SUPREME COURT CASE NO. S220775

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NANCY F. LEE,
Plaintiff-Petitioner and Appellant,

v.

WILLIAM B. HANLEY,
Defendant-Respondent and Respondent.

After a Decision of the Court of Appeal
Fourth Appellate District, Division Three
Court of Appeal Case No. G048501
Orange County Superior Court Case No. 30-2011-00532352
Honorable Robert J. Moss, Judge

APPELLANT'S ANSWER TO RESPONDENT'S PETITION FOR REVIEW

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1. Appellant Agrees That This Court Should Review The Meaning And Effect Of Section 340.6, But Asserts Respondent's Arguments Are Unsupported And Flawed.

With both parties filing a Petition for Review, it's clear that both believe this matter is societally important. After considering respondent's petition, however, appellant opposes respondent's arguments (but not its requested result) and makes the following observations and points:

In this action, respondent asserts *Stoll, Vafi, Yee,* and *Levin*, a legal Rorscach test and conclusions (without analysis or reason), and Appellant counters with Legislative Intent, *Samuels v. Mix,* and *Roger Cleveland Golf, Inc.*, definitions/applications of the terms "professional services" and "arising in."

2. The Only Wrongs "Arising In" Are Breaches of Attorney's Duty of Due Care.

The only wrongs "arising in"[1] the performance of a professional service, are: a) attorney's failure to do a task required by the attorney's

[1] It's noteworthy that the statutory term is not "arises," or "arises from," or any of the myriad variations that courts have applied, modifying the term to write easily, or conversationally, about the application of section 340.6. The Legislature (or Mallen, in drafting his "specially tailored statute of limitations for legal malpractice," as the Court may choose) used the specific, stilted, "only-provides-one-meaning" term, "arising in"; the various "variations on a theme" change the

duty of due care in the particular retention, or b) the inappropriate doing (below standard) of a task required by the attorney's duty of due care in the particular retention. To appellant's knowledge there is no other wrong "arising in" the performance of a particular "professional service"; to appellant's knowledge, there is no other **duty**, or **thing**, or **result**, or **consequence**" "arising in" the "performance" of a "professional service."

Insofar as interpretation of section 340.6 is held to Mallen's representation (that it's a "specially tailored statute of limitations for legal malpractice" (*Mallen, Panacea or Pandora's Box? A Statute of Limitations For Lawyers,* 52 State Bar Journal 22, at p. 24)), there's no other possible – conceivable – way to interpret the language and terms of the targeting phrase of the statute.

3. The Application Of Reason And Logic To The Targeting Phrase Results In A Definition (And If Appropriate A Quantification) Of Professional Services.

Although the "gravamen-of-the-action-is-breach-of-attorney's-duty-of-due-care" test worked well, that has been abandoned since *Stoll.* Appellant prays the Supreme Court reinstate it as a legitimate test for application of section 340 6 to claims against attorneys. Approached

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interpretation and the meaning/application of the statute. Please don't do that in this matter of grave importance – the taking of people's property rights.

separately, however, on the basis of the targeting phrase, appellant asserts that the following should inform the definition of professional services.

The first inquiry is, "what are not, and can never be considered, 'professional services'?" Appellant asserts this is a "common sense" inquiry, informed by the concept that attorneys are "officers of the court." As an "officer," the following are **not** professional services under any circumstances: acts of moral turpitude (theft, embezzlement, conversion, any form of "misappropriation" or "underhanded" or "self dealing," etc.); fraud; acts in the nature of intentional torts (infliction of emotional distress, etc.); physical altercations; etc.[2]

On a common sense inquiry, any activity not requiring a license to practice law is not a "professional service," specifically excluding from the definition of professional services: "ordinary" (non "legal malpractice") negligence (e.g., negligently driving the client to the courthouse causing injury); businessman functions (the billing for, or receipt of compensation

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[2] Under this inquiry, the Fourth District observed that a professional services activity must "... render legal services to [the client]" (Opinion, p. 3, l. 1-2) and that the attorney's activities must "... provide a service to the client ..." (Opinion p. 12, ll16-17). (It's noteworthy that under *Stoll* (with only a "wrongful act or omission" inquiry, without considering "arising in the performance of professional services," all the above defalcations are protected by the one year from discovery limitation of section 340.6 – but none of these defalcations are covered by a malpractice insurance policy. The net result is the extinguishment of the client's property right, protection of an attorney (who needn't explain any wrong) and financial benefit to attorney – not an insurer. This *Stoll* interpretation specifically benefits the "wrongdoing attorneys" – the self dealing or evil ones – and does nothing for a good attorney, an "officer of the court." This is societal detriment.)

for, or the holding of advances for, or the self-payment from advances for an attorney's services (which can all be done by staff personnel); it's noteworthy that billing for services, or receiving or holding advances for later payment for services, or paying oneself from advances, is simply running a business, done by every businessman); trustee functions (the holding of money for a purpose, which is not measured by the attorney's duty of due care, and, again, can be done by non-attorney support staff); accounting functions (even accountings done in relation to funds obtained via direct authority of the retainer agreement (e.g., settlement funds) – again, not measured by attorney's duty of due care and can be done by support staff).

In the businessman function, it's noteworthy that the Fourth District found in this case that "... an attorney's receipt of a client advance for the future performance of legal services does not constitute the attorney's performance of those services." (Opinion, p. 9, ll. 21-22)

All these are acts or activities which can be done by an attorney, or just as easily by non-attorney support staff – and no license to practice law is required. These acts are not "legal" tasks, nor are they what a reasonable man would believe to be "professional services" under 340.6. All these acts should be excluded from the definition of "professional services."

"What are professional services"? As used in section 340.6, "professional services" are special, are based on the attorney's license to

practice law, are determined by the retainer and the intended result, and are measured by attorney's duty of due care. In the case at bar, such services were the prosecution of the underlying litigation against the Tongs, comprised of the individual legal tasks making up such prosecution. Insofar as any such legal task was done in good faith, in service to appellant, they should be protected under section 340.6 (and such acts will be insured under respondent's malpractice insurance policy and any savings will inure to the insurer's benefit).

Insofar as those services were completed no later than February 1, 2010, the wrongful taking or failure to return could never be "arising in" the performance of the professional services; insofar as the taking or failure to return is not a breach of attorney's duty of due care, section 340.6 could never have application.

Insofar as respondent's holding of appellant's advances is to be considered, this was not a legal task (such as filing the complaint, sending discovery, negotiating terms, etc.); this was not a necessary-to-the-retention task; this was not a task "in service to appellant" (this was solely and only for respondent's benefit). Such "holding" is not a "professional services" or "performance of professional services" under section 340.6.

4. The "Discovery Rule" Set Forth In *Neel* And *Budd* Applied *Only* To "*Neel* Defined" Legal Malpractice Claims – Breaches Of An Attorney's Duty Of Due Care To His Client – *Only*! In Enacting

Section 340.6, The Legislature Intended To "Cap" And/Or "Extinguish" *Only* "*Neel* Defined" Legal Malpractice Claims.

The "discovery rule," which was established via this Court's two landmark cases, *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971)* 6 Cal. 3d 176, 180, 98 Cal. Rptr. 837, 491 P.2d 421, and *Budd v. Nixen* (1971) 6 Cal.3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433, had no application to fiduciary duties, or to any other form of attorney wrongdoing; the "discovery rule" applied solely and only to claims of an attorney's breach of his or her duty of due care to the client, i.e., "legal malpractice."

In *Neel*, *supra,* at pg. 180, the Supreme Court stated:

> Legal malpractice consists of the failure of an attorney '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.' (Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 825, 364 P. 2d 685, 689.) [3] When such failure proximately causes damage, it gives rise to an action in tort.[4] Since in the usual case, the attorney undertakes to perform his duties pursuant to a contract with the client, the attorney's failure to exercise the requisite skill and care is also a breach of an express or implied term of the contract.[5] Thus legal malpractice generally constitutes both a tort and a breach of contract.[6]

In footnote 3, the *Neel* Court referenced those sections of two law review articles dealing specifically and only with "professional negligence," making it clear that the subject under discussion in *Neel*, necessitating the "discovery rule," was legal malpractice: the breach of attorney's duty of due care – **and nothing else**!

Because insurers believed the "discovery rule" imposed open-ended exposure on **every** attorney, for every attorney's **every** "professional services" transaction, insurers believed they had to increase reserves; to raise reserves, insurers believed they had to "astronomically" raise premiums.

In section 340.6, the Legislature intended a "measured response" to the "increased reserves" problem: cap the discovery period for "*Neel* defined" legal malpractice at four years from the occurrence (when section 340.5 capped the discovery period at three years from the occurrence), and impose a one year from discovery limitations period **on "*Neel* defined" legal malpractice.**

Noteworthy to this statement is:

If the discovery rule only had application to breaches of attorney's duty of due care, i.e., to legal malpractice, it's unclear how anyone would conclude that the Legislature "intended" to extinguish claims which were not "*Neel* defined" legal malpractice (or claims which were other-than legal malpractice).

If the four year "discovery cap" of section 340.6 had application solely and only to attorney's breach of his duty of due care, i.e., to legal malpractice, it's unclear how anyone would conclude that the Legislature "intended" that the one year from discovery provision would apply to claims which were not "*Neel* defined" legal malpractice (or claims which

were other-than legal malpractice). Respondent's mewling to the effect, "some courts describe breaches of fiduciary duties as legal malpractice," doesn't transform a "breach of fiduciary duty" into a "breach of attorney's duty of due care."

Section 340.6 has no application to this case **in which appellant does not claim** that attorney breached his duty of due care.

5. **Appellant's Claim For The Return Of Her Funds Is Not So Intertwined With Any "Professional Service" As To Preclude Individual Analysis.**

In the underlying retainer agreement, and by course of conduct, the parties promised the following:

Respondent attorney promised:

– to represent appellant client in prosecuting litigation against the Tongs (via this provision, respondent agreed to accept appellant's transfer of the right and authority to act as appellant's agent (her attorney) in the handling of such litigation),

– to bill appellant at $395/hr. for time actually expended on her matter,

– to hold in trust all funds advanced by appellant to pay billings as they came due,

– to bill monthly

– to return all unused advances,

Appellant client promised:

– to pay respondent attorney's charges, and

– to advance $15,000 for said charges (later in the relationship, appellant also advanced an additional $10,000 for expert witness fees, and $95,000 to be used for attorney's fees if services were rendered.) SAC, paras. R-1, -2, -3, -4, -6; CT 164:7 – 165:10, 166:14-23.

As noted above, implied in her promises and by virtue of the agreement, appellant transferred to respondent the right and authority to act as her agent/attorney for prosecution of the subject litigation. (It is this transfer of rights, authorizing attorney "to act in her stead," "to represent her interests," which assists in determining "professional services," as that term is used in section 340.6)

Noteworthy in the above is that attorney made promises to perform both "professional services" (that is, services which could be measured against "... 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" *Neel, supra*, p. 180) and non "professional services: to bill only for time actually expended, to hold funds in trust, to bill monthly, to return unused advances.

In a contract case, the courts regularly examine each promise, and it's performance, **individually**; although the contract may be bilateral, its breach typically involves only some of the promises, but our courts

regularly analyze based on the allegations of wrong, whether from one side, or both, and whether involving only one of the promises made, or all of them. In a multiparty, multi claim case, each claim is first considered, individually.

The case at bar is typical. Herein, respondent makes no claim as to client wrongdoing. Appellant makes no claim as to respondent's promises one, two or four. Appellant's claim is not that attorney failed to represent her interests, or that he did a bad job in his representation of her interests; her only claims are that respondent failed to return all unused advances, and that he failed to hold her advances in trust. These would appear to be simple claims, susceptible to analysis by any court, and without the necessity of analyzing what was done in the prosecution of the Tong litigation.

Respondent's mewling to the effect, "it's all so intertwined and interconnected, how could any court separate the attorney's professional services from his charges for professional services," is simply nonsensical. First, appellant's advances **never were, never became**, "attorney's fees"; such funds have always maintained their integrity as appellant's monies (such funds never became even a "fee dispute"; such funds have always been her money). Second, Appellant never made a claim about the professional services performed; in fact, she paid $131,000 for said services

and felt appropriately treated. Those services were completed by February 1, 2010. Where's the "confusing" interconnection?

What appellant wants is the return of her unused advances, which attorney promised to hold in trust and return to her – **but kept!** How does the breach of that promise interconnect, or intertwine, with any professional services analysis? – **When all professional services were completed in February 2010, how is a subsequent taking even remotely connected to the performance of any professional service?**

6. **Respondent Asserts The "Legal Rorschach Test," With "Clear" Conclusions (But Neither Reason, Nor Logic).**

In respondent's Petition for Review ("RPFR"), at pg. 21, line 16, he states:

> "... The failure of an attorney to return unearned fees and unused expert witness fees (which Lee voluntarily advanced as part of the attorney's representation) is an alleged wrongful act or omission arising in the performance of professional services. Its strains reason to conclude it is anything else."

A bold conclusion, but an unsupported conclusion. While using the word "reason," Respondent fails to reason. What's the definition of professional services? What is the "performance" of those professional services? And how is the wrongful failure to return "arising in" the performance of professional services?

In RPFR, pg. 22, line 12, Respondent states:

> "... Handling client funds is intertwined with the attorney's services,[3] **arises** in[4] the performance of professional services, and can form an independent basis of a malpractice claim." (Bold added.)

"Handling" client funds is not the wrong; the "taking of funds" or "keeping the funds" is the wrong. If the funds are misappropriated to the attorney's own use, that's not professional services (it certainly provides no benefit to the client, and it is not in service of the client). For "legal malpractice," the gravamen of an action must be attorney's breach of his duty of due care to his client; insofar as attorney's "handling client funds" is simply a trustee function – any person can take and handle funds for an express purpose – it does not require an attorney's license to practice and a taking or misuse of funds is not the breach of attorney's duty of due care. Such taking or misuse would be a breach of a trustee's duty, and better handled by that statute.

Insofar as claims dealing with the handling of money will more often than not be claims of misappropriation, such claims would not be covered under any malpractice insurance policy, and any savings from an "early" statute of limitations, would inure to the benefit of attorney, not the insurer.

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[3] Although attorneys do "handle" client funds as part of some litigation services, such handling was not involved in this action. Here, attorney held funds solely for **his** benefit, **not for the client's**. Here, attorney wanted to make sure he was going to get paid and so demanded that client advance additional funds. Being vulnerable, she did so. Being vulnerable, attorney stole her money from her.

[4] The statutory term is "arising in," not "arises in."

To reward an attorney for moral turpitude – to allow him to keep his ill-gotten gain – is a societal detriment, unintended by the Legislature.

7. **Respondent Contends The Legislature Intended To Enact An "All Inclusive" Statute Of Limitations For Attorney – Such A Statute Would Create Two Different Classes Of Businessmen, Of Trustees, And Of Accountants.**

Subsumed in respondent's analysis, attorneys are not officers of the court, they are simply mercenaries. Attorneys don't do good, they do money; they don't serve, they prosper financially.

In respondent's world, attorney has a four-year statute of limitations to sue for his fees (under a breach of written contract claim), while a client is barred after one.

In respondent's world, all-other-businessmen have a normal statute of limitations, but attorney-businessmen, simply "doing business," have a one-year limitation; all-other-trustees (holding funds or property) have a three-year statute of limitations, but attorney-trustees, simply doing trustee functions, have a one-year limitations period; all-other-accountants have a normal limitations period, but attorney-accountants, simply doing accounting functions, have a one-year limitations period. This is wrong.

8. **There Was No Ambiguity Or Uncertainty In Appellant's**

Pleading Of The Facts In Her SAC, And The Fourth District Simply Supplied A Remedy As A Matter Of Law To The Facts.

The Fourth District found that appellant's SAC pleaded **facts** warranting relief under a conversion theory of recovery, at least, and held the demurrer was improperly sustained as a matter of law. The court did not find any ambiguity or uncertainty in the **facts pleaded**. It's unclear the nature of respondent's exact complaint. The law seems settled, however, that in a demurrer proceeding plaintiff is "... entitled to any relief warranted by the facts pleaded ..."

Insofar as respondent's assertion is simply that section 340.6 applies to every cause of action except fraud, both parties seek Supreme Court review to determine this issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant review of this action.

Respectfully submitted,

Dated: 9-15, 2014

By: Walter J. Wilson

Walter J. Wilson,
Attorney for Petitioner Nancy F. Lee

CERTIFICATION OF WORD COUNT

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains **3,132** words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: 
Walter J. Wilson

PROOF OF SERVICE BY MAIL

1. I am employed in the County of Los Angeles, State of California. At the time of service I was over 18 years of age and **not a party to this action.**

2. My business address is: 333 West Broadway, Suite 200, Long Beach, CA 90802

3. On September 15, 2014, I served the following document(s): **APPELLANT'S ANSWER TO RESPONDENT'S PETITION FOR REVIEW**

4. I served the documents on the **person or persons** below, as follows:

DIMITRI P. GROSS, ESQ.
LAW OFFICE OF DIMITRI P. GROSS
19200 VON KARMAN AVENUE, SUITE 900
IRVINE, CA 92612

CLERK FOR THE SUPERIOR COURT
SUPERIOR COURT OF CALIFORNIA
700 CIVIC CENTER DRIVE WEST, DEPT. C23
SANTA ANA, CA 92701

CLERK FOR THE COURT OF APPEAL
4TH DISTRICT COURT OF APPEAL, DIVISION 3
601 W. SANTA ANA BOULEVARD
SANTA ANA, CA 92701

OFFICE OF THE ATTORNEY GENERAL
300 S. SPRING STREET, SUITE 1700
LOS ANGELES, CA 90013

5. The documents were served by the following means:
   a. **(XX) By United States Mail.** I enclosed the documents in a sealed envelope or package to the persons at the addresses in item 4 and **placed** the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of

business with the United States Postal Service, in a sealed envelope with postage fully prepaid and mailed at **LONG BEACH, CA**.

Executed on September 15, 2014, at Long Beach, California.

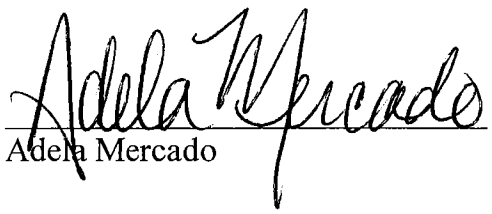
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Adela Mercado

PROOF OF SERVICE BY ELECTRONIC DELIVERY

On September 15, 2014, I, Adela Mercado, submitted to the **Supreme Court** an electronic copy in .PDF format of Petitioner Nancy F. Lee's, **APPELLANT'S ANSWER TO RESPONDENT'S PETITION FOR REVIEW** by submitting it to **http://courts.ca.gov/24590.htm**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 15, 2014, in Long Beach, California.



Adela Mercado