

October 15, 2003

**COMMENTS OF
HALT, INC. AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM
TO THE CALIFORNIA LAW REVISION COMMISSION
IN OPPOSITION TO THE RECOMMENDATION
TO RESTRICT STATUTE OF LIMITATIONS
FOR ACTIONS BASED ON ESTATE PLANNING MALPRACTICE**

Pursuant to the California Law Revision Commission's request of May 23, 2003, HALT – *An Organization of Americans for Legal Reform* hereby submits comments opposing the recommendation to establish estate planning malpractice exceptions to the current statute of limitations for legal malpractice actions.

The Trusts and Estates Section of the State Bar proposes a special exception to the current statute of limitations for legal malpractice in California. Among the Section's primary proposals are to impose, in place of the general statute of limitations:

- (1) a statute of repose that would terminate liability seven to ten years after completion of an estate planning project; and
- (2) a requirement that estate planning lawyers 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 beneficiaries within five to seven years.

HALT objects to the proposed exceptions to the statute of limitations for the following four reasons:

- (1) estate planners have not demonstrated any compelling need for this draconian change in the law;
- (2) any shortening of the statute of limitations would impose significant burdens on and frequently cause detrimental consequences to clients and their beneficiaries;
- (3) state bar programs offer no alternative recourse to clients and beneficiaries time-barred by a statute of repose; and

- (4) any new exception for estate planning malpractice would be a radical departure not only from long-established California jurisprudence but also from that of the vast majority of other jurisdictions.

Founded in 1978, HALT is a nonprofit, nonpartisan public interest group that pursues an aggressive education and advocacy program which challenges the legal establishment to improve access and accountability in the civil justice system. As part of our reform efforts, HALT has worked to help victims of attorney misconduct obtain recourse. HALT has written extensively on this subject and has published *Using a Lawyer: And What To Do if Things Go Wrong* and *If You Want to Sue a Lawyer: A Directory of Legal Malpractice Attorneys*. Most recently, HALT filed an *amicus curiae* brief in the California Supreme Court legal malpractice case, *Viner v. Sweet*.

HALT has also worked extensively in the area of estate planning reform, publishing a number of books on the subject, including *The Easy Way to Probate: A Step-By-Step Guide to Settling an Estate*; *Wills: A Do-It-Yourself Guide*; and *Your Guide to Living Trusts & Other Trusts: How Trusts Can Help You Avoid Probate and Taxes*. As an organization that regularly hears from legal consumers about the obstacles they face when bringing legal malpractice actions arising out of estate planning errors, HALT is in a unique position to offer input about the impact that a shortened statute of limitations would have on legal consumers and their beneficiaries.

In light of the extensive work we have done in the areas of legal malpractice and estate planning reform as well as the feedback we have received from legal consumers for over a quarter of a century, HALT urges the CLRC to resist the estate planners' self-interested desire for an unnecessary and harmful exception to the current statute of limitations in California.

I. Estate Planners Have not Demonstrated Any Need for this Radical Change in California Law.

Comments to the CLRC from estate planners do not establish the necessity for a drastic change to the statute of limitations for legal malpractice. Although many attorneys speculate that they may face litigation decades after drafting an estate plan, there has been no showing on the record of this hypothetical situation actually occurring and unduly prejudicing the rights of any practitioner. To avoid what is at best a speculative exposure, estate planning attorneys are willing to severely curtail the right of clients injured by their attorneys' negligence or incompetence to seek compensation through a common law legal malpractice suit.

Indeed, the only showing that *has* been made on the record is that there is absolutely no need for a change in the law. Attorney John Perrott reminds us that we should:

...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 (Comments of John Perrott, Exh. 50).

This remedy provides estate planners with sufficient protection, yet nearly all the attorneys submitting comments – with the notable exception of Mr. Perrott – insist that a sweeping change in the law is urgently needed without providing any evidence that supports this assertion.

In proposing this unnecessary departure from current law, estate planners dismiss the fact that a seven to ten year statute of repose would lapse before most clients or beneficiaries would be able to detect attorney errors. As they well know, defects in estate plans are not generally discoverable until a client's death and probate of the estate. In many cases, a statute of repose would lapse before beneficiaries are even born or of adult age. Without clear evidence of the need for this special exception, the CLRC should reject a recommendation with such draconian consequences.

A. Exposure to malpractice lawsuits should be reduced by developing careful and prudent work practices, not by precluding injured clients and beneficiaries from bringing legitimate lawsuits.

The chief grievance raised by estate planners is that they may have to face possible malpractice claims brought years after completion of work on an estate plan. While all who submitted comments profess to being careful and professional estate planners who have never had claims filed against them, they nonetheless speculate that “it is only a matter of time” before they are sued (quote from Comments of Dwight Griffith, Exh. 29; see also Comments of Robert Goodwin, Exh. 28, Kelly Carroll, Exh. 8 and William H. Soskin, Exh. 72). Refusing to acknowledge that malpractice suits are rarities, estate planners instead groundlessly suggest that these claims are a common occurrence caused by clients and beneficiaries who are innately litigious and inclined to bringing frivolous lawsuits.

As an organization that hears every day from individuals who have suffered as a result of attorney misconduct, we can assure the CLRC that malpractice lawsuits are rarely frivolous. If anything, malpractice is under-prosecuted because it is so difficult to find a plaintiff-side legal malpractice attorney. We regularly hear from California legal consumers, particularly those in rural communities, who cannot find an attorney willing to sue another attorney.

In addition, many harmed clients and beneficiaries do not even consider a malpractice case because they realize that the standard for proving malpractice is a very demanding one. As the California Supreme Court recently ruled, plaintiffs in transactional malpractice cases – including estate planning malpractice – may only recover damages by showing that but for their attorney’s negligence, they would have achieved a better result (*Viner v. Sweet*, 30 Cal. 4th 1232, 1235 (2003)). Malpractice actions are not brought simply because clients and beneficiaries have a whim to sue estate planners; they are brought only when harm caused by an attorney has been so severe that it justifies the immense effort and expense required to litigate a lengthy malpractice action.

B. The cost of extended insurance coverage does not justify the need for a statute of limitations that would prematurely bar harmed clients and beneficiaries from bringing malpractice actions.

Many estate planners protested on the record about the “unfair” expense of professional liability insurance (Comments of Irwin Goldring, Exh. 25, Sandra Locke, Exh. 40, Donald Gary, Jr., Exh. 22, John Dundas II, Exh. 15 and James Walker IV, Exh. 77). One attorney, Paula Matos, states: “[T]wenty years later I still have to worry about the hundred or so estate plans I worked on as a fledging associate! And unless you do something about it, I will have to worry about it twenty years hence!” (Comments of Paula Matos, Exh. 42.) Ms. Matos went on to complain that the “specter of that Sword of Damocles still hanging over my gray and trembling head twenty years from now is not pleasant.” Perhaps attorneys would not need to be so fearful if they did not undertake responsibility for the estate plans of families while acknowledging that they are merely “fledgling associates.”

The problem is not the expense of malpractice insurance; the problem occurs when attorneys draw up estate plans – legal instruments that are often the most important and precious to clients and families – without possessing the requisite skill and experience or exercising the necessary care. The statute of limitations for legal malpractice should not be dramatically altered simply to immunize the possible errors of inexperienced and incompetent attorneys.

C. California law already limits an attorney’s malpractice exposure to within one year of the attorney’s death.

Some attorneys on the record even pose 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 the statute of limitations for malpractice in the estate planning area has not lapsed” (Comments of Daniel Crabtree, Exh. 13). This concern, as the Commission correctly noted, is without merit because any claim against the attorney’s

estate must be brought within one year of the attorney's death. Cal. Code Civ. Proc. § 366.2.

D. The asserted difficulty of litigating a stale claim is a false concern because capable estate planners keep their records up to date.

Estate planners also complain that they will not be able to successfully defend a legal malpractice claim brought by beneficiaries after a client's death because "trying to recall client conversations and directions 30 or 40 years after the fact is virtually impossible" (Comments of William H. Soskin, Exh. 72). Instead of developing better methods for memorializing discussions with clients, estate planners would rather simply preclude them from bringing suits.

In addition, the fear that a plethora of suits will be brought 30 or 40 years after the completion of an estate plan defies logic. Most clients simply do not form an estate plan forty years before their death and never return to it with updates or amendments. Each time a client returns for a modification, the estate planner has an opportunity to review her previous work or ask the client to confirm or clarify an earlier instruction. And in the rare circumstance in which a client does not wish to make updates, no capable estate planning attorney would let records lapse for decades without follow-up. Indeed, many estate planners stated on the record that this is a regular part of their practice (Comments of Robert Goodwin, Exh. 28). We should not preclude legitimate lawsuits simply because an attorney's memory is faulty and she never made the effort to obtain clarification.

E. The current statute of limitations is anything but a "threat to the public."

Perhaps the estate planners' most astonishing assertion is that the current statute of limitations "is more of a threat to the public than a benefit" because it discourages attorneys from practicing estate planning (Comments of Maxine Burton, Exh. 1). In response to this insincere presumption, we share the views of attorney Perrott, who explains:

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 (Comments of John Perrott, Exh. 50).

Estate planners may respond that with the rise of self-help materials and other less expensive alternatives, they will be priced out of the market if they raise their rates to accommodate the cost of extended insurance coverage. If an estate is quite valuable and the attorney is well-qualified, the increased rate should make little difference to the client. If, on the other hand, an estate is small, self-help materials and other more affordable nonlawyer alternatives might be a better way of managing the estate. Therefore, any concern about the current statute of limitations being a detriment to clients is wholly unjustified.

F. Far from demonstrating the necessity of a shortened statute of limitations, the comments of estate planners amount to little more than exaggerated and speculative fears.

Comments from many of the estate planners are startling in their hostility toward clients and their exaggerated cries of self-pity. Attorney Lynn Stutz’s comments reflect the perspectives of many estate planners on the record, when she complained:

All of the onus is on the attorney.... 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 if discovered sooner could be remedied. They can wait until the only ‘fix’ is money.... There is no closure, no retirement, no true peace for the estate planning attorney” (Comments of Lynn Stutz, Exh. 73).

Perhaps this attorney should have found a different line of work. Lawyers who view their clients as adversaries should not be shaping professional liability policy in California, and their exaggerated “Chicken Little” cries that “the sky is falling” should be ignored by the CLRC.

The self-interestedness of the estate planners’ position becomes abundantly clear with comments such as those provided by attorney Christopher Enge, who stated that a “side benefit” of the statute of repose is that “clients would be motivated to have their plans updated, to restart the statute of limitations” (Comments of Christopher Enge, Exh. 18). Under Mr. Enge’s plan, clients would be forced to pay estate planners needless additional funds simply to preserve their own and their beneficiary’s right to sue once the statute of repose lapses. A statute of repose translates into more business – and easy business – for estate planners.

* * * * *

Arguments raised by the estate planners amount to little more than exclamations of self-pity, antagonism toward clients, exaggerated alarm and groundless speculation.

They do not demonstrate any need for a radical departure from long-settled California jurisprudence. Before considering such a drastic move, private market alternatives, such as a self-insurance cooperative for estate planners or a voluntary compensation fund for those shielded by the statute of repose, should be exhausted.¹

II. The Estate Planning, Trust and Probate Law Section's Proposal Unduly Prejudices the Rights of Injured Clients and Beneficiaries

As CLRC Staff Memorandum 2003-14 highlights, the estate planners' proposals would cause many – and perhaps most – clients and beneficiaries to go uncompensated for serious harm caused by a careless estate planning attorney. Remarkably, the vast majority of estate planning attorneys who submitted comments are outspoken about the alleged unfairness of the current statute of limitations, but completely ignore the inequities that a statute of repose and a notice-triggered time limit would pose to consumers.

A statute of repose would begin to run as soon as an estate planning document is drafted and would lapse before most clients or beneficiaries would be able to detect attorney errors because defects are not generally discoverable until the client's death and probate of the estate. In many cases, a statute of repose would lapse before beneficiaries are even born or of adult age.

A notice-triggered time limit is equally problematic. While the Notice of Termination informs clients that a statute of repose is starting to run, it does not alert beneficiaries to the urgency of examining the estate plan for attorney error. And, even if notice were required to be given to beneficiaries, the same problem exists as with the statute of repose: most defects are not discoverable until after the client's death and many beneficiaries would not yet have been born or be of adult age. Even putting these significant problems aside, the Notice of Termination essentially requires the client – and accessible beneficiaries – to retain a second attorney to review the documents so that the statute does not lapse before the malpractice is discovered. This additional cost to clients and beneficiaries is unjustified.

¹ Some have suggested the 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. They propose that contributions to the fund would be voluntary, but the statute of repose would only apply to attorneys who contribute. We would note that to be fully effective, such a new fund must extend to the full range of malpractice and cover attorney negligence, not merely dishonesty and fraud. In addition, any such fund should not place a cap on the amount that a victim could be reimbursed.

Even more troubling, the statute of repose and the notice-triggered time limit could actually encourage individuals to delay estate planning until they believe they are approaching death, so that they can preserve their beneficiaries' right to sue for common law malpractice. This could result in a large population of individuals who die without wills or trusts because they were waiting until the eleventh hour to have an attorney draft the estate plan. It could also mean that many individuals who form estate plans will be incompetent or incapacitated because they will wait until they are faced with a life-threatening illness to develop an estate plan.

Comments from estate planners suggest that their proposed exceptions would apply to a very small and discrete subset of malpractice cases. Although the estate planners would have this Commission believe that the exception would be only infrequently invoked, data from the American Bar Association Standing Committee on Lawyers' Professional Liability refutes this assertion. According to the committee's survey, *Legal Malpractice Claims in the 1990's*, malpractice claims in the estate, probate and trust area accounted for 7.59 percent of all malpractice claims from 1990-95. Estate planning malpractice ranked seventh of 25 areas analyzed, but the increase from the 1983-85 figures to the 1990-95 figures was the sixth greatest. Therefore, the estate planning area contributes significantly to the overall number of malpractice claims, and any new exception would be invoked frequently.

Not only do estate planning errors account for a large portion of malpractice claims, they also are responsible for creating perhaps the most profound financial impact on victimized individuals. When someone seeks the assistance of an attorney to draft an estate plan, rather than relying on self-help materials, the estate is typically complex and quite valuable. An error by an attorney can have massive fiscal consequences. With so much at stake, it would be manifestly unfair to change the law so that fewer clients and beneficiaries can bring claims against careless estate planners.

In addition to the profound financial consequences of estate planning error, the CLRC should also weigh the extreme emotional impact of this particular form of malpractice. Imagine the pain of an individual losing a loved one, discovering that an incompetent attorney made a major error 10 years ago in the loved one's estate plan and being deprived of funds the loved one intended for the individual to receive, and then, adding insult to injury during this most difficult time, being prohibited from filing any claim against the unscrupulous attorney simply because of a new, lawyer-inspired exception in the statute of limitations.

III. State Bar Programs Do not Provide Viable Alternatives for Victims Time-Barred from Bringing Malpractice Claims.

Unfortunately, if a statute of repose or a notice-triggered time limit were to bar a harmed client or beneficiary from filing an action for malpractice, the individual would not be able to find alternative forms of recourse through state bar programs.

One suggestion made in CLRC Staff Memorandum 2003-14 is to allow time-barred plaintiffs to seek compensation through the state's Client Security Fund. However, the Client Security Fund, under California Rules of Procedure, does not reimburse individuals for losses arising out of the negligent or incompetent actions of an attorney. Instead, the fund only compensates for losses resulting from an attorney's dishonesty or fraud. Therefore, in most cases, the Client Security Fund provides no alternative to an individual who has been time-barred from bringing a legal malpractice action.

The attorney discipline system would also be unable to offer monetary relief to victimized clients and beneficiaries. As a rule, California's discipline system, like disciplinary bodies in most states, does not offer restitution to complainants. Even if a client simply wished to see sanctions imposed upon an unscrupulous attorney, our research demonstrates that the state bar rarely metes out discipline. According to the most recent statistics from the American Bar Association's Survey on Lawyer Discipline Systems, only four percent of investigated cases led to formal discipline in 2001.²

Without the opportunity to collect restitution through California's Client Security Fund or the attorney discipline system, clients and beneficiaries who are time-barred from bringing malpractice actions would simply be out of luck.

IV. A Statute of Repose would be a Radical Departure from Current California Law and the Laws of the Vast Majority of States.

A new statute of repose in the isolated area of estate planning malpractice would contradict long-established California jurisprudence disfavoring such statutes. In addition, this new exception would be at odds with the California statute of limitations

² In addition, HALT's 2002 Lawyer Discipline Report Card, a comprehensive evaluation of attorney discipline systems nationwide, found that California's system is remarkably unresponsive to consumers. The state received particularly low marks for featuring a confusing automated telephone system that prevents consumers from obtaining prompt answers to specific questions from the agency. California's discipline system offers little recourse to individuals who would be time-barred from bringing lawsuits against careless estate planning attorneys.

governing medical malpractice, which tolls until discovery of injury. A statute of repose also runs contrary to the laws of the vast majority of states and would put California in the tiny minority of jurisdictions, such as North Carolina and Montana, which severely curtail clients' rights.

A. California has rejected statutes of repose in nearly all contexts.

As Ellen Nudelman states in her CLRC staff memorandum, California law generally looks unfavorably upon statutes of repose (Comments of Ellen Nudelman, Exhs. 81-82). As Ms. Nudelman points out, the few clear statutes of repose that exist in California are specific to property and isolated securities law matters. Specifically, sections 337.2 and 339.5 of the California Code of Civil Procedure provide for statutes of repose for breaches of unwritten leases and abandonment of property. The statute of repose in section 349.2 applies to lawsuits contesting the validity of authorization, issuance and sale of bonds by public utilities.

While these statutes do not require actual injury, they do apply in contexts where an aggrieved party would be likely to discover injury before the statute of repose lapses. If property is abandoned, for example, a landlord will likely notice this and be able to sue the wrongful tenant before the two-year statute of repose expires. Similarly, the bonding process has a built-in timing component – the point of sale – that acts as a trigger for scrutiny.

In the context of estate planning malpractice, however, it is unlikely that most clients and beneficiaries would have the opportunity to discover error before the occurrence of actual injury. As stated earlier, in many cases, beneficiaries would not even have been born or of adult age by the time the proposed statute of repose would lapse.

California's law makes it clear that statutes of repose should only govern cases where injury is easily discovered prior to the statute lapsing. Estate planning malpractice represents the antithesis of this rule – for discovery of malpractice usually occurs after the client's death.

B. A statute of repose would run contrary to California's general malpractice jurisprudence.

California's current statute of limitations for legal malpractice clearly conforms with the principles behind California's statute of limitations for medical malpractice. Despite minor differences of language in Code Civ. Proc. § 340.5, applicable to medical malpractice actions, and Code Civ. Proc. § 340.6, applicable to legal malpractice, the statute of limitations in both laws commence only once the plaintiff has suffered the effects of the injury. The establishment of a statute of repose for estate lawyers, which

would effectively have the statute of limitations start to run from the time in which a document is drafted, would contradict a well-established rule in California's malpractice law.

Code Civil Procedure §340.5 provides:

In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the *date of injury* or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. Cal. Code Civ. Proc. § 340.5 (emphasis supplied).

California courts have clearly established that the phrase "date of injury" refers to when the plaintiff becomes "aware of the physical manifestation of the injury" (*Hills v. Aronsohn* 152 Cal App 3d 753 (1984)). In *Hills*, a patient had to undergo surgery after detecting lumps in her skin that developed due to a previous negligent breast implant. The court held that the three-year statute of limitations started running once the plaintiff noticed the physical manifestation of her injury. See also *Steingart v. Oliver*, 243 Cal. Rptr. 678, 682 (1998) (where the statute of limitation commenced only with the diagnosis of a disease); see also *Larcher v. Wanless* 557 P.2d 507, 512 (Cal. 1976) (where the statute of limitation began at the death of the mistreated patient).

Estate lawyers might respond that medical malpractice cases cannot be compared to legal malpractice because medical error is usually manifested sooner than an error in the writing of a will or trust. However, the same definition of a "date of injury" has been used even in cases where a medical error was only discovered after an extensive period of time. *Martinez-Ferrer v. Richardson-Merrel*, 164 Cal. Rptr. 591, 595 (1980). In *Martinez-Ferrer*, a patient was given medication that caused an initial temporary irritation and dermatitis, but also caused the plaintiff to develop cataracts in his eyes 16 years later. The court held that his claim brought after developing of the cataracts was still within the three-year statute of limitations, even though it came 16 years after the doctor prescribed the medication.

A statute of repose exception for estate planning malpractice would therefore run contrary not only to the general statute of limitations rule for legal malpractice, but also the California statute for medical malpractice.

C. Only four states have adopted statutes of repose such as the one advocated by the estate planners.

The vast majority of states do not have statutes of repose for estate planning malpractice. In her June 13, 2002 memorandum to the CLRC, Ms. Nudelman discusses seven states – North Carolina, Alabama, Montana, Illinois, Louisiana, South Dakota and Connecticut – where she has found statutes of repose (Comments of Ellen Nudelman, Exh. 82).

While these seven states do have such statutes on the books, North Carolina, Montana, Louisiana and Connecticut impose rigid statutes of repose; the remaining states sharply limit the applicability of their statutory schemes.

Illinois' statute of repose for legal malpractice provides an exception for estate planning malpractice. Subsection (d) of Illinois Code of Civil Procedure section 13-214.3 provides that the statute of repose is inapplicable to an injury that does not occur until the client's death. Therefore, if the injury occurs after a client's death, a plaintiff may still bring a legal malpractice action against an estate planner so long as she brings her suit within the general statute of limitations.

A literal reading of Alabama's statute of repose, Ala. Code 175 § 6-5-574, allows a maximum four year limit on legal malpractice commencing from the date of the act, omission or failure giving rise to the claim. However, in practice, courts have historically interpreted the Alabama Legal Services Liability Act as allowing time limits to be measured from the date of accrual of an action and not from the occurrence or omission, as the Act's language might indicate. In recent years, the Alabama Supreme Court has upheld both the "accrual" and "occurrence" approaches, so the meaning of the statute remains unclear (*Floyd v. Massey*, 807 So. 2d 508 (2001)).

South Dakota allows its statute of repose to toll through its doctrine of continuous representation. Under this doctrine, the statute tolls until the attorney-client relationship ends, which is marked by the last bill sent to the client. Therefore, the state's statute does not operate as a "true" statute of repose. So long as the client continues to update her will, for example, the statute is tolled.

Thus, only four states enforce pure statutes of repose for legal malpractice arising out of estate planning error.

Conclusion

HALT respectfully requests that the CLRC resist the estate planners' self-interested appeal to severely curtail the current statute of limitations. Carving out a special exception for estate planning malpractice would leave most clients and beneficiaries without any recourse against unscrupulous and incompetent estate planners. It would also represent a radical change in California law and place California in a very tiny minority of states that artificially curtail clients' rights. Charged with helping the legislature to implement *needed* reforms, the CLRC should reject the estate planners' unnecessary and harmful recommendation.

Respectfully submitted:

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