing a trend across our country where surprisingly it can be difficult to insure a residence (it is now nearly impossible to find carriers for houses in certain locations like those on the ocean front) or to obtain other types of insurance. In just the past few months there has been a marked flee of carriers from the legal malpractice market. For the first time in 25 years our AV rated firm had great difficulty being able to obtain any coverage and the coverage we finally were able to obtain in the past week was not with the desired limits of liability. When we were unable to locate replacement coverage when our policy was lapsing, we had to negotiate for a short term extension and even had to solicit a bid from Lloyd's for our coverage.

Certainly, this trend does not bode well for the future or for what the market conditions will be like at my retirement from practice. The Executive Committee of the Trust & Estate Section of the State Bar's efforts to persuade the legislature to enact a statute of limitation or statute of repose that would apply to unaccrued claims of errors and omissions with respect to estate planning clearly are appropriate. I commend the California Law Revision Commission in considering a proposal to limit the period of time in which an estate planning attorney will be liable for an erroneously drafted will or trust.

In this increasingly uncertain time, there is no assurance that there will always be malpractice insurance coverage from a major insurance company.

Law Offices Of
DONALD J. GARY, JR., INC.
A PROFESSIONAL CORPORATION
1745 W. ORANGEWOOD AVENUE, SUITE 201
ORANGE, CALIFORNIA 92868
Donald J. Gary, Jr.
TELEPHONE: (714) 978-1422
FAX: (714) 712-7770
email: djg4amdg@aol.com

March 26, 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94353-4739

Attn: Barbara Gaal

RE: Proposed Amendment to Statute of Limitations for Estate Planning Attorneys

Dear Ms. Gaal:

I am writing in support of efforts to adopt a statute of limitations for estate planning practices in the State of California. Presently, there is no statute of limitation protecting estate planning attorneys. Therefore, we face exposure for malpractice claims for the duration of our lives, despite the fact that our work may have been performed years and even decades prior to a claim. Moreover, claims may be based on circumstances or information that has changed and for which we have no information considering that our communication with a client may have terminated years prior to a claim.

As an attorney who performs estate planning services, I have been personally affected by the unlimited claim exposure. I have been practicing estate planning since 1992. In addition, I have held a CPA license since 1980. During that entire time, I have worked with estate and trust issues. No claims have ever been made against me and I have not been the subject of a disciplinary investigation. In fact, I have never been notified that a claim might be forthcoming. Yet, for the policy year commencing 3/15/2003, my professional liability premiums tripled from the previous year. Several carriers refused to cover "prior acts" although the premium remained at approximately triple the rate paid last year. The reason provided for the severe increase in the premium was the increased incidence in claims against estate planning attorneys; particularly claims from work performed in prior years.

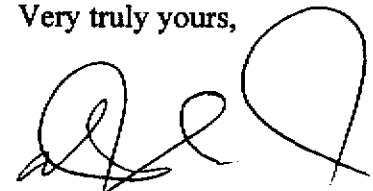
I would note two points that should be considered in connection with this issue. First, most other legal disciplines enjoy a reasonable statute of limitations for claims of malpractice. Second, estate planning clients are given their documents on completion of the work and have ample opportunity to review documents, forward them to concerned family members or others, and identify potential errors. Therefore, limiting the time for which claims may be made imposes no greater burden on clients than the limitations affecting other legal disciplines.

It is well to note that insurance carriers have not asked about the nature of our clients. Estate

planning attorneys serving clients of modest means are affected by increased premiums in a manner similar to those attorneys serving wealthy clients. An issue facing attorneys like myself who also work with less affluent clients (and pro-bono clients) is whether we can continue to offer services that are affordable considering the significant increase in costs associated with professional liability insurance premiums.

I trust that the Commission will consider the information presented and I pray that some change can be adopted to assist those of us in the estate planning arena so that we can continue to offer our services to our clients. Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Donald J. Gary, Jr.
California State Bar #162631

Copy to: Randolph B. Godshall, Esq.
Sheppard, Mullin, Richter & Hampton, LLP
650 Town Center Drive, 4th Floor
Costa Mesa, CA 92626

Terence Nunan, Esq.
Rutter, Hobbs & Davidoff
900 Avenue of the Stars, #2700
Los Angeles, CA 90067-4301

COMMENTS OF BRUCE GIVNER

To: bgaal@clrc.ca.gov <bgaal@clrc.ca.gov>
Cc: Marshal Oldman (E-mail) <Mao@oclslaw.com>, <rbriskin@rablegal.com>, <tnunan@rutterhobbs.com>
Subject: Statute of Limitations On Legal Malpractice
Date: March 20, 2003

Dear Barbara:

Unfortunately, I have a personal anecdote with too many familiar names in it.

My old law firm had [M] as a lawyer in it. I won't characterize his status. I met with his father-in-law regarding his estate plan. My then partner [A] prepared a living trust and an irrevocable insurance trust (I don't remember the exact details) in 1992 or 1993. I dissolved that firm at the end of October, 1993.

[A] continued to provide services to [M's] family. [M's] in-laws died over the next few years. The accounting firm committed malpractice in filing the 706 related to GSTT. Sometime in 2002 I was named as a co-defendant in a malpractice action filed by [M's] family — they hired [T]. My personal counsel (not hired by my malpractice carrier) characterized the lawsuit as "slapped together to avoid expiration of the statute of limitations." [A] said he has no idea why they named me as a defendant since I had nothing to do with it, other than my name was on the door of the old law firm, and the malpractice was committed by the CPA firm.

Before my carrier was fully involved I hired a young lawyer — name of [P] — as an expert to examine the documents. He opined that there was no malpractice at all by the lawyers.

So, my anecdote is that I was sued about 10 years after I met with a client. Happily my malpractice insurance covers it. But, unhappily, I can barely remember any of the details. The old law firm is gone. The records were destroyed in the 1994 Northridge earthquake (the old law firm's files were stored in the Iron Mountain facility in Northridge and the water sprinklers went off and damaged the cardboard storage boxes).

I hope to have a happy outcome from this. I have consistently refused to settle. I will refuse to settle. I hope to get a positive disposition so that I can sue the plaintiffs and their counsel for malicious prosecution. That will be my contribution to the public good, to encourage lawyers to do a better job of research before naming people as defendants.

☞ Staff Note. We have substituted initials (M, A, T, P) for the names in this comment.

IRWIN D. GOLDRING
ATTORNEY AT LAW
16311 VENTURA BLVD., SUITE 1200
ENCINO, CALIFORNIA 91436-2152

CERTIFIED SPECIALIST
ESTATE PLANNING
TRUST AND PROBATE LAW
TAXATION LAW

THE STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

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(818) 986-0304
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E-MAIL: idglaw@sbcglobal.net

March 20, 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
Attention: Barbara S. Gaal, Staff Counsel

Re: Statute of Limitations: Attorney Malpractice
Estate Planning

Gentlemen:

From conversations which I have had over the past many years with various insurance agents and representatives, I am advised that malpractice coverage for persons practicing in the estate planning area (particularly including trust preparation) are among those least favored by the insurers because of the extended time over which an occurrence of malpractice can occur.

By the very nature of what estate planners do, their potential exposure can be for several generations which is exacerbated by the fact that many of those affected are not yet born or are otherwise not known. Therefore premiums, if coverage is available, are very substantial compared to other areas of practice where the normal statute of limitations period would run.

While not advocating that the statute should terminate two years after a particular document is drafted and executed. I believe that some shorter period than "forever" should be instituted as a limitation, perhaps five to seven years.

Within any legislation there must be some definition of from when the statute begins to run. Perhaps this might be the execution of a set of estate planning documents. The problem is that typically the services of an estate planning attorney continue with a person or family over an extended period of years. The usual estate planning client is not like a litigation client where when a trial is over the attorney-client relationship terminates.

Thank you for your consideration.

Very truly yours,

IRWIN D. GOLDRING

IDG:ja

cc: Terence Nunan, Esq.

IDG\BLS\CALawRevComm.Ltr

LAW OFFICES
GOODSON AND WACHTEL
A PROFESSIONAL CORPORATION

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gw@gwtaxlaw.com

MARVIN GOODSON
email mg@gwtaxlaw.com

April 3, 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94353-4739
Attn: Barbara Gaal

Dear Ms. Gaal:

I would like to express my strong support of both current proposals to limit the time in which malpractice claims may be filed against estate planning attorneys. I think it's immaterial whether the goal is accomplished by means of a statute of repose or by sending a notice to the client that all claims must be filed within a certain time period.

Although this firm has not had a major problem obtaining malpractice insurance coverage because of the lack of limitation on claims, this is an important matter that I encourage the Law Revision Commission to pursue. It would certainly help me sleep at night!

Very truly yours,

Marvin Goodson

MG/jrs

cc: Randolph B. Godshall, Esq.
Terence Nunan, Esq.

15/ATMG/MIS/485

COMMENTS OF ROBERT E. GOODWIN

Date: March 25, 2003
To: bgaal@clrc.ca.gov
From: Reglegal@aol.com

March 25, 2003

California Law Revision Commission

Dear Commissioners:

I fully support the proposal of the Executive Committee of the Trust & Estate Section of the State Bar of California to have you consider a proposal to limit the time period in which an estate planning attorney could be held liable for an erroneously drafted will or trust. As a solo practitioner who devotes about twenty-five percent of his time to this field of legal work and is approaching the age of retirement, it concerns me greatly that I would have to be concerned about continuing expensive malpractice premiums and/or defending myself against claims as I grow older and may be less able to do so effectively.

It is my practice to advise estate planning clients, in writing, that they should have their documents reviewed by me or by some other attorney at least once every five years and sooner if their family or financial circumstances change. Thus, at least for clients who are so advised, there is a great likelihood that their wills and trusts will get appropriate professional review from time to time giving them some degree of assurance that errors that an earlier drafting attorney made will come to light and be corrected.

Very truly yours,

Robert E. Goodwin

REG:rms

cc: Susan Orloff

COMMENTS OF DWIGHT J. GRIFFITH

Date: March 25, 2003
To: bgaal@clrc.ca.gov
From: Dwight J. Griffith <d.griffith@rdgattorneys.com>
Subject: Statute of limitations for estate planning matters

Dear Commission Members,

I am a practicing attorney of nearly 28 years who has specialized his practice in the area of estate planning and estate settlement matters. My "firm" is comprised of myself and two other attorneys (who are trial lawyers) together with a probate assistant. While I have drafted hundreds of estate plans over the years and while I have taken charge from a now deceased prior partner several hundred more of his files, thus far I have been lucky enough to not yet have a malpractice claim made against me.

I say that it is luck, not because there is any lack of diligence on my part. Instead, given the proliferation of resources for client self help in terms of amending or distorting their plans (or over-riding plans by beneficiary designations for IRA's and the like), the never ending change in applicable law, and the nasty habit of clients ignoring recommendations to return for the review and updating of their plans, it would seem to me only a matter of time before such a claim is made.

I can only hope that I will continue to be in active practice with insurance coverage when that claim may be brought. In light of our small firm, however, it is very likely that there will be no firm presence with insurance coverage. Further, in light of the poor health of the insurance industry as a whole, I cannot look forward to being able to maintain tail insurance over the remainder of my life time.

I am unaware of any other profession where clients routinely ignore the admonitions of the professional, practice self help, and rely upon the "expertise" of other advisors and are still free, years later, to bring suit if they (or their beneficiaries) are disappointed with the outcome of the services they received.

Noting the importance of the services we provide, a system must be devised which more fairly balances the interests of the client and the attorney. As an aside, the shameful estate planning mills and do it yourself lectures conducted by non attorneys must be eliminated. If not, the downward pressure on fees brought about by this poor or nonexistent quality competition, will only lead to a lower common denominator of work product provided by practitioners such as myself seeking to somehow make a living with rising fixed costs and a very real limit on the amount that can be charged for the service no matter how much time and effort may be required to provide it.

But I digress. I would suggest that a reasonable time limit must be placed upon the bringing of claims of this type to allow some certainty and fairness for the drafting attorney (for instance 5 years). At the same time, to provide reasonable protection for the client, I would suggest that as a matter of law, every will and trust agreement that is prepared be required to display immediately above the signature line of the client a recitation/admonition in 10 pt. bold type that the testator/settlor should review the foregoing document with a qualified legal advisor periodically and at least once before the passage of 5 years after the date of adoption. By so doing, I would hope that the client would effectively be protected by more likely having the benefit of a review (by the drafting attorney or some other attorney who may detect and eliminate any prior error), and the further benefit of re-setting the 5 year statute of limitations. At the same time, if a client failed to follow that legislatively mandated advice, they would be taking their chances that their plan is not current with the law or with their present (or past) intent.

In short, a reasonable person knows that they need periodic physical exams to be assured that they will not suffer the dire effects of some treatable disease (which may have been over looked by a prior physician). Estate planning lawyers who are expected to keep up with changes in the thinking/behavior of their clients and the myriad of retro-activley applicable laws should be able to have the same basic benefit of shifting to the client the obligation to act in a responsible manner.

I hope you will kindly consider the above on behalf of one member of the estate planning bar.

Dwight J. Griffith
Bar No. 66030

COMMENTS OF MICHAEL HANKS

Date: March 26, 2003
To: bgaal@clrc.ca.gov
From: hankslaw <hankslaw@pacbell.net>
Subject: Support for Proposed Statute of Limitations for Estate Planners

Dear Sirs: This office supports the proposes statute of limitations changes with respect to the drafting of estate planning documents. While either proposal would be an improvement over the current, unconsidered and somewhat “patchwork” laws that currently apply, I support an bar of 5 years following the client’s receipt of the final advisory letter from the attorney. Under the current law, estate planning is the only field of practice without some form of effective control on the attorney’s liability, and it is important that attorneys be encouraged and permitted to practice in this field without undue and unfair “unlimited” exposure. Thank you for your consideration. Michael Hanks

COMMENTS OF KIM MARIE HEROLD (3/25/03)

Date: March 25, 2003
To: bgaal@clrc.ca.gov
From: KMH <KMH@bolenfransen.com>
Subject: Statute of limitations for estate planning malpractice

Dear Sirs:

I am writing in support of the proposal to limit the period of time in which an estate planning attorney would be liable for an erroneously drafted estate planning document. Other areas of legal practice have a statute of limitations on their liability. Estate planning particularly needs a statute of limitations because often it is not the client but the beneficiaries after a client's death that question an estate planning document. This could occur years after the document is prepared and frivolous actions do arise from beneficiaries that are not pleased with the distribution that they are to receive (or not receive) under the document in question.

I heartedly concur that we need a statute of limitations established for estate planning matters liability.

Very truly yours,

Kim Marie Herold
Bolen, Fransen & Russell LLP

BOLEN, FRANSEN & RUSSELL LLP
ATTORNEYS AT LAW
345 POLLASKY AVENUE
CLOVIS, CALIFORNIA 93612-1139
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HAL H. BOLEN II
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1322 EAST SHAW AVENUE
FRESNO, CALIFORNIA 93710-7906
TELEPHONE (559) 226-8177
FAX (559) 227-4971

Sender's E-Mail Address:
kmh@bolenfransen.com

March 27, 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94353-4739

Attention: Barbara Gaal

Re: Proposal for Statute of Limitation for Estate Planning Malpractice Liability

Dear Ms. Gaal:

I am writing in support of the efforts by Executive Committee of the Trust and Estate Section of the California State Bar to introduce legislation for a statute of limitations for unaccrued claims of errors and omissions with respect to estate planning.

I understand that there is a current proposal to limit the period of time in which an estate planning attorney would be liable for an erroneously drafted will or trust to 5 or 7 years after written notification by the attorney. I also understand that there is an alternative proposal to instead provide for a statute of repose limiting the time period in which an estate planning attorney would be liable for an erroneously drafted document to 7 to 10 years after completion of the matter.

I support either proposal but obviously the statute of repose would be easier to enforce because the statute could run from the date the document is signed. Attorney notification under the current proposal would not be difficult but practitioners would need to provide that notification every time an estate planning document is amended or updated.

Other areas of legal practice have a statute of limitations on their liability. Estate planning particularly needs a statute of limitations because most often it is not the client but the beneficiaries after a client's death that question an estate planning document. This could occur years after the document is prepared, when evidence may be difficult produce. Often, frivolous

actions arise against estate planning attorneys from beneficiaries that are not pleased with the distribution that they are to receive (or not receive) under the document in question even if such dispositive plan was correctly drafted.

I heartedly concur that we need limitations established for liability for estate planning matters.

Very truly yours,

Kim Marie Herold

KMH:kh

cc: Randolph B. Godshall
Terence Nunan

F:\014\Dc\CLRC.doc

ROBERT L. HEWITT

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ALL CALIFORNIA COUNTIES

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Law Revision Commission
RECEIVED
APR 21 2003
File: J-111

April 17, 2003

California Law Revision Commission
Attention: Barbara Gaal
4000 Middlefield Road, Room D-1
Palo Alto CA 94353 4739

RE: Statute of Repose/Limitation for Estate Planning Attorneys

Dear Ms. Gaal:

For myself and on behalf of California attorneys who engage in estate planning, I would appreciate the Commission to propose a revision to existing law in order to set a limit on unaccrued claims of errors and/or omissions with respect to estate planning matters. At the present time only estate planning attorneys are not included in the protections afforded by Code of Civil Procedure 340.6 and, in particular 340.6(b). See, also, Rules of Professional Conduct 3-400.

Thank you for your courtesy in this matter.

Very truly yours,

Robert L. Hewitt
Attorney at Law
Copy:
Randy Godshall (by e-mail rgodshall@sheppardmullin.com)
Terence Nunan (by e-mail tsn@rhdlaw.com)

COMMENTS OF RICHARD K. HOOKER

Date: April 3, 2003
To: bgaal@clrc.ca.gov
From: Rich Hooker <RKHesq@msn.com>
Subject: Statute of Limitations - Trusts & Estates matters

Dear Ms. Gaal,

I understand that the commission is considering a proposal to limit the period of time in which an estate planning attorney would be liable for an erroneously drafted will or trust. I wholeheartedly support such a change, preferable with a 5 year limit.

I retired as a Deputy District Attorney in the County of San Bernardino just over 2 years ago. My hopes were to have a small practice away from the criminal field. I chose estate planning because it interested me and seemed to be a more direct family 'helping area'. I spent a year attending estate planning training and seminars, and began setting up my office resources to open my practice. I have done so, and offer what I believe to be among the lowest fees for wills, trusts, and DPAs by a non 'mill' operation. I give my clients very personal service, and limit my practice to document preparation, for the time being, as I find this to be a very complex area of law and do not want to spread myself too thin, for the sake of my clients. This of course also limits my business income.

Why is any of this important? In speaking to many fellow attorneys in this field I commonly am told "it is not a matter of 'whether' you will have a will contest, it is 'when' you will have it". The high liability insurance rates underscore the high liability of this field. There seems to be no limit. In order to keep my cost low so I can keep my fees low, I am only able to work part time, so that I qualify for a part time policy. My clients so far are very happy with my fees and the amount of attention I have been able to give them. However, with the high cost of my liability insurance, and the open-ended threat of litigation, I worry that my retirement (which I live on, not my practice) will be threatened. I enjoy providing these services to people who could not afford them otherwise, but I don't know how much longer I can do so under these conditions. A reasonable time limitation on litigation would be a major relief, not only to me, but ultimately to the client. As a Deputy DA I enjoyed qualified immunity. I am certainly not advocating that, but reasonable protection (not unlike most other areas of legal practice) is certainly warranted.

Tha[nk] you for your consideration.

Sincerely,

Richard K. Hooker, Esq.
167012

RUSSAKOW, RYAN & JOHNSON
A Professional Law Corporation
225 South Lake Ave, Eighth Floor
Pasadena, CA 91101
Telephone: 626 683-8869 Facsimile: 626 683-8870
E-mail: RRJLaw@aol.com

October 10, 2002

Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Study J-111: Statute of Repose

Dear Ladies and Gentlemen:

I understand the above study would establish a four-year statute of limitations in estate planning matters, activated by written notice to a client or former client. I support this legislation as a long overdue and much needed solution to an unconscionable deficit in California law.

As an attorney who works with clients on their estate planning needs, I find it disturbing that reasonable good faith limits are imposed by law on virtually every aspect of law, except murder and estate planning. I carry insurance and believe that the purchase of "tail coverage" at retirement is a reasonable thing to do. What is unreasonable is to buy "tail coverage" which must cover unlimited liability.

It is unreasonable and unjust for California to have no statute of limitations on malpractice claims in connection with wills and trusts.

I strongly urge your active consideration and recommendation to the Legislature of a statute of limitations with reasonable limitations, which balances both the interests of the consumer and those of us who assist the consumer.

Sincerely,

RUSSAKOW, RYAN & JOHNSON

Christopher B. Johnson
Attorney at Law

CBJ:ct

COMMENTS OF THOMAS JOHNSON

Date: March 25, 2003
To: bgaal@clrc.ca.gov
From: Thomas Johnson <tom@tmjlaw.com>
Subject: Statute of Limitation for Legal Malpractice

Dear Ms. Gaal,

I am writing concerning the proposed statute of limitations for legal malpractice concerning the drafting of estate planning documents. I am strongly in favor of the proposal I have heard regarding a 5 to 7 year statute after notice. My legal practice focuses on estate planning and real estate, so this statute would have a direct effect on my practice. I am a fairly new attorney, having passed the bar nearly 3 years ago, so I am not immediately faced with an urgent problem with malpractice coverage. But, some of my colleagues are presently in such a situation. One is an attorney who has practiced for 40 years in California. He has wanted to retire, but cannot without keeping malpractice coverage. And, to keep malpractice coverage, he is required to work a certain number of hours each week. For now, this is workable, but what would happen if he were to begin to exhibit the symptoms of dementia or Alzheimer's? If he stopped practicing, it would jeopardize his coverage, and thus his estate. But, to continue practicing would jeopardize the public. This is one situation I am personally familiar with, but I am sure there are many others like it.

Prior to working in estate planning, the majority of my experience was in civil litigation. To me, it seems incongruous that estate planning would have a basically unlimited statute of limitations while litigators enjoy a one year statute. I do not believe the one year statute is too short. But I believe that litigation involves far more opportunities for malpractice than estate planning, yet it is covered by a definite statute. I can only explain this by the fact that the trial lawyers and consumer attorneys have a strong lobby in the legislature.

I would like to thank you for your efforts regarding this legislation and strongly encourage you to continue to promote it.

Sincerely,

Thomas Johnson, Esq.
Law Office of Thomas Johnson
1440 N Harbor Blvd, Ste 800
Fullerton, CA 92835
714-449-8406
714-459-7127 fax
<mailto:tom@tmjlaw.com>tom@tmjlaw.com

COMMENTS OF DENNIS P. KELLY

Date: March 25, 2003
To: bgaal@clrc.ca.gov
From: Dennis & Elizabeth Kelly <DennisKelly@VLC.SDCoxMail.com>
Subject: Statute of Limitations for Estate Planning Attorneys

Ladies and Gentlemen:

I wish to urge you to do something to give relief to us Estate Planning attorneys, who live with a statute of limitations which expires one year after our death. Among other consequences, is the fact that this drives the cost of professional liability insurance up.

Thank you for your attention to this request.

Sincerely,

Dennis Pearce Kelly, Attorney at Law
Village Law Center
1132 San Marino Drive 201
Lake San Marcos, CA 92069
(760)727-6566
Fax: (760)727-2214

COMMENTS OF MARYCLARE LAWRENCE

Date: March 26, 2003
To: bgaal@clrc.ca.gov
From: MaryClare Lawrence <mlawrence@clrg.com>
Subject: Statute of limitations for estate planning

Dear Commissioners: Estate planning is the only attorney activity with potential liability for mistakes extending years or even decades. My understanding is that this is not even a well-thought-out decision by the legislature, but rather a patchwork picture of case law, some of which did not even pertain to estate planning.

Some may argue that people can't know about a mistake until someone dies. This is not correct. Most estate planning error claims concern obvious problems (wrong heir, etc.), which should be discovered within a reasonable time.

As to the rest of the problems, I perceive a new cottage industry for lawyers of offering free reviews of other attorneys' work to detect errors in time to correct them. I suppose this might actually result in MORE claims against lawyers, but frankly, I can't see anyone but lawyers losing any sleep over that.

The important thing is that errors would be caught and corrected BEFORE someone dies and it's too late.

Please impose a reasonable statute of limitations on estate planning errors.

Sincerely,

MaryClare Lawrence
SBN 104616
707.523.0480

COMMENTS OF SANDRA LOCKE

Date: April 2, 2003
To: bgaal@clrc.ca.gov
From: Sandra Locke <slocke@MyEstatePlanHQ.com>
Subject: proposed change in the SOL

Hello,

I appreciate the efforts to place a time-frame on the statute of limitations concerning malpractice cases against estate planning attorneys. As a relatively new practitioner is this area, I was amazed to find out that the laws differ so widely from state to state. For instance, I learned that beneficiaries have no cause of action at all against an estate planning attorney, though the client does have such a cause of action.

Here in California, I am almost afraid to do anything because of the malpractice issue hanging over my head. While the change in the law would give me some comfort, it would not change my practice at all in how carefully I prepare documents for my clients. It would just give me a little less to worry about at night knowing that something I did 30 years ago wasn't still hanging over my head or could cause my family harm even after I'm dead.

I am in full support of a statute of limitations on this and would be happy to contribute whatever information I can to see that something reasonable becomes law. I pay astronomical prices for malpractice insurance, largely due to the lack of a SOL.

Thank you,

Sandra Locke, Esq.
619-795-9840

COMMENTS OF ROBERT A. MALLEK, JR.

Date: March 25, 2003
To: bgaal@clrc.ca.gov
From: Bob Mallek <RAM@dgmalaw.com>
Subject: Statute of Limitations on Estate Planning

Attn: Ms Barbara Gasl:

I would like to lend my support and encouragement to the Commission's consideration of this issue. As a partner in a small law firm in Fresno, CA, it has each year becoming increasingly difficult and expensive to maintain malpractice insurance. This not the result of poor practice standards, but rather the rapid departure of many insurance carriers from the California market.

In order to continue to practice in the area of estate planning in this state, it is essential that we have some protection from stale claims that may be the result of unmotivated claimants. I have been in practice for 25 years and have never had a claim made against me. Someday, I would like to retire without the worry that during that retirement someone may raise a claim about something I said or did or didn't do in this area 35 years earlier. A 5-7 year period seems much more reasonable in light of the present difficulty in obtaining consistent and reasonable insurance coverage. We should not be treated materially different from other law practitioners who enjoy essentially one year statues of limitation. This is particularly difficult where, as in our case, a senior partner dies. The cost in time and money to review each and everyone of his estate planning files accumulated over 42 years of practice is prohibitive.

I hope you will be able with the Commission to make real progress on this issue and bring much needed assistance to the estate planning bar.

Respectfully submitted,

Robert A. Mallek, Jr. (Bar #82411)

COMMENTS OF PAULA MATOS

Date: April 28, 2003
To: bgaal@clrc.ca.gov
From: Paula C. Matos <paulamatos@mail.fea.net>
Subject: Statute of Limitations on Estate Planning

Dear Commissioners:

As an estate planning attorney, I want to resoundingly endorse the proposal for the revised Statute of Limitations for estate planning attorneys. The specter of that Sword of Damocles still hanging over my gray and trembling head twenty years from now is not pleasant.

Back in the early eighties I paid more than $4,000 for tail coverage for my first three years of law practice with a law firm that no longer exists and had no tail coverage. Now that carrier is out of business and cannot be located. Thus, after paying a huge amount for a such a short period of coverage, I am "bare" for those years. That would be irrelevant to anyone other than an estate planning attorney, but twenty years later I still have to worry about the hundred or so estate plans I worked on as a fledgling associate! And, unless you do something about it, I will have to worry about it twenty years hence!

Paula Matos

COMMENTS OF JAMES D. MELLOS III

Date: April 2, 2003
To: bgaal@clrc.ca.gov
From: James D Mellos III Esq <jim3@lawyer.com>
Subject: Statute of Limitation for Legal Malpractice

I am one of those whose malpractice insurance was not renewed this past year, and I am still without malpractice insurance. I have spoken with numerous insurance brokers, as well as agents for some of the insurance companies, and I have been informed that one of the reasons for their pulling out of the market, is the "unlimited statute of limitations for estate planners." Therefore, I am in FULL support of any reduction in the statute of limitations, and would be in full support of the alternative proposal of a "statute of repose."

Please feel free to contact me if you would like to discuss this further.

Thank you, Jim

J. Demetrios Mellos, III, Esq.
Law Offices of J. Demetrios Mellos, III
A Professional Corporation
1901 First Ave, Suite 275
San Diego, CA 92101-2311
Tel: (619) 696-3600
Fax: (619) 696-7900
Pager: (619) 977-1900

COMMENTS OF A. MARI MILLER

Date: March 25, 2003
To: bgaal@clrc.ca.gov
From: Mari Miller <mari.miller@certifiedplannersinc.com>
Subject: Estate Planning statue of limitations

Hello Ms. Barbara Gall:

I support a statute of limitations on liability for attorney who drafts estate planning documents. Many clients fail to follow the advice of attorneys to review their estate plan periodically with the attorney (ex every 2-5 years). In the interest of minimizing litigation and controlling malpractice insurance costs, there should be some kind of limitation on how long an attorney can be held liable, especially when clients fail to follow the advice the attorney gives regarding reviews.

Thank you for considering this matter.

Regards,

A. Mari Miller, Esq.
Law Offices of A. Mari Miller
~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~
2680 Bishop Drive Suite 206
San Ramon, CA 94583
925.866.1246 office
925.830.0847 fax
~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~
mmlaw@certifiedplannersinc.com

COMMENTS OF STEVEN NELSON

Date: April 2, 2003
To: bgaal@clrc.ca.gov
From: Steven Nelson <gone2tahoe@earthlink.net>
Subject: Estate planning Statute of Limitations

Gentlemen. That the estate planning attorney must be exposed to malpractice claims until death, and the attorney's assets exposed until a year afterward is a unique and unfair situation in the law. It makes sense to have a statute of limitation/repose for estate planning services. I cannot charge the client enough for this risk nor build in many years of malpractice premiums. An attempt to do so would result in estate planning fees that no client would pay. Please consider and endorse one of the proposals from the Trusts and Estates Section of the State Bar that is before you. Steven V. Nelson. State Bar No. 57888.

J NISWONGER
ATTORNEY AT LAW
3233 Arlington Ave., Ste. 105
Riverside, CA 92506

909/ 367-9440 Fax: 909/ 786-9813

October 07, 2002

Law Revision Commission
RECEIVED

Law Revision Commision
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

OCT 1 0 2002

File: J-111

Re: Study J – 111: Statute of Repose

Dear Ladies and Gentlemen:

I understand the above study would establish a four-year statute of limitations in estate planning matters, activated by written notice to a client or former client. I support this legislation as a long overdue and much needed solution to an unconcionable deficit in California law.

As an attorney who works with clients on their estate planning needs, I find it disturbing that reasonable good faith limits are imposed by law on virtually every aspect of law, except murder and estate planning. I carry insurance and believe that the purchase of "tail coverage" at retirement is a reasonable thing to do. What is unreasonable is to buy "tail coverage" which must cover unlimited liability.

It is unreasonable and unjust for California to have no statute of limitations on malpractice claims in connection with wills and trusts.

I strongly urge your active consideration and recommendation to the Legislature of a statute of limitations with reasonable limitations which reasonably balance the interests of the consumer and those of us who assist the consumer.

Respectfully,

J Niswonger, Esq.

JN:as

COMMENTS OF THOMAS J. O'KEEFE

Date: March 25, 2003
To: bgaal@clrc.ca.gov
From: TOKNKOK@aol.com
Subject: att'n Barbara Gaal

I understand that you are considering a law revision which would clarify the statute of limitations with respect to attorneys' errors and omissions in connection with estate planning. I would urge you to favorably recommend such an action. Clients are advised to at least have their estate plan documents reviewed at least every three to five years. Certainly the statute of limitations should be no longer than that. Substantially all other occupational errors are subject to definate statutes of limitations, even bulders errors that are latent and burried in the ground. The present situation will make it even harder to obtain insurance and will serve to discourage qualified people from entering the field ultimately harmin the consumer. Thomas J. O'Keefe SBN 32977

COMMENTS OF MARSHAL OLDMAN

From: Marshal Oldman <mao@oclslaw.com>
To: <bgaal@clrc.ca.gov>
Subject: Malpractice Insurance Estate Planning Problems
Date: March 20, 2003

Barbara

My malpractice insurance renewed last year with an increase from $22,000 to $55,000 for the my firm. The number of lawyers insured remained unchanged but my broker informed me that only nine carriers were in the California market and that two of them were refusing to insure law firms that did estate planning. My broker also informed me that the remaining carriers were quoting hirer premiums for estate planning because of the lack of an effective statute of limitations.

Marshal A. Oldman

ORREN & ORREN
ATTORNEYS AT LAW

October 28, 2002

Barbara Sandra Gaal
California Law Revision Commission
4000 Middlefield Road #D2
Palo Alto, CA 94303-4739

RE: Amendment for Section 340.6 of the Code of Civil Procedure

Dear Ms. Gaal:

I am writing to support the Proposal of the State Bar Estate Planning, Trust, and Probate Law Section of May 13, 2002 ("Proposal") to amend Section 340.6 of the Code of Civil Procedure.

Under existing Section 340.6, attorneys may be subject to malpractice for many decades after they cease representation of clients, possibly decades after retiring from the practice of law. This is particularly troublesome in the area of estate planning where I practice. The Notice of Termination provision in the Proposal which starts a four year statute of limitation is a fair way to cut off the now virtually open-ended malpractice exposure for attorneys. The current law needlessly drives up the cost of malpractice insurance, a cost that is ultimately borne by clients, and discourages attorneys from offering certain services.

I strongly urge consideration of the Proposal.

Sincerely,

Lowell H. Orren

1100 EAST GREEN STREET • PASADENA, CALIFORNIA • 91106-2513
PHONE: (626) 793-7989 • FAX: (626) 793- [illegible] L:LOWELL.ORREN@ORRENLAW.COM

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Jeffery R. Gilles
Derinda L. Messenger
Timothy J. Minor
James W. Sullivan
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Todd D. Bessire
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(fax) 831-754-2011
email-lomgil.com

April 21, 2003

Ms. Barbara Gaal
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, Ca 94353-4739

Dear Ms. Gaal:

I am writing to express my support for a statute of limitation on legal malpractice for estate planning attorneys. As you know, estate planners (and their families) are essentially liable for alleged errors in their work product until a year following death. As a result, malpractice insurance for estate planners is approaching the prohibitive range, which in turn will deny effective representation and encourage clients to turn to trust mills and non-lawyer scam artists. I understand there are 2 current proposals to address this situation. One would require an estate planning lawyer such as myself to send a notice to the client that the estate planning work has been completed and that any claim must be asserted by the client or the beneficiaries within 5 to 7 years. I think most clients would find it extremely unsettling to receive from their attorney, as soon as he or she has finished the estate plan, this type of notice. The notice proposal in my view would do damage to the attorney-client relationship. An alternative proposal would provide for a "statute of repose" of 7 to 10 years following completion of the estate planning project. The statute of repose would, I feel, provide a level of actuarial comfort to the E&O insurance community that would result in a significant impact on insurance rates and a corresponding benefit to clients who will continue to find estate planning attorneys able to serve their needs for reasonable rates.

Very truly yours,

Lombardo & Gilles, PLC

Steven D. Penrose

SDP:vff

COMMENTS OF JOHN H. PERROTT

Date: March 26, 2003
To: bgaal@clrc.ca.gov
From: John Perrott <jhperrott@yahoo.com>
Subject: Attorney Malpractice Stautue of Limitations

Dear Sir or Ms:

You probably expect that I, as an attorney, will argue that estate planning attorneys should have a shorter statute of limitations when they draft a will or trust. I will not.

I just want you to be reminded that any revision MUST not cut off a cause of action for fraud or other intentional tort when a will or trust is drafted. If you revise a statute, please include explicit language keeping the drafting attorney liable for fraud or other intentional tort.

Remember, the beneficiaries of a trust may not even know they are beneficiaries (or even exist) when it is drafted, and hence, any statute limiting the drafter's liability also necessarily runs into Federal Constitutional problems: everyone is supposed to get notice and an opportunity to be heard, at a mininmum, under the Due Process Clause of our 14th Amendment.

A far better solution: use what already exists and is designed to solve this problem. The probate system allows a judge to review a will and then issue probate orders of distribution, which are final and, except in instances of extrinsic fraud, cut off the drafter's liability.

The real problem is that probate fees are simply too high. Some form of accelerated probate, just for trusts, which would give beneficiaries the possibility of their day in court, and which would not entail the huge costs and delays of the ordinary (byzantine) probate system, is needed.

Even better would be to overhaul the entire probate system to bring those costs and delays down to a reasonable level.

Complaints that attorneys are not entering estate planning, or that malpractice insurance is too high, will simply lead to the cost of a trust rising. The customer will, ultimately, pay for all the costs associated with this product, just like any other. Lowering the standards to allow more people to afford estate planning is a bad idea, because it will really only protect the bad attorneys. The good attorneys will, in time, raise their rates to cover the costs.

Please do not attempt to solve this problem with a band-aid. Keep attorneys liable, and thereby protect the reputation of the profession.

Sincerely,

John H. Perrott, Esq.
CSB 213080

RICHARD W.S. PERSHING

Attorney at Law
Pershing Law Corporation
3233 Arlington Avenue, Suite 105, Riverside, California 92506
909/781-5931 Fax: 909/786-9813

October 01, 2002

Law Revision Commision
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Study J – 111: Statute of Repose

Dear Ladies and Gentlemen:

I understand the above study would establish a four-year statute of limitations in estate planning matters, activated by written notice to a client or former client. I support this legislation as a long overdue and much needed solution to an unconcionable deficit in California law.

As an attorney who works with clients on their estate planning needs, I find it disturbing that reasonable good faith limits are imposed by law on virtually every aspect of law, except murder and estate planning. I carry insurance and believe that the purchase of "tail coverage" at retirement is a reasonable thing to do. What is unreasonable is to buy "tail coverage" which must cover unlimited liability.

It is unreasonable and unjust for California to have no statute of limitations on malpractice claims in connection with wills and trusts.

I strongly urge your active consideration and recommendation to the Legislature of a statute of limitations with reasonable limitations which reasonably balance the interests of the consumer and those of us who assist the consumer.

Very truly yours,

PERSHING LAW CORPORATION

By: _____
Richard Pershing

COMMENTS OF RODNEY PINKS

Date: March 26, 2003
To: bgaal@clrc.ca.gov
From: Pinks, Rodney <RPinks@AHJTW.com>
Subject: statute of limitation for legal malpractice

As an estate planning lawyer, I fully support the proposal to enact a statute of limitation or statute of repose for errors and omissions regarding estate planning matters. The present unlimited statute of limitations is too great a risk of exposure, particularly in view of substantial changes in the tax and substantive law and family circumstances that may occur after completion of the estate planning matter and may affect estate planning documents.

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CAROL VERES REED
PROBATE & ESTATE PLANNING
SPECIALIST CERTIFIED BY
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April 18, 2003

Law Revision Commission

APR 2 2 2003

File: J-111

California Law Revision Commission
4000 Middlefield Rd., Rm. D-1
Palo Alto, CA 94353-4739

Attn: Barbara Gaal

Dear Ms. Gaal:

As a California Bar Association certified specialist in the area of Probate and Estate Planning I am in favor of legislation to enact a statute of limitations on unaccrued claims of errors and omissions in estate planning.

Estate planning law firms tend to have long histories. My spouse, James E. Reed and I own Nichols, Catterton, Downing & Reed an estate planning firm dating back to the early 1900's. We keep people's Wills and estate documents that our predecessors wrote for decades. This provides a service for families.

Estate Planning should be available at moderate rates to everyone. A limit on claims, after proper notice for a reasonable length of time would allow estate planners to afford malpractice insurance and provide estate planning services at reasonable prices. The five to seven year proposal for a statute of limitations would be longer than most limitations but would afford estate planning attorneys some finality of liability.

In particular, retired attorney's would not have to purchase never ending insurance for work performed many years before.

The client for whom the work is performed is usually deceased and any malpractice claims are asserted by the heirs. The longer the client is deceased the less likely the attorney can prove that the plan was drafted in accordance with the client's wishes. This creates an inherent unfairness for the defendant attorney.

Thank you for your consideration.

Very truly yours,

Carol Veres Reed

Carol Veres Reed
CVR/jp
cc: Randy Godshall

RICHMOND & RICHMOND
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GORDON X. RICHMOND (1904-1979)
SCOTT D. RICHMOND*
MEGAN A. RICHMOND◇
MARC L. WILSON

◇OF COUNSEL
*CERTIFIED SPECIALIST:
Probate, Estate Planning, and Trust Law
State Bar of California
Board of Legal Specialization

April 10, 2003

FROM: **ORANGE** OFFICE

Law Revision Commission
RECEIVED
APR 14 2003
File: J-111

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94353-4739

Re: STATUTE OF LIMITATION FOR LEGAL MALPRACTICE

Gentlemen:

We need a statute of limitations for estate planning attorneys' errors or omissions. Open ended liability makes the costs of E&O insurance almost prohibitive. A capable attorney told me how he notifies his clients up front that because of the cost he does not carry any errors and omissions insurance. He notifies them so they have an option to look for an attorney who does carry such insurance. This is not the protection we all want for the consumers in California. Please consider a reasonable statute of limitations to limit liability for us in the estate planning field just like liability is limited for professionals in other fields. Thank you for considering this request.

Yours truly,

SCOTT D. RICHMOND

SDR:jmc
cc: Randolph B. Godshall
Sheppard, Mullin, Richter & Hampton, LLP
650 Town Center Drive, 4th Floor
Costa Mesa, California 92626

MEMORANDUM

May 14, 2003

Sent Via E-Mail Only

To: Barbara S. Gaal, Staff Counsel / *California Law Revision Commission*

From: Robby Savitch

Re: Statute of Limitations for Legal Malpractice

Dear Barbara:

The Revised Tentative Agenda for your June 5th meeting includes a discussion concerning the Statute of Limitations for Legal Malpractice, specifically focusing on the apparent open-ended statute of limitations pertaining to Estate Planning. I am writing as a follow-up to our recent conversation on that topic and at the urging of my client, James M. Cowley of Cowley & Chidester, LLP. I understand that the Commission has begun examining this situation and has been gathering information and comments from certain sources within the legal community. My objective is to provide the Commission input on this subject from my perspective as an established broker of legal malpractice insurance.

By way of introduction, I am Vice President of Driver Alliant Insurance Services, Inc. Our firm, founded in 1925 and headquartered in San Diego, is the largest privately held insurance brokerage operation in California. We have nine offices statewide, will transact more than $1 billion in premium this year and generate revenues in excess of $125 million. We are a significant provider of malpractice insurance to California attorneys, many of whom practice in the Estate Planning arena. I oversee our firm's professional liability division and have been in the business for over twenty-three years.

Some Insurance Background Information

The current malpractice insurance industry in California (along with the overall insurance marketplace) is undergoing massive changes. Some understanding of these changes, and certain aspects of malpractice coverage, is important because of their collective impact on the issues facing the Commission.

There are roughly twenty-five carriers writing malpractice coverage today in California. (A representative list of these carriers is attached). There is zero uniformity among them. Each has its own set of underwriting guidelines, policy terms, pricing structure, and appetite for risk. However, one thing they all share are participation in an industry that is in the midst of tremendous turmoil. The September 11th terrorist attacks, while causing unprecedented insurable losses, further exacerbated the financial problems of an insurance industry already reeling (and continuing to reel) from a decade of unprofitable underwriting, a weakened economy, a volatile stock market, depressed interest rates, a lack of tort reform, numerous corporate scandals, and reduced returns on fixed income and equity investments. The resulting "hard" market has altered the way carriers utilize their capacity (capital) to insure risk. They are not only far more selective about the law firms they wish to insure, but are raising premiums, providing less coverage, lowering limits, increasing deductibles, and imposing policy restrictions. Carriers, in many respects, are becoming risk averse. This environment will likely be with us for some time.

You may also know that legal malpractice policies today, unlike other forms of liability insurance, are written on a "claims-made" basis rather than an "occurrence" basis. Under an "occurrence" policy, the *date* of the negligent act determines which policy responds to the claim. Under a "claims made" policy the date the error is *discovered and reported* determines which carrier responds. This distinction is critical. For example, under an "occurrence" policy, if negligence occurred in 1998, but was discovered today, the matter would be reported to the carrier who wrote the policy during 1998. Under a "claims-made" policy that same 1998 error would be reported under the policy in force at the time of discovery, provided that policy affords prior acts coverage encompassing the year of the negligence. Thus, as long as law firms maintain continuous "claims-made" policies with appropriate prior acts coverage, claims for past acts would be covered under the current policy in force. By contrast, an "occurrence" policy is "alive" forever. Since the early 1980's, legal malpractice polices have been written on a "claims-made" form.

In the face of marketplace instability, diminished availability, soaring costs, and the inherent limitations of a claims-made policy format, many law firms are flat out struggling to keep coverage in place. A central concern to many long-practicing attorneys who are either looking forward to retirement, contemplating merger or law firm dissolution, is the fear that these dangerous market conditions will eventually cause them to lose their prior acts coverage because of their firm's

inability to maintain coverage. It is this last concern that is most relevant to the issue facing your Commission.

Legal Malpractice Insurance and The Statue of Limitations Problem

It is my understanding that under existing law a four year statute of limitations applies for legal malpractice claims brought against estate planning attorneys, unless the claim falls into one of four categories of exception, any one of which could potentially toll the statue indefinitely. The apparent concern here is the open-ended nature of such a tolling and the potential of lawyers having to face litigation many years after the original work was performed for the client.

As already mentioned, a key component of a malpractice policy is its ability to respond to claims arising from past acts. If prior acts coverage is appropriately maintained, the carrier should respond. Unfortunately, in this present climate, maintaining that prier acts coverage is increasingly difficult and costly. Many of the carriers listed on the attached list will not offer coverage to firms practicing in the estate planning arena. If coverage is offered the price is often significantly higher than if the firm practices in other areas. Insurers primarily willing to offer coverage are Lloyd's of London, Carolina Casualty, Admiral Insurance Company, Hartford, Lawyers Mutual, CNA, and Arch. All will charge extra for the risk. While certain others on the list may offer terms, they will do so only if the firm's estate planning practice amount s to a small portion of the overall practice. In addition, some of the carriers willingly offer terms on an excess basis. That is, they will only provide limits over and above another carrier's primary layer of liability.

Equally troubling is the shift among many of these insures to limit the terms and conditions under which they will make extended reporting period (ERP) coverage available. Commonly known as "tail coverage", an insured typically has the right to purchase ERP in the event the carrier or the insured cancels or non-renews a malpractice policy. Until around two years ago, most carriers made "tail" available for periods ranging from 12 months to unlimited. The cost of the "tail" was a multiple of the expiring premium. Presently, only a handful of carriers in California will offer an unlimited ERP option. The average cost of this unlimited ERP can be as high as 300% of the expiring premium.

Among the carriers with an appetite for insuring estate planning law firms, only two currently offer the unlimited ERP. They are CNA and Arch, the latter carrier being endorsed by the California State Bar Association. The longest term available from the others is five years and, in several instances, only one year is offered. The point is that the handful of carriers willing to insure such law firms also fail to offer the indefinite protections that may be required because of the open-ended (unlimited?) nature of the current stature of limitations. The

resulting disaster is that an attorney would not have the backing of an insurance carrier to pay for claims that arise years down the line.
It should be stated that carriers are keenly interested in limiting their long-tail exposures arising under claims made policies. In this marketplace they are seeking, whenever possible, to run off these exposures and close their books on an account. In effect, the carriers are refusing to write unlimited tail coverage because such coverage actually converts a claims-made policy into an "occurrence policy", thereby potentially keeping the carrier in play for as long as a particular claim may require. Their books would remain open indefinitely.

I have raised this concern with other law firms we represent and have asked them to write your Commission. Within the next few months you should begin receiving those comments.

If the statute of limitations is not modified, and if insurance conditions continue to deteriorate, there will eventually be no way for retired attorneys to fund a defense or pay damages years after they retire, other than out of their own pocket. Law firms facing merger, dissolution, or the complete loss of their insurance placement, will have to confront this situation as well.

In conclusion, it seems as if the insurance carriers are already on the road to adopting their own kind of statue of repose by limiting the availability and duration of "tail" while increasing its cost. I would urge the Commission to recognize this problem as it studies the recommended changes to the current law. Thank you very much for the chance to provide my input.

Kindest regards,
DRIVER ALLIANT INSURANCE SERVICES, INC.

Robby Savitch
Vice President

Attachment

REPRESENTATIVE CALIFORNIA CARRIER LISTINGS

Admiral Insurance Company

American International Group Companies (AIG)

Arch Insurance Group

Attorney's Insurance Mutual Risk Retention Group, Inc.

Attorney's Liability Assurance Society, Inc. (ALAS) A Risk Retention Group

Carolina Casualty

Chubb – Executive Risk

CNA

General Star Indemnity Company/General Star National Insurance Company

Great American Insurance Company

Hartford Specialty

Interstate Insurance Group

Lawyers Mutual Insurance Company of California – Standard Program

Lloyd's of London – Attorney Select

Plus Companies, Kemper Law/Pro Plus

Professional Insurance Liability Organization, Inc. (Lloyd's of London)

POMARC

St. Paul Fire & Marine – Defense Research Institute

St. Paul Fire & Marine Insurance Company

TIG Insurance Company

United National Insurance Company (Black/White Concord Insurance Brokers

Westport Insurance Corporation

SEED MACKALL LLP
COUNSELLORS AT LAW

1332 ANACAPA STREET, SUITE 200
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POST OFFICE BOX 2578
SANTA BARBARA, CALIFORNIA 93120

TELEPHONE: (805) 963-0669
FACSIMILE: (805) 962-1404

HARRIS W. SEED, RETIRED

NICHOLAS J. SCHNEIDER

April 18, 2003

Attn: Ms. Barbara Gaal
California Law Review Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94353-4739

Re: *Estate Planning Law Statute of Limitations*

Dear Ms. Gaal:

I am writing regarding the current proposal in front of the California Law Review Commission to shorten the statute of limitations for estate planning attorneys. I am an estate planning attorney in Santa Barbara, California. I strongly support such revision. As a matter of fairness, it seems appropriate that there should be a reasonable and certain limitation in this area.

Sincerely,

SEED MACKALL LLP

By
Nicholas J. Schneider

NJS:jm
cc: Randy Godshall, Esq.
Terence Nunan, Esq.

Law Offices
DAVID S. SCHWARTZ
23901 CALABASAS ROAD, SUITE 2090
CALABASAS, CALIFORNIA 91302
(818) 906-2604
FAX: (818) 222-2601

March 31, 2003

California Law Revision Commission
4000 Middlefield Road
Room D-1
Palo Alto, California 94353

Attention: Barbara Goal

Re: Proposed Statute of Limitation for legal malpractice
With respect to Estate Planning

Dear Ms. Goal:

I am in receipt of the proposal to impose limits on the unlimited Statute of Limitation in Estate practice. I have practiced in this field for over forty (40) years after being a Trust Officer for the former Security First National Bank for six (6) years. It is my opinion that the proposed amendments would solve little. After creating and reviewing the Trust with the client(s) they merely put the documents away for safekeeping until a definitive event occurs. This is usually the norm unless the client calls and wants to amend the Trust.

Undoubtedly the most definitive event is the death of the first settlor to die in this situation of a husband and wife trust. At that time the settlor will likely see a attorney to prepare a Federal Estate Tax return (706), an affidavit of Surviving Trustee, etc.

It is my opinion the Statute of Limitation should be one (1) year after the death of the first settlor to die. It is then that the Trust (in this situation of a husband and wife Trust) becomes irrevocable as to the first settlor to die. Prior to that time the trust can always be amended to correct any errors. Thus, the damages to the client would only be the attorney's costs of amending the trust which should be nominal.

If the above makes sense I would be happy to volunteer my time to consult with the commission.

Very truly yours,

DAVID S. SCHWARTZ

DSS:js
c/c Randy Godshall
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650 Town Center Drive
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Costa Mesa, CA 92626

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Susan E. Greek
Shelley M. Hamblin
Linda T. Hollenbeck
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Ted Kimball
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Of Counsel
Robert M. Nostrand, Esq.
Hon. Mack P. Lovett
Judge Superior Court (ret.)*
*Not an active member of the State Bar

April 1, 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94353-4739

ATTN: Barbara Gaal

RE: Estate Planning Statute of Limitations

Dear Ms. Gaal:

I understand that there is a proposal being considered to limit the statute of limitations for estate planning attorneys for malpractice claims for wills and trusts. I strongly support such a proposal. While I understand that it is difficult to know in advance of someone's death whether or not a document is defective, the same is true of many contracts and other documents that may not be subjected to judicial scrutiny for many years. The unlimited and perpetual exposure has been a constant source of worry for me and many of my colleagues.

I am facing a particularly difficult situation, since the firm I was with dissolved due to the death of one partner and the medical disability of the other. For now, my former partner is maintaining entity malpractice coverage on the successor firm, but when he dies or becomes unable to practice, I will be faced with a problem of trying to obtain separate tail coverage, at high expense and questionable availability.

The current situation is chaotic and leads to substantial uncertainty and the danger of inconsistency. I believe that a reasonable statute of repose should be put in place after the completion of the work, particularly in a modern environment where there is often no ongoing legal representation or relationship after the initial work is completed. I feel strongly that any such legislation should apply to existing work, rather than just prospectively, since it would be impossible to try to go back and give notice to the clients or beneficiaries for wills that were drafted 20 or 30 years ago. Like most estate planning professionals, I have drawers of files where I have not heard from the

clients for decades. I often have no way to contact them, but cannot in good conscience simply dispose of the files, both for their legal needs and my own protection.

I think the most common problem comes not from real errors in drafting, but rather from dissatisfied heirs that don't like the provisions of someone's will and are looking for a "deep pocket" to go after. The drafting attorney presents an easy target, and it is difficult to defend against such claims after many years, when memories are faded and principals (including drafting attorneys who have long since retired) are deceased or unavailable. If it proves impossible to pass a blanket statute of repose that is politically acceptable, it might be worth considering one that limits liability only to clear errors in drafting that appear on the face of the document, rather than claims of undue influence, incapacity, and things of that nature that are peculiarly difficult to prove or defend against many years later. However, I would much prefer to just see a simple Statute of Limitations saying that within a period such as five years from the completion of the estate planning work all claims are simply barred, as a matter of public policy.

Very truly yours,

Charles Scott of
KIMBALL, TIREY & ST. JOHN

CTS:sjw

cc: Randall B. Godshall, Sheppard, Mullin, Richter & Hampton, LLP

COMMENTS OF LON D. SHOWLEY

Date: March 25, 2003
To: bgaal@clrc.ca.gov
From: Lon D. Showley <ldslaw@pacbell.net>
Subject: Estate Planning Malpractice Statute of Limitations

To the California Law Revision Commission:

As a long time practioner here in California, I am all too aware of the dramatically increasing costs of obtaining malpractice insurance. I would strongly encourage consideration of any legislativie action that would place a reasonable, definable limitation on the number of years that California attorneys are liable for estate planning work done. This year alone the projected annual premium for such insurance is expected to increase one hundred percent (100%) from last year's cost. I strongly urge you to consider taking appropriate action to make these much needed changes.

Respectfully submitted,

Lon D. Showley

COMMENTS OF ALAN SILVER

Date: April 8, 2003
To: bgaal@clrc.ca.gov
From: Alan Silver <asilver@kmlaw100.com>
Subject: Statute of Limitations For Estate Planning Attorneys, Legal Malpractice

Ladies and gentlemen, I am strongly in favor of codifying the statute of limitations issue with respect to estate planners. As it is currently, we have no rational framework of limitations within which our industry can operate, and the open-ended nature of the claims potential represents a serious risk for which malpractice carriers must be compensated. As a result, coveraga availability fluctuates as do the rate structures. I have been practicing in this field since 1977, and feel more uncomfortable by the week with this situation unresolved. We need certainty in this area, and I urge you to consider the revisions being considered.

Yours truly,

Alan J. Silver, Esq.
Certified Specialist, Estate Planning, Probate and Trust Law
State Bar of California, Board of Legal Specialization
Kay & Merkle
100 The Embarcadero, Penthouse
San Francisco CA 94105-1217
415-357-1200
415-512-9277 (Fax)
asilver@kmlaw100.com
SBN 078148

COMMENTS OF ROBERT SILVERMAN

Date: April 2, 2003
To: bgaal@clrc.ca.gov
From: Robert Silverman <rsilverman@berding-weil.com>
Subject: Statute of Limitations on malpractice actions against estate planners

My practice involves a significant amount of estate planning. I just wanted to send you my perspective that an unlimited statute of limitations on malpractice actions against attorneys by not only clients, but current and remainder beneficiaries, is patently unfair and unreasonable. I urge you to consider legislation under which a practical and fair limitations period is established.
This email was sent by:

Robert J. Silverman, Esq.
Berding & Weil, LLP
3240 Stone Valley Road, W.
Alamo, CA 94507
Ph: (925) 838-2090 x 218
Fax: (925) 820-5592
Email: <mailto:rsilverman@berding-weil.com>rsilverman@berding-weil.com
Website: <http://www.berding-weil.com>www.berding-weil.com
Paralegal: Tricia Huvane, x 213

LAW OFFICES OF
MICHAEL T. WALSH
A PROFESSIONAL LAW CORPORATION

4425 JAMBOREE ROAD, SUITE 190
NEWPORT BEACH, CALIFORNIA 92660
TELEPHONE 949.851.9210
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November 6, 2002

Law Review Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Re: Study J-111
Memorandum 2002-13

Dear Sir or Madam:

It is my understanding that the Commission is studying the statute of limitations/repose for legal malpractice in the area of estate planning. As currently enacted, Probate Code Section 340.6 potentially allows a claim for malpractice against estate planning attorneys to be filed decades after the alleged malpractice was committed. As a new estate planning attorney, I am giving serious consideration to changing my area of practice because of this potential for lifetime liability. In Orange County, there are very few young attorneys who practice in the estate planning area and it is my feeling that this concept of lifetime liability may be a factor.

Although estate planning is my preferential area of practice and where I believe I make a difference in people lives, the idea that any beneficiary, potential beneficiary or heir at law (who had nothing to do with the design of the estate plan) could bring an action for malpractice decades after the estate plan was drafted, coupled with the prospect of maintaining an ever increasingly expensive malpractice insurance policy for the next fifty or sixty years, has caused me to reconsider my career choice as it relates to practicing estate planning.

Even with insurance, the cost may become so prohibitive that it simple may not be economical to practice this type of law. If insurance is even available, the cost will be borne by the estate planning consumer until estate planning just becomes so expensive that many clients who are already reluctant to take the necessary steps to plan their estate will simple give up on the process altogether.

The current proposal that attorneys be given the option to send a "Notice of Termination" is a good starting point. However, it would be preferential that this notice be required rather than optional. This would eliminate the potential for any abuse of the optional method.

As an alternative, I do think serious consideration should also be given to the idea of using California Code of Civil Procedure Section 337.15 as a model for estate planning malpractice. This would at least set some absolute deadline for suits yet give estate planning consumers adequate time to discover any errors or omissions in their estate plan.

I strongly urge the Commission to act on this important issue.

Sincerely

Michael A. Simon, Esq.

COMMENTS OF LEMOINE SKINNER III

Date: April 2, 2003
To: bgaal@clrc.ca.gov
From: Lemoine Skinner III <ls@gwtaxlaw.com>
Subject: Statute of Limitations for Estate Planning Malpractice

I am writing to express my support of legislation to limit the statute of limitations for malpractice claims against lawyers arising out of estate planning. The fees most estate planners can charge will not cover the cost of malpractice insurance that will protect them against claims for the current extended period of the statute of limitations.

Lemoine Skinner III
Telephone (310) 208-8282
Fax (310) 208-8582

LAW OFFICES OF
WILLIAM H. SOSKIN
2100 GARDEN ROAD, SUITE F
MONTEREY, CALIFORNIA 93940

WILLIAM H. SOSKIN, J.D., C.P.A.
FELLOW, THE AMERICAN COLLEGE
OF TRUST AND ESTATE COUNSEL

AREA CODE 831
TELEPHONE 649-8006
TELEFAX 655-3432

March 31, 2003

California Law Revision Commission
4000 Middlefield Road
Room D-1
Palo Alto, CA 94353-4739
ATTN: Barbara Gaal

Dear Ms. Gaal:

I am writing to support your consideration of a proposal to limit the period of time in which an estate planning attorney is liable for an erroneously drafted will or trust.

Under the current state of the law, estate planners, such as myself, are forced to keep extra files for years and years and, of course, trying to recall client conversations and directions 30 or 40 years after the fact is virtually impossible. As a result, after practicing for 30 years, my potential exposure is far beyond any insurance policy I can afford. Even though I have never been sued for malpractice, knowing that there is the possibility that years from now I can be sued for work I did 30 years ago is extremely upsetting to me and my family, particularly as I approach retirement years.

I think the proposal to limit the time period for claims with respect to estate planning documents is an excellent compromise. It protects clients without unduly burdening attorneys, financially and administratively.

I would be happy to answer questions or appear before you with respect to these issues. Please do not hesitate to contact me if I can be of assistance.

Very truly yours,

Bill Soskin

William H. Soskin

WHS/kag
cc: Randy Godshall
Terence Nunan

COMMENTS OF LYNN STUTZ

Date: March 26, 2003
To: bgaal@clrc.ca.gov
From: Lynn Stutz, Attorney at Law <lynn@stutzlaw.com>
Subject: Statute of Limitations on Estate Planning malpractice claims

Dear Commissioners:

I would like to add my voice to those requesting that you consider setting a statutue of limitations or statute of repose on estate planning malpractice claims. I think all working folk look forward to retirement as a time when the stresses of their careers are over and they can wake each day without concern for the ever present possiblities of making an error that impacts others. Estate planning attorneys have no hope of such a time.

Under the current law, there will never be a time when the work I have done, and any mistakes I may have made, will be behind me. Even on my death bed I can be served, to the detriment of my family, for an error make decades before.

All of the onus is on the attorney. He must, of course, try to do the job correctly in the first place (well, I think we all try our best to do so) He must fix any errors he does find (becoming aware of the mistake either through a later review of the documents or through further education). And by then the attorney may have lost track of the client. But the clients and their families can wait as long as they like to search for and find a mistake. They can wait until the lawyer is no longer able to fix the problem, which is discovered sooner could be remedied. They can wait until the only “fix” is money — money earned by the lawyer in good faith and earmarked for the lawyer’s family or for his own retirement and medical care.

There is no closure, no retirement, no true peace for the estate planning attorney. Please, set a reasonable statute of limitations on estate planning claims. — Lynn Stutz, Attorney at law, CA Bar 116944

COMMENTS OF PAMELA M. TOPA

Date: March 26, 2003
To: bgaal@clrc.ca.gov
From: Topeesq@aol.com
Subject: Statute of Limitation for Legal Malpractice

Dear Barbara Gaal,

Re: Statute of Limitation for Legal Malpractice

I understand that the California Law Revision Commission has been considering a proposal to limit the period of time in which an estate planning attorney will be liable for an erroneously drafted will or trust. The current proposal would require that the lawyer send a notice to the client of the completion of work with the information that a claim would need to be asserted by the client or the beneficiaries within 5 to 7 years.

Trial lawyers effectively have a one-year statute of limitations after they complete their work. Estate planning attorneys (and their families), however, have risk exposure until one year following the death of the attorney. The premiums estate planning lawyers pay currently are significantly affected by the perceived "unlimited" statute of limitation. This seemingly limitless exposure, is both prejudicial and extremely unjust.

The absence of the statute of limitation has resulted in unfair results making it difficult for many of us to obtain malpractice insurance coverage.

We urge you to strongly consider out position to llimit the period of time in which an estate planning attorney will be liable for an erroneously drafted will or trust to five to seven years as proposed.

Sincerely,

Pamela M. Topa
Law Offices of PMT & Associates
16161 Ventura Boulevard, Suite 828
Encino, Califorina 91436
(818) 990-6018

COMMENTS OF HUGH VERANO

Date: March 26, 2003
To: bgaal@clrc.ca.gov
From: Verano & Verano <verano-verano@sbcglobal.net>
Subject: Limitations Period for Estate Planning Legal Malpractice

To The California Law Revision Commission

Attention: Barbara Gaal

Dear Barbara:

My partner, Beverly Verano, and I have been practicing estate planning for the last 22 years. We have over 500 bankers boxes of closed files, a substantial part of which are one time estate planning projects. Many of these projects involved the preparation of simple wills; others are quite complex plans. Over the years, we have tried to alert our former clients to changes in the law. In most instances, we have written letters to former clients advising them to contact us or other attorneys if their circumstances change.

As you probably know, many former clients move out of the area, find new attorneys, or simply do not want to think about their estate planning or incur the cost to have it updated from time to time. As a practical matter, it is virtually impossible to stay in touch with many of our former clients for a variety of reasons, foremost among which is an unwillingness on the former client's part to continue the communication. We are extremely apprehensive of what could happen 20 to 30 years after we have last performed estate planning services for a client, and for whatever reason the client has chosen not to stay in touch with us or seek our services to update their estate planning documents.

We have not been sued yet, but without a statute of repose, it is almost inevitable that at some time in the future, we will be sued for malpractice by beneficiaries who we have never met concerning an estate plan we did for a client decades ago who is deceased and thereby unable to provide testimony as to the scope and background for a particular estate plan. This will put us in a nearly impossible situation with the passage of time and the unavailability of the witness most knowledgeable concerning the plan.

A notice provision starting a 5 to 7 year statute of limitations period would be fair both to us and to the former clients, particularly when a former client for whatever reason elects not to communicate with us. Our malpractice premiums have nearly doubled this year, even though we have never been sued. Statistically, without a statute of repose or similar relief, the longer we provide estate planning services, the higher the probability is that a claim will be filed against us. This is surely a statistical fact that malpractice carriers consider.

Please feel free to contact us if you need additional information. Thank you for your help.

Regards,

Hugh Verano
Verano & Verano
2301 Dupont Drive
Suite 310
Irvine, CA 92612-7503

Tel. 949-852-9830
Fax 949-852-9831
Email hverano@cox.net
****

cc: Randy Godshall, Esq.; Terence Nunan, Esq.

COMMENTS OF JAMES L. WALKER IV

Date: March 26, 2003
To: bgaal@clrc.ca.gov
From: James Walker <dwjlw@pacbell.net>
Subject: re: Statute of Limitation for Estate Planning Claims

California Law Revision Commission
Attn: Barbara Gaal
4000 Middlefield Road, Room D-1,
Palo Alto, CA 94353-4739,

re: Statute of Limitation for Estate Planning Claims

Dear Commission:

As a California State Bar Certified Specialist in Estate Planning, Trust & Probate Law, I am writing in support of creating a statute of repose for estate planning documents and related matters. Recently I found as my firm's E &O insurance came up for renewal that there were several insurance companies that would not quote small firms that do any significant amount of estate planning work. One company that ("grudgingly" according to my insurance agent) provided a quote, quote a premium that was nearly 600% over my firm's premium for last year. I was told it was because of the estate planning element of my practice and the unlimited statute of limitations on claims.

Although I was solicited by the LA Bar-affiliated carrier to seek a quote, no quote was given, due (according to my insurance agent) to the estate planning element of our practice and thus claim exposure. As I investigated the tail coverage aspects of the insurance I was buying, I learned that there are no companies presently in California who are selling unlimited tail coverage. The best most will offer is 3 years coverage. Yet I have to face an unlimited statute of limitations.

This means that I cannot retire, ever, as I cannot leave my wife fully exposed to claims that may arise long after I am out of practice. Further, it compels me to either leave California or start making sure my assets are re-positioned (out of my name) if I desire to leave any legacy for my surviving spouse or children.

I know of a situation of one attorney who passed away, whose community property passed to his wife. When a groundless, but undefendable (for lack of evidence) claim was made, she was compelled to settle for a substantial amount rather than risk spending their life savings defending the action.

Thank you for your consideration.

Very truly yours,

James L. Walker, IV
DeMartini & Walker 175 No. Redwood Dr. #250 San Rafael, California 94903
(415-472-7880) (fax 415-472-7950)

COMMENTS OF THEODORE I. WALLACE, JR.

Date: March 25, 2003
To: bgaal@clrc.ca.gov
From: Wallace, Ted <twallace@rutan.com>
Subject: Statute of Limitations for Estate Planning

Attention: Barbara Gaal

Gentlemen:

I strongly urge the commission to consider a statute of limitations for estate planning. I understand that under existing law, an estate planning lawyer's exposure to malpractice claims can be open ended, which can be a nightmare particularly for retired lawyers who practiced estate planning.

Sincerely,

Theodore I. Wallace Jr.
Rutan & Tucker
611 Anton Boulevard Suite 1400
Costa Mesa, CA 92626
Tel. No. 714-641-3409

COMMENTS OF SUSAN WIDULE

Date: March 26, 2003
To: bgaal@clrc.ca.gov
From: Susan Widule <Susan.Widule@ceb.ucop.edu>
Subject: Malpractice Statute of Limitations

I am writing to encourage a contemplated law change that would limit the statute of limitations for attorney malpractice in preparing an estate plan. I believe the current state of the law unjust, as well as dangerous over the long term, in terms of reduced access to important legal services for moderate income individuals.

I am a solo practitioner in the Oakland area, with an emphasis in probate and estate planning. I have been in practice for myself for the last seven years. My practice is less than full time (I am also raising my three children) and focuses on moderate income families. I keep a low overhead by keeping a home office and limited staff. Unfortunately, the cost of my malpractice insurance has skyrocketed — nearly 100% jump in the last two years. Given my client base, and competition from "trust mills," I am not able to substantially raise my rates for doing estate plans. Due to a large extent to this insurance premium increase, I am at this point planning to phase out my practice over the next year. This saddens me, as I have truly enjoyed being an attorney and believe my moderate fees have allowed numerous middle class families to get a customized and well-crafted estate plan to protect their children and their assets. I also fear for the future of my family savings and assets, should I be subject to a judgment at some later date. I intend to purchase tail coverage (also, of course, extremely expensive), but have no assurance that it will be adequate over the long term.

Thanks for looking out for these attorneys.

Susan Widule, Esq.
(510) 521-0512

COMMENTS OF W. SCOTT WILLIAMS

Date: April 2, 2003
To: bgaal@clrc.ca.gov
From: Scott Williams <wsw@solanalaw.com>
Subject: Attn: Barbara Gaal / Statute of Limitations for Legal Malpractice

Attn: Barbara Gaal
California Law Review Commission
4000 Middlefield Road Room D-1
Palo Alto, CA 94353-4739

Dear Ladies and Gentlemen:

I understand that the Commission is reviewing a proposal to limit the statute of limitations for asserting claims for an erroneously drafted will or trust. I have been practicing in this area for a number of years and thankfully have not had any malpractice actions filed against me. However, the current law permits a claim to be filed up to a year after my death, even if that occurs thirty years after the fact! Needless to say, a claim would be a bit difficult to defend at that point in time, as it is almost impossible to document for the file every conversation with a client during the course of an estate planning engagement.

I would very much support the enactment of some sort of statute of limitations that would provide a finite period of time in which to file a claim. That would extend to trusts and estates attorneys a modicum of the same protection afforded other attorneys. Also, despite advice to clients to have their estate planning documents reviewed and updated from time to time, most do not, sometimes with negative results to them, their estates, and their intended beneficiaries. It seems to me that, if clients are notified at the conclusion of an engagement that a finite statute of limitations applies, they may pay more attention to our advice that they have the estate planning reviewed periodically.

Thank you for the opportunity to provide these comments.

W. Scott Williams, Attorney at Law
Worden, Williams, Richmond
Brechtel & Kilpatrick
462 Stevens Avenue, Suite 102
Solana Beach, CA 92075
phone: 858-755-6604
fax: 858-755-5198
e-mail: wsw@solanalaw.com
web site: <http://www.solanalaw.com/>

June 5, 2002

To: Barbara Gaal

From: Ellen Nudelman

Re: Statutes of Repose in California and Other Jurisdictions

Questions Presented

1) Other than construction defect repose statutes, what repose provisions has the state of California promulgated?

2) What states have adopted legal malpractice statutes of repose?

3) What other types of statutes of repose have been adopted in other states?

Statutes of Repose in California

Other than Code of Civil Procedure Section 337.15 for latent construction defects, California appears to have no other true statute of repose. However, I was unable to find any law review article which stated this outright. This may partially be due to the court's confusing use of the term "statute of repose." Because "[c]ourts have not always been consistent in distinguishing between statutes of limitations and statutes of repose," there can be "analytical difficulties" in determining whether a statute is truly a "statute of repose." Ferguson, *Repose or Not? Informal Objections to Claims of Exemptions after* Taylor v. Freeland, 50 Okla. L. Rev. 45, 72 (1997) (noting five definitions distinguishing statutes of limitation and statutes of repose).

According to Tyler Ochoa and Andrew Wistrich, the California Legislature has only enacted "a few socalled 'statutes of repose,'" in recent years.

June 13, 2002

To: Barbara Gaal

From: Ellen Nudelman

Re: California Statutes of Repose, Part II

Question Presented

1) Within Title 2 of the California Code of Civil Procedure, are there statutes of repose other than Section 337.15 regarding latent construction defects?

Statutes of Repose

I have found several provisions in the Code of Civil Procedure that can be construed as statutes of repose. First, Section 337.2 grants a four year statute of repose for breach of a written lease and abandonment of property. Second, Section 339.5 provides for a two year repose period for breach of an unwritten lease and abandonment of property. Third, Section 349.2 gives a six month statute of repose for contesting the validity of authorization, issuance and sale of bonds by public utilities.

Two additional provisions which may be statutes of repose are Sections 339(3) and 340.4. Section 339(3) limits the time you can file a claim for an action based upon the rescission of a contract not in writing. However, the wording, the "time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred," is vague and might not be from the time of the wrongful act. Section 340.4 governs actions for personal injuries before or during birth, mandating that the action be filed within six years from birth. Again, this is not necessarily measuring the limitations period from the wrongful act, but it should be pretty close considering the short duration of the pregnancy.

Ochoa & Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453, 463 (1997). They cite only three examples: Code of Civil Procedure Sections 337.15, 340.5 (medical malpractice) and 340.6 (legal malpractice). Id. n41. However, the latter two sections are not true statutes of repose, as both are subject to tolling and do not start running until the date of injury. See Tyler T. Ochoa & Andrew J. Wistrich, *Limitation of Legal Malpractice Actions: Defining Actual Injury and the Problem of Simultaneous Litigation*, 24 Sw. U. L. Rev. 1, 17 (1994). Most likely, if there had been another example of a true statute of repose, other than Section 337.15, Ochoa and Wistrich would have mentioned them. However, the only way to be absolutely sure that there are no other statutes of repose in California would be to analyze all of the statutes of limitation in the California Code of Civil Procedure.

Legal Malpractice Statutes of Repose

Before going into other states' statutes of repose in the area of legal malpractice, it is worth noting Ochoa and Wistrich's analysis of why the California Legislature's decided not to promulgate a true statute of repose in Section 340.6:

> In some cases, the Legislature has acted to restrict the impact of the discovery rule because of a perceived "crisis" in the availability and cost of liability insurance.
>
> Similar concerns prompted the enactment of section 340.6 in 1977. Section 340.6, however, is not a true statute of repose . . . The adoption of this tolling provision demonstrates the Legislature's unwillingness to allow the policies favoring limitation to override the policy favoring adjudication of disputes on their merits. Although tolling the limitation period until "actual injury" occurs might appear to be inconsistent with the apparent statutory goal of reducing malpractice liability exposure for attorneys, it can be viewed as promoting this purpose indirectly. Preserving causes of action from the bar of limitation until actual injury has occurred, may serve to reduce unnecessary litigation by encouraging

> clients who have discovered allegedly negligent conduct to wait and see if the conduct causes injury before commencing suit. Because malpractice liability insurance covers the cost of defending lawsuits in addition to paying judgments or settlements, the intended purpose of the "actual injury" tolling provision may have been to achieve a net reduction in liability insurance premiums by discouraging the premature filing of potential actions in which no damage ultimately occurs, despite preserving of other potential actions for a longer period of time. *Id.* at 17-18.

Several states have adopted statutes of repose for legal malpractice. These "typically provide that no action for legal malpractice may be brought after a certain number of years from the occurrence of the act, omission, or failure constituting the malpractice." Begleiter, *First Let's Sue All the Lawyers - What Will We Get: Damages for Estate Planning Malpractice*, 51 Hastings L.J. 325, 356 (2000). For example, in *Hargett v. Holland*, the North Carolina Supreme Court interpreted the state's professional malpractice statute as a true statute of repose, which runs from the "last act" of the defendant giving rise to the cause of action. Hanks, *Do You Need "Will Insurance?" Let the Testator Beware* - Hargett v. Holland, 21 N.C. Cent. L.J. 353 (1995). The North Carolina statute states, in relevant part:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action . . . Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . *Id.* at 358 n29, quoting N.C. Gen. Stat. 1-15(c) (1983).

The North Carolina statute has been called one of the harshest against claimants of legal malpractice. Byrne, *Let Truth Be Their Devise*: Hargett v. Holland *and the Professional Malpractice Statute of Repose*, 73 N.C.L. Rev.

2209, 2239 (1995). According to Byrne, there were only seven other jurisdictions with statutes of limitation applicable specifically to legal malpractice or non-medical professional malpractice. *Id.* Byrne cites only two states in those jurisdictions--Alabama and Montana--that have statutes of repose for legal malpractice. Alabama Code Section 6-5-574, enacted in 1988, states:

> (a) All legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards; provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided, further, that in no event may the action be commenced more than four years after such act or omission or failure; except, that an act or omission or failure giving rise to a claim which occurred before August 1, 1987, shall not in any event be barred until the expiration of one year from such date.
>
> (b) Subsection (a) of this section shall be subject to all existing provisions of law relating to the computation of statutory periods of limitations for the commencement of actions, namely, Sections 6-2-1, 6-2-2, 6-2-3, 6-2-5, 6-2-6, 6-2-8, 6-2-9, 6-2-10, 6-2-13, 6-2-15, 6-2-16, 6-2-17, 6-2-30, and 6-2-39; provided, that notwithstanding any provisions of such sections, no action shall be commenced more than four years after the act, omission, or failure complained of; except, that in the case of a minor under four years of age, such minor shall have until his or her eighth birthday to commence such action.

Montana Code Section 27-2-206, enacted in 1977, states:

> Actions for legal malpractice. An action against an attorney licensed to practice law in Montana or a paralegal assistant or a legal intern employed by an attorney based upon the person's alleged professional negligent act or for error or omission in the person's practice must be commenced within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the act, error, or omission, whichever occurs last, but in no case may the action be commenced after 10 years from the date of the act, error, or omission.

Thus, North Carolina and Alabama have a four year statute of repose, and Montana has a ten year statute of repose for legal malpractice.

States that have more recently adopted such a statute of repose include Illinois, Louisiana, and South Dakota. In 1990, the Illinois Code of Civil Procedure Section 13-214.3 created a six year statute of repose for legal malpractice. The statute provided an exception for injuries that did not arise until "the death of the person for whom the professional services were rendered." Mikva & Pfander, *On the Meaning of Congressional Silence: Using Federal Common Law to Fill the Gap in Congress's Residual Statute of Limitations*, 107 Yale L.J. 393, 401 (1997). Illinois Public Act 89-7 amended Section 13-214.3 to strike the proviso, "apparently in an effort to extend the benefits of the repose provision to attorneys who commit malpractice in the course of providing such estate planning advice." *Id.* However, Public Act 89-7 was held unconstitutional by *Best v. Taylor Mach. Works.* 689 N.E.2d 1057 (Ill., 1997). Without the amendments made by Public Act 89-7, the statute once again incorporates the proviso for injuries not occurring before death. Section 13-214.3, without the 1995 unconstitutional amendment, states:

> (a) In this Section: "attorney" includes (i) an individual attorney, together with his or her employees who are attorneys, (ii) a professional partnership of attorneys, together with its employees, partners, and members who are attorneys, and (iii) a professional service corporation of attorneys, together with its employees, officers, and shareholders who are attorneys; and "non-attorney employee" means a person who is not an attorney but is employed by an attorney.
>
> (b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an

attorney to assist the attorney in performing professional services must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

(c) Except as provided in subsection (d), an action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.

(d) When the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered, the action may be commenced within 2 years after the date of the person's death unless letters of office are issued or the person's will is admitted to probate within that 2 year period, in which case the action must be commenced within the time for filing claims against the estate or a petition contesting the validity of the will of the deceased person, whichever is later, as provided in the Probate Act of 1975.

(e) If the person entitled to bring the action is under the age of majority or under other legal disability at the time the cause of action accrues, the period of limitations shall not begin to run until majority is attained or the disability is removed.

(f) This Section applies to all causes of action accruing on or after its effective date.

Mikva and Pfander claim that the "motivating force" behind the 1995 amendment to strike the death exception in subdivision (d) was the Section on Trusts and Estates of the Illinois State Bar Association. Mikva at 402. To follow up on this claim, one would have to contact the Illinois State Bar.

Louisiana enacted a statute of repose for legal malpractice in 1990. It is a true statute of repose because it sets two peremptive time periods to file a malpractice claim. Prior to the enactment of Section 9:5605 of the Louisiana

Revised Statutes, tort and contract law governed legal malpractice claims and the statute of limitations provided more leniency for both types of claims. Thornton, *Louisiana Revised Statute Section 9:5605: A Louisiana Lawyer's Best Friend*, 74 Tul. L. Rev. 659, 661 (1999). Section 9:5605 states:

> A. No action for damages against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide legal services shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.
>
> B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. However, with respect to any alleged act, omission, or neglect occurring prior to September 7, 1990, actions must, in all events, be filed in a court of competent jurisdiction and proper venue on or before September 7, 1993, without regard to the date of discovery of the alleged act, omission, or neglect. The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.
>
> C. Notwithstanding any other law to the contrary, in all actions brought in this state against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional law corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, the prescriptive and peremptive period shall be governed exclusively by this Section.

> D. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.
>
> E. The peremptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953.

Thus, Louisiana has a very stringent statute of repose of one year from discovery or three years after the act, whichever comes sooner. However, despite the clear language of the statute, the courts added some leniency in their interpretation. First, the courts refused to identify the one-year period of limitation as peremptive, although most courts readily acknowledge that the three year period is peremptive. *Id.* at 673. Second, courts have suspended both limitation periods by applying the doctrine of continuous representation. *Id.* However, the Louisiana Supreme Court, while asserting in dicta that it understands the perception that the statute is not equitable, reversed the lower court's holding that continuous representation is an exception to the peremptive period. *Id.* at 674-75; see *Reeder v. North*, 701 So. 2d 1291 (La. 1997).

South Dakota is the last state I found with a statute of repose specifically for legal malpractice. The South Dakota Codified Laws Section 15-2-14.2 states:

> Time for bringing legal malpractice actions -- Prospective application. An action against a licensed attorney, his agent, or employee, for malpractice, error, mistake, or omission, whether based upon contract or tort, can be commenced only within three years after the alleged malpractice, error, mistake, or omission shall have occurred. This section shall be prospective in application.

Although this is a statute of repose because it is based on the occurrence of the act, the South Dakota court have allowed the doctrine of continuous representation to postpone the running of the statute. See *Schoenrock v. Tappe* 419 N.W.2d 197 (1988). Interestingly, the court never refers to the statute as one

of repose in *Schoenrock*. Also, in an article commenting on the South Dakota statute of limitations, the term repose is not mentioned. Volkmer, *Impact of S/L on Legal Malpractice*, 24 Est. Plan. 188 (1997).

Connecticut is an example of a state where the general statute of repose for torts has been applied to legal malpractice. *Sanborn v. Greenwald*, 39 Conn. App. 289, 301-02 (1995). Connecticut General Statute Section 52-577 states:

> No action founded upon a tort shall be brought but within three years from the date of the act or ommission complained of.

The statute was amended in 1991 to reduce the time period from six years to three. Id. at 306; Schwartz, Behrens & Lorber, *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 Wm. Mitchell L. Rev. 237, 242 n24 (2000).

There may be other states besides Connecticut where a general statute of repose is applied to legal malpractice. However, my research has not revealed such states as they are difficult to search for without a case that has litigated the constitutionality of the statute applied to legal malpractice, such as in *Sanborn v. Greenwald*.

The policy argument for passing a legal malpractice statute of repose in the various states has been predominantly a concern for the rising costs in malpractice insurance. Interestingly, in North Carolina, the professional malpractice statute was passed by the Legislature due to a perceived crisis in obtaining *medical* malpractice insurance. However, the statute also applied to the legal profession, even though the legislative history does not point to concerns about legal malpractice insurance. Hanks, 21 N.C. Cent. L.J. 353, 361-62.

Professional Malpractice Statutes of Repose

In some states, such as North Carolina, there is a general professional malpractice statute of repose. See N.C. Gen. Stat. 1-15(c) above. However, even the general North Carolina statute applies only to medical, legal, and other professional malpractice not covered in another statute specific to construction based claims against engineers and architects. Byrne, 73 N.C.L. Rev. 2209, 2228. Connecticut also has a specific statute of repose for architects and engineers. See Conn. Gen. Stat. § 52-584a (providing a seven-year repose period). In writing about North Carolina Section 1-15(c), one article commented on the similarity between medical and legal malpractice claims, with the prime exception in the trusts and estates practice:

> The results of negligent medical treatment are generally apparent shortly after the services are performed; a four year statute of repose is unlikely to effectively abolish a cause of action. Section 1-15(c) has been deemed constitutional in the context of a medical malpractice claim on the ground that it is rationally related to the purposes of attempting to preserve medical treatment and controlling malpractice insurance costs, both of which were threatened by the increasing number of malpractice claims.
>
> The availability of legal services and the cost of legal malpractice insurance are similarly valid interests. The negligent drafting of a will, however, is generally not apparent to the testator shortly after a will is drafted; the testator would not execute a will if he realized it did not dispose of his estate according to his wishes. Furthermore, the testator's intended beneficiaries do not have a cause of action until the testator dies. Therefore, unless the testator dies within the period of the applicable statute of repose, the beneficiaries are completely deprived of a remedy. It would be of significant interest to assemble empirical data showing the time within which most actions for negligent drafting of wills are brought to determine whether 1-15(c) effectively abolishes all potential claims against attorneys for damages sustained by beneficiaries from wills negligently drafted or executed. Hanks, 21 N.C. Cent. L.J. 353, 366.

Other states with general malpractice statutes of repose are Idaho (Idaho Code § 5-219(4) (2001)) and Nebraska (Neb. Rev. Stat. Ann § 25-222 (2001)). This is not a comprehensive list, however, as it is derived from cases challenging the constitutionality of the statute of repose.

Some states have a specific statute of repose for medical malpractice. The following examples are also not comprehensive, but give a useful picture of the substantial number of states with such statutes. The Arkansas Code Annotated Section 16-114-203 is an example of such a statute for medical malpractice. Section 16-114-203, last amended in 1995, states:

> (a) Except as otherwise provided in this section, all actions for medical injury shall be commenced within two (2) years after the cause of action accrues.
>
> (b) The date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time. However, where the action is based upon the discovery of a foreign object in the body of the injured person which is not discovered and could not reasonably have been discovered within such two-year period, the action may be commenced within one (1) year from the date of discovery or the date the foreign object reasonably should have been discovered, whichever is earlier.
>
> (c)(1) If an individual is nine (9) years of age or younger at the time of the act, omission, or failure complained of, the minor or person claiming on behalf of the minor shall have until the later of the minor's eleventh birthday or two (2) years from the act, omission, or failure in which to commence an action.
>
> (2) However, if no medical injury is known and could not reasonably have been discovered prior to the minor's eleventh birthday, then the minor or his representative shall have until two (2) years after the medical injury is known or reasonably could have been discovered, or until the minor's nineteenth birthday, whichever is earlier, in which to commence an action.

For more detailed analysis of the Arkansas medical malpractice statute, see George, *Prognosis Questionable: An Examination of the Constitutional Health of the Arkansas Medical Malpractice Statute of Repose*, 50 Ark. L. Rev.

691 (1998). Other states with specific medical malpractice statutes of repose include Alabama, Florida, Georgia, Illinois, Iowa, Louisiana, Maine, Mississippi, Oregon, South Carolina and Wisconsin.

Alabama's medical malpractice statute provides for a two year statute of repose, unless discovery of the injury is not reasonable in that time period, in which case the maximum time period is four years. Ala. Code § 6-5-482 (2001). In Alabama, the continuing treatment rule does not extend the statute of repose. *Jones v. McDonald*, 631 So. 2d 869 (Ala. 1993). Florida's medical malpractice statute has the same time limits as Alabama, except for the proviso that minors have additional time to file a claim. Fla. Stat. § 95.11(4)(b) (2001). Georgia has a two year statute of limitations after death or injury from a wrongful act and a five year statute of repose from the date of the wrongful act. Ga. Code. Ann. § 9-3-71 (2001). Illinois' medical malpractice statute allows for two years after discovery, but not more than four years after the wrongful act. Illinois also provides an exception for minors, extending the period of repose to 8 years. Ill. Code Civ. Proc. § 13-212. Iowa grants two years after discovery, but not more than six years after the wrongful act, unless there is a foreign object left in the patient's body after surgery. Iowa also provides an extension of the repose period to some minors under the age of eight to file by age ten. Iowa Code § 614.1(9). In Louisiana, a patient has one year from discovery, and no more than three years after the wrongful act to file a medical malpractice claim. La. Rev. Stat. § 9:5628 (2002). Maine has a three year statute of repose for heath care providers and practitioners, without any reference to discovery. Maine provides some exceptions for minors and foreign objects. Me. Rev. Stat. § 2902 (2001). Mississippi has a statute of repose of seven years, with exceptions for foreign objects, minors, and persons with disabilities. Miss. Code. Ann. § 15-1-36. In Oregon, a plaintiff has within two years of discovery but not more than

five years to file a medical malpractice claim. Or. Rev. Stat. § 12.110(4) (2001). South Carolina requires filing within three years of discovery, but not more than six years after the wrongful act, providing extensions for minors and foreign objects. S.C. Code Ann. § 15-3-545 (2001). Wisconsin has a five year statute of repose, with exceptions for fraud and foreign objects. Wis. Stat. § 893.55 (2001).

Other Statutes of Repose:

Other than statutes of repose for professional malpractice, most repose periods relate to products liability and improvements to real property (or construction defects). As mentioned from the beginning of the memo, California already has a construction defect statute of repose in Section 337.15. In the area of products liability statutes of repose, Professor Werber provides a compilation of such statutes, both in effect and repealed as of 1995: the states with the products liability statutes include Alabama, Arizona, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Kansas, Nebraska, New Hampshire, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, and Texas. Werber, *The Constitutional Dimension of a National Products Liability Statute of Repose*, 40 Vill. L. Rev. 985, 1053 (1995). The repose period in these states, as of 1995, ranged from six to fifteen years, with ten years being the most common period. *Id.*

The policy argument for statutes of repose for product liability are essentially the same as that for legal and medical malpractice:

> In an effort to "dampen the rapid escalation of insurance rates" following an "explosion" in products liability litigation since the advent of strict products liability, many states adopted products liability statutes of repose in the late 1970s and early 1980s. Generally, the legislative intent in

> enacting these statutes was to provide an absolute cutoff date for bringing suit. The legislatures passed products liability statutes of repose to protect product manufacturers and insurance companies from what is frequently referred to as the "long-tail" liability problem . . . Peacock, *An Equitable Approach to Products Liability Statutes of Repose*, 14 N. Ill. U. L. Rev. 223, 229-30 (1994) (advocating the use of equitable estoppel to extend a statute of repose in cases of manufacturer misrepresentation).

However, to some degree, the policy judgments in products liability statutes of repose differ from those of professional malpractice:

> The statute also serves the public policy concerns of reliability and availability of evidence after long periods of time, and the ability of manufacturers to plan their affairs without the potential for unknown liability. . . . It is also rationally related to the General Assembly's reasonable determination that, in the vast majority of the cases, failure of products over ten years old is due to wear and tear or other causes not the fault of the manufacturer . . . Alberts & Henn, *Product Liability: Survey of Recent Developments in Indiana Product Liability Law*, 34 Ind. L. Rev. 857, 862 (2001) (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 980 (Ind. Ct. App. 1997)).

In professional malpractice statutes of repose, there is not the same implication that it is not the defendant's fault after the repose period, but rather more of a concern with evidentiary proof and decreasing the cost of liability insurance.

Finally, other statutes of repose passed outside California include those concerning asbestos (see Ky. Rev. Stat. Ann. § 342.750(4)(a) (2001) (granting a 20 year statute of repose from the "last injurious exposure to the occupational hazard" in a workers' compensation statute)), and the federal aviation statute of repose (see General Aviation Revitalization Act of 1994, an 18 year repose period for manufacturers of the aircraft and its components) which is applicable in California (2-21 California Torts § 21.02).

A Brief Note on Constitutionality

Although the constitutionality of statutes of repose is not the focus of this memo, two possibly helpful law review articles pertaining to this subject are: Schwartz & Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance: Appendix 2: Tort Reform Laws Upheld as Constitutional by State Courts after January 1983* , 32 Rutgers L. J. 952 (2001) and Vardaro & Waggoner, *Statutes of Repose - The Design Professional's Defense to Perpetual Liability*, 10 St. John's J.L. Comm. 697, 712 n. 112 (1995).