# PROFESSIONAL NEGLIGENCE

## 600. Standard of Care

**[A/An] [*insert type of professional*] is negligent if [he/she] fails to use the skill and care that a reasonably careful [*insert type of professional*] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."**

**[You must determine the level of skill and care that a reasonably careful [*insert type of professional*] would use in similar circumstances based only on the testimony of the expert witnesses[, including [*name of defendant*],] who have testified in this case.]**

*New September 2003; Revised October 2004, December 2007*

### Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence, for which CACI No. 501, *Standard of Care for Health Care Professionals*, should be used. See CACI No. 400, *Essential Factual Elements* (Negligence), for an instruction on the plaintiff's burden of proof. The word "legal" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. (See *Sources and Authority* following CACI No. 500, *Essential Factual Elements* (Medical Negligence).)

Read the second paragraph if the standard of care must be established by expert testimony.

See CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

If the defendant is a specialist in his or her field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810 [121 Cal.Rptr. 194].) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id.* at pp. 810–811.)

Whether an attorney-client relationship exists is a question of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756].) If the evidence bearing upon this decision is in conflict, preliminary factual determinations are necessary. (*Ibid.*) Special instructions may need to be crafted for that purpose.

## Sources and Authority

- The elements of a cause of action in tort for professional negligence are "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433]; *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 699 [91 Cal.Rptr.2d 844].)
- " 'In addressing breach of duty, "the crucial inquiry is whether [the attorney's] advice was so legally deficient when it was given that he [or she] may be found to have failed to use 'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' . . ." . . . " ' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710].)
- "[T]he issue of negligence in a legal malpractice case is ordinarily an issue of fact." (*Blanks, supra,* 171 Cal.App.4th at p. 376.)
- "It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313, 705 P.2d 886].)
- "The standard is that of members of the profession 'in the same or a similar locality under similar circumstances'. . . . The duty encompasses both a knowledge of law and an obligation of diligent research and informed judgment." (*Wright, supra,* 47 Cal.App.3d at p. 802, internal citations omitted; but see *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470–471 [71 Cal.Rptr.3d 707] [geographical location may be a factor to be considered, but, by itself, does not provide a practical basis for measuring similar circumstances].)
- Rules of Professional Conduct, rule 3-110 (Failing to Act Competently) provides:

  (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

  (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

- Lawyers who hold themselves out as specialists "must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra,* 47 Cal.App.3d at p. 810.) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id.* at pp. 810–811.)
- If the failure to exercise due care is so clear that a trier of fact may find professional negligence without expert assistance, then expert testimony is not required: " 'In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary.' " (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093 [41 Cal.Rptr.2d 768], internal citations omitted.)

### *Secondary Sources*

1 Witkin, California Procedure (4th ed. 1996) Attorneys, §§ 315–318, pp. 385–387

4 Witkin, California Procedure (4th ed. 1996) Pleadings, § 552

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 990, 991, 994–997

Vapnek et al., California Practice Guide: Professional Responsibility (The Rutter Group) ¶¶ 1:39, 6:230–6:234

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.31 (Matthew Bender)

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals,* §§ 30.12, 30.13, Ch. 32, *Liability of Attorneys*, § 32.13 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.50, 76.51 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.50 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.20 et seq. (Matthew Bender)

## 601. Damages for Negligent Handling of Legal Matter

**To recover damages from [*name of defendant*], [*name of plaintiff*] must prove that [he/she/it] would have obtained a better result if [*name of defendant*] had acted as a reasonably careful attorney.**

*New September 2003*

### Directions for Use

In *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820 [60 Cal.Rptr.2d 780], the trial-within-a-trial method was applied to accountants. In cases involving professionals other than attorneys, this instruction would need to be modified by inserting the type of the professional in place of "attorney."

The issue of collectibility does not apply to every legal malpractice action: "It is only where the alleged malpractice consists of mishandling a client's claim that the plaintiff must show proper prosecution of the matter would have resulted in a favorable judgment and collection thereof." (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506 [33 Cal.Rptr.2d 219].)

### Sources and Authority

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. [Citations.] The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433]; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749–750 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- The trial-within-a-trial method "is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance." (*Mattco Forge, supra,* 52 Cal.App.4th at p. 834.)
- "For the reasons given above, we conclude that, just as in litigation malpractice actions, a plaintiff in a transactional malpractice action must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Viner v. Sweet*

(2003) 30 Cal.4th 1232, 1244 [135 Cal.Rptr.2d 629, 70 P.3d 1046], original italics.)

- To prove damages in a legal malpractice action, plaintiff must show the probable value of the lawsuit that he or she has lost. Plaintiff must also prove that careful management of his or her claim would have resulted in a favorable judgment and collection of it. (*Campbell v. Magana* (1960) 184 Cal.App.2d 751, 754 [8 Cal.Rptr. 32].) There is no damage in the absence of these latter elements. (*DiPalma, supra,* 27 Cal.App.4th at pp. 1506–1507.)
- "Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine." (*Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, 231 [60 Cal.Rptr.2d 495].)
- The measure of damages in a case predicated on legal malpractice "is the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission. . . . [I]f a reasonably competent attorney would have obtained a $3 million recovery for the client but the negligent attorney obtained only a $2 million recovery, the client's damage due to the attorney's negligence would be $1 million—the difference between what a competent attorney would have obtained and what the negligent attorney obtained." (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1758 [30 Cal.Rptr.2d 217].)
- " 'The trial-within-a-trial method does not "recreate what a particular judge or fact finder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done . . . ." . . . Even though "should" and "would" are used interchangeably by the courts, the standard remains an *objective* one. The trier of fact determines what s*hould* have been, not what the result *would* have been, or could have been, or might have been, had the matter been before a *particular judge* or jury. . . ." (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710], original italics.)
- "If the underlying issue originally was a factual question that would have gone to a tribunal rather than a judge, it is the jury who must decide what a reasonable tribunal would have done. The identity or expertise of the original trier of fact (i.e., a judge or an arbitrator or another type of adjudicator) does not alter the jury's responsibility in the legal malpractice trial-within-a-trial." (*Blanks, supra,* 171 Cal.App.4th at pp. 357-358.)

### *Secondary Sources*

1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 338, pp. 413–415

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.10 et seq. (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.50 et seq. (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.20 et seq. (Matthew Bender)

## 602. Success Not Required

**[A/An] [***insert type of professional***] is not necessarily negligent just because [his/her] efforts are unsuccessful or [he/she] makes an error that was reasonable under the circumstances. [A/An] [***insert type of professional***] is negligent only if [he/she] was not as skillful, knowledgeable, or careful as other reasonable [***insert type of professional***] would have been in similar circumstances.**

*New September 2003; Revised December 2007*

### Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence, for which CACI No. 505, *Success Not Required*, should be used.

### Sources and Authority

- "The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance." (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 489 [275 P.2d 15].)
- "This rule [of *Gagne v. Bertran, supra*] has been consistently followed in this state with respect to professional services (*Roberts v. Karr*, 178 Cal.App.2d 535 [3 Cal.Rptr. 98] (surveyor); *Gautier v. General Telephone Co.*, 234 Cal.App.2d 302 [44 Cal.Rptr. 404] (communications services); *Bonadiman-McCain, Inc. v. Snow*, 183 Cal.App.2d 58 [6 Cal.Rptr. 52] (engineer); *Lindner v. Barlow, Davis & Wood*, 210 Cal.App.2d 660 [27 Cal.Rptr. 101] (accountant); *Pancoast v. Russell*, 148 Cal.App.2d 909 [307 P.2d 719] (architect))." (*Allied Properties v. John A. Blume & Associates* (1972) 25 Cal.App.3d 848, 856 [102 Cal.Rptr. 259].)
- "The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers." (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 [15 Cal.Rptr. 821,

364 P.2d 685], cert. denied (1962) 368 U.S. 987 [82 S.Ct. 603, 7 L.Ed.2d 525], internal citations omitted.)

- Jury instructions stating this principle are proper: "[A]n attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." (*Smith v. Lewis* (1975) 13 Cal.3d 349, 358 [118 Cal.Rptr. 621, 530 P.2d 589], overruled in part on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851 [126 Cal.Rptr. 633, 544 P.2d 561].)
- "In order to prevail on this theory and escape a negligence finding, an attorney must show that there were unsettled or debatable areas of the law that were the subject of the legal advice rendered and this advice was based upon 'reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 378–379 [89 Cal.Rptr.3d 710].)

### *Secondary Sources*

1 Witkin, California Procedure (4th ed. 1996) Attorneys, §§ 342–345, pp. 418–424

Vapnek et al., California Practice Guide: Professional Responsibility (The Rutter Group) ¶ 6:234

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, §§ 32.11, 32.62 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.50 (Matthew Bender)

1 California Legal Forms, Ch. 1A, *Role of Counsel in Starting a New Business*, §§ 1A.30–1A.32 (Matthew Bender)

## 603. Alternative Legal Decisions or Strategies

**An attorney is not necessarily negligent just because he or she [chooses one legal strategy/makes a decision/makes a recommendation] and it turns out that another [strategy/decision/recommendation] would have been a better choice.**

*New September 2003*

### Sources and Authority

- "We recognize, of course, that an attorney engaging in litigation may have occasion to choose among various alternative strategies available to his client . . . ." (*Smith v. Lewis* (1975) 13 Cal.3d 349, 359 [118 Cal.Rptr. 621, 530 P.2d 589], overruled in part on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851 [126 Cal.Rptr. 633, 544 P.2d 561].)
- " 'In view of the complexity of the law and the circumstances which call for difficult choices among possible courses of action, the attorney cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy *or other procedural step*.' [Citation.]" (*Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 613 [116 Cal.Rptr. 919].)

#### *Secondary Sources*

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.11 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability* (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice* (Matthew Bender)

## 604. Referral to Legal Specialist

**If a reasonably careful attorney in a similar situation would have referred [*name of plaintiff*] to a legal specialist, then [*name of defendant*] was negligent if [he/she] did not do so.**

**However, if [*name of defendant*] handled the matter with as much skill and care as a reasonable legal specialist would have, then [*name of defendant*] was not negligent.**

*New September 2003*

### Sources and Authority

- This type of an instruction was approved for use in legal malpractice cases in *Horne v. Peckham* (1979) 97 Cal.App.3d 404, 414–415 [158 Cal.Rptr. 714], disapproved on other grounds in *ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245, 256 [36 Cal.Rptr.2d 552, 885 P.2d 965].
- Rule of Professional Conduct: Rule 3-110 (C) (Failing to Act Competently) provides: "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required."

***Secondary Sources***

1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 319, pp. 387–388

## 605. Breach of Fiduciary Duty—Essential Factual Elements

*Renumbered to CACI No. 4106 December 2007*

## 606. Legal Malpractice Causing Criminal Conviction—Actual Innocence

**[*Name of plaintiff*] alleges that [*name of defendant*] was negligent in defending [him/her] in a criminal case, and as a result, [he/she] was wrongly convicted. To establish this claim, [*name of plaintiff*] must first prove that [he/she] was actually innocent of the charges for which [he/she] was convicted.**

*New April 2009*

### Directions for Use

Give this instruction after CACI No. 400, *Essential Factual Elements,* and CACI No. 600, *Standard of Care,* in a legal malpractice action arising from an underlying criminal case.

To prove actual innocence, the plaintiff must first prove legal exoneration. (See *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201 [108 Cal.Rptr.2d 471, 25 P.3d 670].) Presumably, exoneration will be decided by the court as a matter of law. If there is a question of fact regarding exoneration, this instruction should be modified accordingly.

However, one may be exonerated without actually being innocent of the charges; for example, by the People's decision not to retry the case on remand because of insufficient evidence. (See *Coscia, supra,* 25 Cal.4th at p. 1205 [exoneration is *prerequisite* to proving actual innocence (emphasis added)].) Do not give this instruction if the court determines as a matter of law that the exoneration does establish actual innocence; for example, if later-discovered DNA evidence conclusively proved that the plaintiff could not have committed the offense.

The exoneration requirement can lead to statute of limitations difficulties if the statutory period (see Code Civ. Proc., § 340.6) runs before exoneration is obtained. (See *Coscia, supra,* 25 Cal.4th at pp. 1210–1211.) See CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*.

### Sources and Authority

- "In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and

diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. In a legal malpractice case arising out of a criminal proceeding, California, like most jurisdictions, also requires proof of actual innocence." (*Wilkinson v. Zelen* (2008) 167 Cal.App.4th 37, 45 [83 Cal.Rptr.3d 779], internal citations omitted.)

- "If the defendant has in fact committed a crime, the remedy of a new trial or other relief is sufficient reparation in light of the countervailing public policies and considering the purpose and function of constitutional guaranties." *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 543 [79 Cal.Rptr.2d 672, 966 P.2d 983].)
- "The question of actual innocence is inherently factual. While proof of the government's inability to prove guilt may involve technical defenses and evidentiary rules, proof of actual innocence obliges the malpractice plaintiff 'to convince the civil jurors of his innocence.' Thus, the determination of actual innocence is rooted in the goal of reliable factfinding." (*Salisbury v. County of Orange* (2005) 131 Cal.App.4th 756, 764–765 [31 Cal.Rptr.3d 831], internal citations omitted.)
- "[A]n individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action. . . . [P]ublic policy considerations require that only an innocent person wrongly convicted be deemed to have suffered a legally compensable harm. Unless a person convicted of a criminal offense is successful in obtaining postconviction relief, the policies reviewed in *Wiley* [*supra*] preclude recovery in a legal malpractice action." (*Coscia, supra,* 25 Cal.4th at p. 1201.)
- "[A] plaintiff must obtain postconviction relief in the form of a final disposition of the underlying criminal case—for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People's refusal to continue the prosecution, or a grant of habeas corpus relief—as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel." (*Coscia, supra,* 25 Cal.4th at p. 1205.)
- "[T]he rationale of *Wiley* and *Coscia* requires a plaintiff in a criminal legal malpractice case to show actual innocence and postconviction exoneration on any guilty finding for a lesser included offense, even though the plaintiff alleges he received negligent representation only on

the greater offense." (*Sangha v. LaBarbera* (2006) 146 Cal.App.4th 79, 87 [52 Cal.Rptr.3d 640].)

- "[Plaintiff] must be exonerated of all transactionally related offenses in order to satisfy the holding in *Coscia*. Because the judicially noticed facts unequivocally demonstrate that [plaintiff] plead no contest to two offenses transactionally related to the felony charge of battery on a custodial officer in order to settle the criminal action, and she was placed on probation for those offenses, she cannot in good faith plead exoneration." (*Wilkinson, supra,* 167 Cal.App.4th at p. 48.)

### *Secondary Sources*

1 Witkin, California Procedure (4th ed. 1997) Attorneys, § 315

Vapnek et al., California Practice Guide: Professional Responsibility (The Rutter Group) ¶¶ 6:935–6:944

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.02 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.10, 76.381 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.32 (Matthew Bender)

## 607–609. Reserved for Future Use

## 610. Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)

---

**[***Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that before [***insert date one year before date of filing***] [***name of plaintiff***] knew, or with reasonable diligence should have discovered, the facts of [***name of defendant***]'s alleged wrongful act or omission.**

**[If, however, [***name of plaintiff***] proves**

**[***Choose one or more of the following three options:***]**

**[that [he/she/it] did not sustain actual injury until on or after [***insert date one year before date of filing***][,/; or]]**

**[that on or after [***insert date one year before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

**[that on or after [***insert date one year before date of filing***] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[,/;]**

**the period within which [***name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] continued to represent [name of plaintiff]***].]**

---

*New April 2007; Revised April 2009*

### Directions for Use

Use CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit,* if the four-year limitation provision is at issue.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date

on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that he or she had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

## Sources and Authority

- Code of Civil Procedure section 340.6 provides:

  (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. In no event shall the time for commencement of legal action 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 such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and

  (4) The plaintiff is under a legal or physical disability which 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 such act or event.

- Code of Civil Procedure section 352 provides:

  (a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or

insane, the time of the disability is not part of the time limited for the commencement of the action.

(b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)
- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)
- "[D]efendant, if he is to avail himself of the statute's one-year-from-discovery limitation defense, has the burden of proving, under the 'traditional allocation of the burden of proof' that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Samuels, supra,* 22 Cal.4th at pp. 8–9, internal citations omitted.)
- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of

limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." (*Neel, supra,* 6 Cal.3d at p. 194.)
- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)
- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)
- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)
- "Section 340.6, subdivision (a), states that 'in no event' shall the

prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)

- "We conclude that the two-track approach adopted in [cases from Pennsylvania and Maryland] is most consistent with the requirements of Code of Civil Procedure section 340.6, subdivision (a), and the interests of fairness to both plaintiffs and defendants in criminal malpractice actions. Thus, the plaintiff must file a malpractice claim within the one-year or four-year limitations period set forth in Code of Civil Procedure section 340.6, subdivision (a). Although such an action is subject to demurrer or summary judgment while a plaintiff's conviction remains intact, the court should stay the malpractice action during the period in which such a plaintiff timely and diligently pursues postconviction remedies. '. . . [T]rial courts have inherent authority to stay malpractice suits, holding them in abeyance pending resolution of underlying litigation.' By this means, courts can ensure that the plaintiff's claim will not be barred prematurely by the statute of limitations. This approach at the same time will protect the interest of defendants in attorney malpractice actions in receiving timely notice and avoiding stale claims." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1210–1211 [108 Cal.Rptr.2d 471, 25 P.3d 670], internal citations omitted.) [See CACI No. 606, *Legal Malpractice Causing Criminal Conviction—Actual Innocence*].)

### *Secondary Sources*

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 577–595

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

## 611. Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit (Code Civ. Proc., § 340.6)

---

**[***Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [his/her/its] alleged wrongful act or omission occurred before [***insert date four years before date of filing***].**

**[If, however, [***name of plaintiff***] proves**

**[***Choose one or more of the following four options:***]**

**[that [he/she/it] did not sustain actual injury until on or after [***insert date four years before date of filing***]][,/; or]]**

**[that on or after [***insert date four years before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred [,/; or]]**

**[that on or after [***insert date four years before date of filing***] [***name of defendant***] knowingly concealed the facts constituting the wrongful act or omission [,/; or]]**

**[that on or after [***insert date four years before date of filing***] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[,/;]**

**the period within which [***name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] knowingly concealed the facts***].]**

---

*New April 2007; Revised April 2009*

### Directions for Use

Use CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the date on which the alleged wrongful act or omission occurred; (2) whether the tolling provision applies;

and (3) if so, for what period of time. The court can then add the additional time to the date on which the alleged wrongful act or omission occurred and determine whether the action is timely.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

## Sources and Authority

- Code of Civil Procedure section 340.6 provides:

  (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. In no event shall the time for commencement of legal action 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 such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and

  (4) The plaintiff is under a legal or physical disability which 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 such act or event.

- Code of Civil Procedure section 352 provides:

  (a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or

insane, the time of the disability is not part of the time limited for the commencement of the action.

(b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 598 fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)
- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)
- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)
- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty,

causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)

- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)
- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)
- "We conclude that the two-track approach adopted in [cases from Pennsylvania and Maryland] is most consistent with the requirements of Code of Civil Procedure section 340.6, subdivision (a), and the interests of fairness to both plaintiffs and defendants in criminal malpractice actions. Thus, the plaintiff must file a malpractice claim within the one-year or four-year limitations period set forth in Code of Civil Procedure section 340.6, subdivision (a). Although such an action is subject to demurrer or summary judgment while a plaintiff's conviction remains intact, the court should stay the malpractice action during the period in which such a plaintiff timely and diligently pursues postconviction

remedies. '. . . [T]rial courts have inherent authority to stay malpractice suits, holding them in abeyance pending resolution of underlying litigation.' By this means, courts can ensure that the plaintiff's claim will not be barred prematurely by the statute of limitations. This approach at the same time will protect the interest of defendants in attorney malpractice actions in receiving timely notice and avoiding stale claims." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1210–1211 [108 Cal.Rptr.2d 471, 25 P.3d 670], internal citations omitted.) [See CACI No. 606, *Legal Malpractice Causing Criminal Conviction—Actual Innocence*].)

### *Secondary Sources*

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 577–595

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

## 612–699. Reserved for Future Use

# MOTOR VEHICLES AND HIGHWAY SAFETY