

Suing a lawyer? The clock is ticking

By Theodore W. Frank

The state Supreme Court recently provided a useful analytical framework to determine whether cases, particularly non-legal malpractice, brought against lawyers are subject to the one-year statute of limitations provided in Code of Civil Procedure Section 340.6. In *Lee v. Hanley*, 2015 DJDAR (Aug. 20, 2015), the court clarified the broad reach of that section and provided a more rational approach to a common issue involving claims confronting lawyer defendants. The pre-filing evaluation of non-legal malpractice claims against lawyers should be made more efficient and result in fewer cases being needlessly pursued.

The uncertainty about whether Section 340.6 applied to any particular case arose with the recent Court of Appeal decisions *Roger Cleveland Golf Co. Inc. v. Krane & Smith APC*, 225 Cal. App. 4th 660 (2014), and *Parrish v. Latham & Watkins*, 238 Cal. App. 4th 81 (2015). *Roger Cleveland* and *Parrish* ran directly counter to the earlier holding in *Vafi v. McCloskey*, 193 Cal. App. 4th 874 (2011), and refused to apply the one-year limitations period of Section 340.6 to malicious prosecution claims against lawyers, instead applying the catch-all, two-year limitations period in Code of Civil Procedure Section 335.1 that applies to malicious prosecution claims generally. *Vafi* found that Section 340.6 applied to all claims against lawyers, except actual fraud, for conduct arising from the performance of professional services.

The trial court in *Lee* sustained the attorney's demurrer on the ground the client's claim for the return of unused fees was time barred under Section 340.6. On appeal, the court reversed, finding the client's allegations could be construed as a claim for conversion, which if proven would not be subject to Section 340.6's one-year limitation period since an attorney does not provide a service to the

client by stealing her money. The Supreme Court affirmed that finding. It reviewed the legislative history of the current version of Section 340.6, noting that the impetus for the current version was the desire to reduce legal malpractice premiums. The high court drew two conclusions from the legislative history:

(1) "[T]he Legislature sought to eliminate the former limitations scheme's dependence on the way a plaintiff styled his or her complaint... The Legislature enacted the statute so that the applicable limitations period for such claims would turn on the conduct alleged and ultimately proven, not on the way the complaint was styled."

(2) "[T]he statute applies not only to actions for professional negligence but to any action alleging wrongful conduct, other than actual fraud, arising in the performance of professional services... while section 340.6(a) applies to claims other than strictly professional negligence claims, it does not apply to claims that do not depend on proof that the attorney violated a professional obligation."

Consistent with *Vafi*, *Lee* expressly disapproved *Roger Cleveland*, concluding that Section 340.6(a)'s "time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services." It then went on to provide guidance on the meaning of "professional services," stating that the "term... is best understood to include nonlegal services governed by an attorney's professional obligations."

The court rejected the argument that Section 340.6(a) should only apply "when an attorney is 'acting as an attorney' — that is, only when an attorney performs services that require a license to practice law." Statutory text, the court said, identifies wrongful conduct "arising in the performance of professional services," not merely legal services. The court also rejected

the argument that Section 340.6(a) should apply to all forms of attorney misconduct, except actual fraud, that occur during the attorney-client relationship or entail the violation of a professional obligation. Lastly, the court disagreed that its holding invites artful pleading when an attorney's professional obligations overlap with generally applicable obligations, noting that the notice pleading requirements (Cal. Code Civ. Proc. Section 425.10(a)(1)) and the certification requirement for pleadings (Cal. Code Civ. Proc. Section 128.7(b)) would adequately guard against such tactics.

Lee is instructive in approaching non-legal malpractice cases against lawyers, such as malicious prosecution. Proving a malicious prosecution claim against an attorney necessarily requires proof that the attorney violated a professional obligation, therefore, such a claim fits squarely within *Lee*'s analytical framework. The malicious prosecution attorney defendant, who files an underlying action on behalf of a client, has the professional obligation to certify that the underlying action is proper and supported by law and evidence. Cal. Code Civ. Proc. Section 128.7(b). The malicious prosecution plaintiff must prove that the attorney defendant lacked probable cause to file the underlying action, which necessarily requires proof that the attorney defendant violated her professional obligations under Section 128.7(b) — "Suits which all reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present no probable cause." *Roberts v. Sentry Life Ins.*, 76 Cal. App. 4th 375, 382 (1999).

However, since a malicious prosecution plaintiff should usually sue both the vanquished adversary and her attorney, as a hedge against the adversary's affirmative defense of "advice of counsel," counsel who find themselves representing malicious prosecution plaintiffs must be

cognizant of the disparate limitation periods that will apply to the client-defendant (Section 335.1, two years) and the attorney-defendant (Section 340.6, one year) in order to avoid malpractice themselves. "Advice of counsel" is an absolute defense to a claim for malicious prosecution, limited only by proof that the client misled the lawyer in connection with the advice. *Sosinsky v. Grant*, 6 Cal. App. 4th 1548, 1556 (1992).

Applying a one-year statute of limitation to a malicious prosecution claim against an attorney and a two-year statute to the attorney's client for the same claim may jar one's sense of fairness, especially those prosecuting malicious prosecution claims. However, applying the one-year limitations period to malicious prosecution claims against attorneys fulfills the Legislature's intent in enacting the current version of Section 340.6 — to provide uniform time limits on attorney liability — which, in turn, keeps malpractice premiums down.

With this important clarification, it is anticipated that disposing of non-legal malpractice claims against lawyers will be easier and, as a result, promote more accurate and effective evaluation of the viability of such claims before they are filed, thus reducing the ever increasing workload of our court system.

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