

NAVIGATING THE ONE-YEAR STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE CLAIMS



1. Introduction

Clients who want to sue their attorneys for any claim (except fraud) have only one year to do so (as explained in this article). In contrast, attorneys have between two and four years to sue clients for nonpayment of their invoices. This disparity, and the complex way the clients' one-year deadline is calculated, often results in clients waiving their legal malpractice claims. This article explains how to avoid this terrible result.

2. What Are Statutes Of Limitations?

Statutes of limitations are rules that set the deadlines for injured parties to file lawsuits. If the injured party fails to file the lawsuit by the deadline, then the injured party's claims are forever barred.

3. What Is The California Statute Of Limitations For Claims By Clients Against Their Attorneys?

In California, the statute of limitations for all claims by clients against their attorneys (except fraud) is governed by *Code of Civil Procedure* section 340.6, which generally requires claims to be filed within one year of discovering the wrongful act or omission (also known as malpractice), or within four years from the date of the malpractice, whichever occurs first.

Code of Civil Procedure section 340.6 states as follows:

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. If the plaintiff is required to establish the plaintiff's factual innocence for an underlying criminal charge as an element of the plaintiff's claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case. Except for a claim for which the plaintiff is required to establish the plaintiff's factual innocence, the time for commencement of legal action shall not 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 those facts are known to the attorney, except that this subdivision shall toll only the four-year limitation.
4. The plaintiff is under a legal or physical disability that 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 that act or event.

4. How To Calculate Deadlines Under *Code Of Civil Procedure* Section 340.6

A. Step One – Does The Client Know About The Claim?

The one-year period starts when the client discovers, or through reasonable diligence should have discovered, the facts constituting the malpractice. The so-called “discovery rule” requires the client to act with reasonable diligence. If the client has information that would lead a reasonable person to suspect their attorney was negligent, then the statute begins running even if the client does not have actual knowledge of the malpractice.

B. Step Two – Is The Claim Based On A Written Instrument?

If the claim is based on a written instrument (e.g., a will), and the effective date of the writing depends on a future act or event (e.g., the death of person with a will), then the limitations period begins at the occurrence of that act or event.

C. Step Three – Do Any Tolling Provisions Apply?

i. No Actual Injury

The client must sustain actual injury due to the malpractice for the statute of limitations to commence accruing. If the client has not suffered harm, then the statute is tolled until an injury occurs. *Jordache Enter., Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 758. “Actual injury occurs when the client suffers any loss or injury legally cognizable as damages in a legal malpractice action based on the asserted errors or omissions.” *Id.* at p. 743.

Determining if the client has sustained an injury to trigger the limitations period is sometimes difficult because legal malpractice plaintiffs suffer actual injury when they incur any loss or harm that can be attributed to the attorney’s negligence, even if the extent of the damage is unknown. *Jordache Enter., Inc. v. Brobeck, Phleger & Harrison, supra*, 18 Cal.4th at p. 752.

[A]ctual injury need not be defined in terms of a monetary amount. Similarly, the limitations period is not tolled after the plaintiff sustains actual injury if the injury is, in some sense, remediable. Furthermore, the statutory scheme does not depend on the plaintiff’s recognizing actual injury. Actual injury must be noticeable, ***but the language of the tolling provision does not require that it be noticed.***

Foxborough v. Van Atta (1994) 26 Cal.App.4th 217, 226-27 (Cleaned up.) (Emphasis added.).

The California Supreme Court recognized the challenge of articulating a “rule for all seasons.” *Adams v. Paul* (1995) 11 Cal.4th 583, 588. “[D]epending on the particulars, actionable harm may occur at any one of several points in time subsequent to an attorney’s negligence.” *Ibid.* Therefore, determining when “actual injury” occurs “is generally a question of fact” contributing to the difficulty in assessing when the statute starts to run. *Ibid.*

The *Adams* Court describes the occurrence of “actual injury” as existing on a spectrum. On one hand there exists the “classic” missed statute case, where the attorney misses the deadline to file an action, and the client’s right becomes substantially impaired. *Adams v. Paul, supra*, 11 Cal.4th at p. 589. The Court explained that “the loss or diminution of a right or remedy is well recognized as constituting injury or damage.” *Id.* at p. 590. In contrast, there are situations where the attorney’s negligence may only create a potential for future harm. *Adams v. Paul, supra*, 11 Cal.4th at p. 590. In the latter situation, while it may appear a statutory period expired, “questions of waiver, estoppel, or even the applicable limitations period may raise factual issues concerning when the attorney’s negligence caused definite and certain injury or more than nominal or insubstantial damages.” *Id.* at pp. 590-91. In such situations “the determination of actual injury does not necessarily depend upon or require some form of final adjudication, as by judgment or

settlement.” *Id.* at p. 591. The spectrum of factors to determine actual injury sometimes makes it difficult to determine when the legal malpractice statute of limitations starts running.

Example: If an attorney negligently failed to file a crucial document in a lawsuit, but the case is still ongoing and the client has not yet suffered any adverse judgment or loss, the statute of limitations would likely not start accruing until the attorney-client relationship terminated and the client suffers harm, such as losing the case due to the missing document. But actual injury may occur before a final adverse judgment. For instance, a client who incurs legal fees when replacement counsel corrects the first negligent attorney’s mistake may constitute actual injury sufficient to start the limitations period. *Jordache Enter., Inc. v. Brobeck, Phleger & Harrison, supra*, at pp. 756-57

Determining when a former client was harmed by their attorney’s negligence is a fact-specific analysis. If a client has any inkling their attorney committed malpractice, they should promptly retain malpractice counsel to evaluate whether the one-year statute of limitations started accruing.

ii. Continuous Representation

If the attorney continues representing the client on the specific matter where the malpractice occurred, then the statute is “tolled” (i.e., paused).

[T]he inquiry into when representation has terminated does not focus on the client’s subjective beliefs about whether the attorney continues to represent him or her in the matter. Instead, the test is objective and focuses on the client’s reasonable expectations in light of the particular facts of the attorney-client relationship. In deciding whether an attorney continues to represent a client, we do not focus on the client’s subjective beliefs; instead, we objectively examine evidence of an ongoing mutual relationship and of activities in furtherance of the relationship. Representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. In other words, tolling under the continuous representation exception ends when a client has no reasonable expectation that the attorney will provide further legal services.

Nguyen v. Ford (2020) 49 Cal.App.5th 1, 14 as modified (Cleaned up.).

Determining when the attorney-client relationship ended is sometimes clear such as when the attorney or client dies, an attorney sends a client a termination letter, or the court grants an attorney’s motion to withdraw as counsel. Sometimes it is not clear due to several factors including poor communication between the attorney and client. In those scenarios, sources to examine include the attorney’s invoices (because if a lawyer is still billing the client, it indicates the representation is ongoing) and email correspondence (because if a lawyer is still providing written legal advice, then the relationship probably is ongoing).

For example, if an attorney handled a real estate transaction for a client that closed on January 1, 2023, but the attorney continued assisting the client with post-closing matters related to the same transaction until March 1, 2023 (e.g., addressing disputes arising from the sale), then the representation is considered ongoing, and the statute of limitations will not begin running until March 1, 2023. This tolling can continue even if the specific tasks change, so long as there is evidence of an ongoing attorney-client relationship and of activities in furtherance of the relationship.

Aggrieved clients should be aware that if an attorney representing them leaves the law firm he or she practices at, and the client moves the case to the lawyer's new firm, then the continuous representation ends as to the former firm because the firm no longer represents the client. *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 505. So, the statute of limitations on the client's claims as to the attorney's former firm starts running from the date the attorney representing the client stopped working at the firm. *Ibid.*

iii. Willful Concealment

If a lawyer conceals their mistake from a client, then the one-year statute of limitation does not start running until the client learns of the lawyer's error or by the exercise of reasonable diligence that should have discovered it. This tolling exception only applies to the four-year limitation period, and the tolling lasts only for that period during which the claim is undiscovered by the client or until the time that the client, by the exercise of reasonable diligence, should have discovered it.

iv. Disability

If the client has a legal disability (e.g., is under 18 years old) or physical/mental disability that restricts the plaintiff's ability to file suit, then the statute of limitations does not start running until that disability no longer affects the client's ability to act.

v. Miscellaneous Tolling Provisions

A bankruptcy filing by the client, or the attorney the client is suing, can toll the statute of limitations for legal malpractice claims. A plaintiff's death may also toll the one-year limitations period. *Code of Civil Procedure* section 366.1 specifies if a person entitled to bring an action dies before the expiration of the statute of limitations, then the period of limitations is extended by six months from the person's death or the limitations period that would have applied but for the death, whichever is later.

If the court assumes jurisdiction over an attorney's law practice (i.e., due to the attorney's death, discipline, inactive enrollment, physical or mental injury, or excess use of alcohol/drugs), and the court assumes jurisdiction before the malpractice claim against the attorney expires, then the statute of limitations is extended for six months from the date of entry of the order assuming jurisdiction. *Business and Profession code* sections 6180-6180.14; *Code of Civil Procedure* section 353.1.

The statute of limitations may be tolled during the attorney's absence from California if the attorney was out of state when the action accrued or left the state after it accrued. *Code of Civil Procedure* section 351.

An attorney may be equitably estopped from asserting the statute of limitations as a defense to malpractice where the attorney's advice was responsible for the client's late filing. *Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 405. To prove the late filing was due to the attorney's advice the client must identify specific conduct by the attorney that induced them to delay filing suit. *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 686-87.

5. How To Stop The Statute Of Limitations Period From Accruing

Clients who have been harmed by their former attorneys can take action to stop the limitations period on their legal malpractice claim from accruing by: (a) getting a tolling agreement signed; (b) filing a mandatory fee arbitration petition; or (c) filing a lawsuit against their former attorney for malpractice.

A tolling agreement is an agreement the attorney and client sign agreeing that the statute of limitations stops accruing. Sometimes, attorneys sign these agreements to give both sides time to evaluate the claim before a lawsuit is filed. Clients have a right to non-binding fee arbitration with their local bar associations to resolve fee disputes. Upon the filing of a petition for fee arbitration, the one-year statute of limitation on client's claims against attorneys stops accruing until the arbitration is finished. *Code of Civil Procedure* section 340.6(a)(5). Of course, a timely filed lawsuit stops the one-year statute of limitations from accruing.

6. Conclusion

Legal malpractice law is a specialty practice. There are only 93 attorneys in California who are California State Bar-certified legal malpractice specialists, and Mark B. Wilson is one of them. Most of the specialists represent law firms. Klein & Wilson LLP represents former clients *against* law firms. If you have a potential legal malpractice case, then call Klein & Wilson LLP at (949) 239-0907. We have recovered over \$40 million for legal malpractice victims. We know how to win these difficult cases.

