

PROFESSIONAL LIABILITY UPDATE

STATUTE OF LIMITATIONS

By Jennifer A. Becker

***Vafi v. McCloskey* (2011) 193 Cal.App.4th 874 903**

The Second District holds that the statute of limitations for claims made by non-clients against attorneys acting in their professional capacity is governed by C.C.P. § 340.6

Sassan Vafi and Kathleen Keller filed counter suits against each other in connection with a trademark dispute. Vafi lost his claims on the pleadings and Keller later dismissed her action with prejudice. More than a year later Vafi filed a malicious prosecution action against Keller and her counsel, Heather McCloskey and the law firm of Ervin, Cohen & Jessup, LLP (McCloskey). McCloskey filed a motion to strike under C.C.P. § 425.16, the anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute. McCloskey alleged her petitioning activity was constitutionally protected and Vafi could not show a reasonable probability of prevailing on the merits because his action was barred by the statute of limitations for actions against attorneys, C.C.P. § 340.6. The trial court granted the motion.

The Court of Appeal disagreed with Vafi's assertion that he had two years to file his complaint under C.C.P. § 335.1 which applies to claims for injury to an individual caused by a wrongful act or neglect. Although this section applies to malicious prosecution generally, C.C.P. § 340.6 applies to an action for malicious prosecution against an attorney. When general and particular statutory provisions are inconsistent, the particular provision governs.

The gravamen of the action, rather than the form of action or the relief demanded, determines the applicable statute of limitations. The gravamen of Vafi's complaint was McCloskey's alleged wrongful conduct in performing professional services for Keller.

Applying principles of statutory construction the Court of Appeal found that the language of § 340.6 was clear and unambiguous. It applies to all actions, except those for actual fraud, brought against an attorney "for a wrongful act or omission" which arise "in the performance of professional services." There is no exemption for malicious prosecution claims.

This conclusion was supported by precedent which held that a client's action for breach of fiduciary duty was governed by § 340.6 rather than the statute applicable to breach of fiduciary duty claims generally.

Section 340.6 is not limited to suits by clients against attorneys for malpractice. The statute refers to "the plaintiff," rather than to a client. The continuous representation tolling provision referring to "the plaintiff" does not change the meaning of the word "plaintiff" to "client." No

other tolling provisions limit the statute to client actions rather than third party claims.

The statute refers to “a wrongful act or omission,” not malpractice. The Legislature could have used different words if the section was to be limited to clients and their attorneys. Courts have consistently applied § 340.6 to various tort and contract actions.

Comment: This case provides needed clarity that the statute of limitations for all claims against attorneys acting in their professional capacity, with the exception of fraud, is governed by C.C.P. § 340.6