

## PROFESSIONAL LIABILITY UPDATE

### STATUTE OF LIMITATIONS

By John B. Sullivan

***Roger Cleveland Golf Company, Inc. v. Krane & Smith, APC, (2014) 225 Cal.App.4th 660***

*The Second District holds California Code of Civil Procedure § 340.6 does not apply to malicious prosecution claims against an attorney.*

Krane & Smith, LLC, Marc Smith, and Ralph Loeb (“Attorneys”) represented Sportsmark in litigation against Roger Cleveland Golf Company, Inc. Sportsmark filed a breach of contract complaint when RCG did not renew its distributorship agreement. The trial court granted RCG’s motion for nonsuit. Sportsmark filed a timely notice of appeal, although the appeal was later dismissed.

More than a year after the trial court decision, RCG filed a malicious prosecution complaint against Attorneys, claiming they maliciously filed and continued to prosecute the underlying proceeding without probable cause. RCG claimed Sportsmark’s attorney admitted the lawsuit had no merit, but he needed only to get the case before the jury.

The Attorneys filed an Anti-SLAPP (anti-Strategic Lawsuit Against Public Participation) motion arguing, among other things, the malicious prosecution complaint was time-barred under California Code of Civil Procedure section 340.6(a), which the trial court granted.

The Court of Appeal held RCG’s claim for malicious prosecution accrued on the day the trial court entered judgment. The statute ran

until Sportsmark filed a notice of appeal. RCG could not maintain a cause of action based upon the judgment during the pendency of the appeal; thus the statute of limitations could not run. Contrary to holdings in other Appellate Districts, the Court held Code of Civil Procedure § 340.6 does not apply to malicious prosecution actions against an attorney. Instead, the statute of limitations period for malicious prosecution is two years under Code of Civil Procedure § 335.1 whether the defendant is a former adversary or attorney.

The Court concluded the Legislature actually intended “plaintiff” to mean “client” in § 340.6, and subsection (a) does not apply to third party actions. The Court concluded the legislative history indicated the Legislature intended to create a specially tailored statute of limitations for legal malpractice actions, just as it had for medical malpractice. The Court found no indication the Legislature considered malicious prosecution actions against attorneys when enacting § 340.6. Finally, it concluded that there was no public policy reason for providing a more circumscribed limitations period for malicious prosecution attorney defendants than for client defendants.

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Nonetheless, the Court concluded the motion was properly granted because RCG did not meet its minimal burden to show Attorneys acted with malice in filing or continuing to litigate the *Sportsmark* action for an improper purpose. It noted that the attorney's comments about getting the case before a jury were typical in litigation, and no inference of malice could be made even viewed in the light most favorable to RCG.

*Comment:* The Second District disagrees with other Districts holding all claims against an attorney other than fraud are subject to Code of Civil Procedure section 340.6. The holding is dicta because the court decided the case failed on the malice element, and thus did not need to decide the statute issue.