S220775

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

NANCY F. LEE

Plaintiff and Appellant,

v.

WILLIAM B. HANLEY

Defendant and Respondent

SUPREME COURT
FILED

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Deputy

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On Review From The Court Of Appeal For the Fourth Appellate District, Division Three, Case No. G048501

After An Appeal From the Superior Court For The State of California, County of Orange, Case Number 30-2011-00532352, Hon. Robert J. Moss

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OPENING BRIEF ON THE MERITS

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I.
INTRODUCTION

Appellant Nancy L. Lee ("Lee") hired Respondent William B. Hanley ("Hanley") to represent her in a lawsuit, advanced money for fees and costs for his services, and, after the lawsuit ended, claims that Hanley failed to return unearned fees. More than a year after she discovered her claims, Lee sued Hanley based on his alleged failure to reimburse unearned fees.

Realizing her complaint was time-barred, Lee tried to resurrect her claims by carefully alleging causes of action designed to avoid the one-year statute of limitations found in California Code of Civil Procedure section 340.6.[1] Lee contends the one-year statute of limitations does not apply because she is not suing for "professional negligence" arising in the performance of professional services, but rather for breach of fiduciary duty, breach of contract, and a host of related causes of action. Lee is mistaken.

Section 340.6 is a broadly worded statute of limitations which applies to all claims by a client against an attorney for wrongful acts or omissions (except actual fraud) arising in the performance of professional services. If the alleged act or omission arises in the performance of

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[1]All statutory references will be to the Code of Civil Procedure unless otherwise specifically stated.

professional services, it is immaterial if the cause of action is titled breach of fiduciary duty, breach of contract, or conversion.

The gravamen of Lee's claims is that Hanley breached his professional duties to her by failing to return funds advanced for his services.[2] Lee's claims fall squarely within section 340.6. The trial court agreed and, after given Lee three opportunities to amend, dismissed her second amended complaint.

The appellate court (the "Fourth District") reversed the trial court and revived Lee's stale claim. To support its holding, the Fourth District reasoned that a client's dispute with her attorney over client funds may support a longer statute of limitations, depending on the cause of action.[3] The answer requires litigation over whether the dispute over attorney fees involves a "theft of funds, an accounting error, or something else."[4]

Such an interpretation of section 340.6 contradicts the legislative intent behind section 340.6 and cases interpreting the statute; creates additional exceptions to section 340.6, even though the only statutory exception is for "actual fraud"; and assumes only "professional negligence"

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[2] Hanley disputes Lee's allegations in her pleadings, but for purposes of these proceedings will present them as pled in Lee's pleadings.

[3] E.g., conversion, theft, breach of fiduciary duty, common counts, etc.

[4] *Lee v. Hanley* (2014) 174 Cal.Rptr.3d 489, 492 ("Lee").

(e.g., poor legal advice) is covered by the statute when it is clear the statute covers all wrongful acts or omissions (except actual fraud), arising in the performance of professional services.

Section 340.6 is the exclusive statute of limitations when a client claims an attorney committed a wrongful act or omission (except actual fraud) arising in the performance of professional services. Any decision which allows another statute of limitations to govern claims arising in the attorney-client relationship will undermine section 340.6 and foster the very uncertainty the statute was designed to eliminate.

The Fourth District's decision should be reversed and the judgment of the trial court affirmed.

II.
STATEMENT OF ISSUES

Does the one-year statute of limitations for actions against attorneys set forth in California Code of Civil Procedure section 340.6 apply to a former client's claim against an attorney for reimbursement of unearned attorney fees advanced in connection with a lawsuit?

III.
SUMMARY OF ARGUMENT

Prior to section 340.6, attorneys were exposed to numerous limitation periods and indeterminate liability. This created a crisis due to the expense of insurance premiums and concerns that insurance companies would not write policies. Section 340.6 was intended to eliminate these

problems by having a single, broad statute of limitations to address all forms of attorney misconduct arising in the attorney-client relationship except those involving actual fraud. (*See, e.g., Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 510 [discussing legislative intent.])

Consistent with the legislative intent, courts addressing section 340.6 have interpreted the statute broadly. Even where the client alleges breach of contract or breach of fiduciary duty courts have found such claims are governed by section 340.6.

Section 340.6 is not limited to typical notions of "legal malpractice," but includes all "wrongful acts or omissions" (except actual fraud) arising in the performance of professional services. How an attorney handles client funds is part of an attorney's professional duties to a client which arise in the performance of the attorney's professional services. But for the professional relationship there would be no dispute over whether fees were earned or unearned.

By excluding from section 340.6 a dispute involving a claim against an attorney for reimbursement of unearned attorney fees advanced in connection with a lawsuit, the Fourth District adds an exception to section 340.6 which is unwarranted and contrary to the legislative intent. Such a ruling will open the door for pleadings designed to avoid the one-year statute of limitations, which is precisely what Lee did in this case.

IV.
SUMMARY OF FACTS AND PROCEDURAL HISTORY

Lee alleges she hired Hanley under a written fee agreement to represent her in a lawsuit, advanced money to be used for fees and costs, and, after the litigation was over, Hanley failed to return unearned fees. (Clerk's Transcript ["CT"] 164) Hanley told her there was no balance remaining. (CT 177)

On December 6, 2010, Lee and her new lawyer terminated Hanley's engagement. (CT 213-215)

On December 21, 2011, more than a year later, Lee filed a complaint for reimbursement of fees advanced in connection with litigation. The original complaint clearly alleged a wrongful act or omission arising in performance of professional services. For example, Lee alleges:

> Pursuant to the attorney client relationship, defendants were to provide attorney services in the LAWSUIT and were to be paid a reasonable fee plus costs. (CT 30)
>
> [Hanley breached his] 'ethical obligations and fiduciary duties" in "violation of Rules of Professional Conduct ('RPC'), Rule 3-300." (CT 30-31; 32-33)
>
> By virtue of the attorney-client relationship, defendants . . . were entitled to a reasonable attorney's fee only. For their services regarding the LAWSUIT, however, they stole from plaintiff $46,321, and their fees overall were otherwise unconscionable. (CT 35)

Hanley demurred to the original complaint on the grounds the complaint was barred by section 340.6. (CT 83-94) The demurrer to the

complaint was the *first time* Lee learned the *one-year statute of limitations* for attorneys applied.[5]

Prior to the hearing on the demurrer, Lee filed a first amended complaint alleging causes of action for Equity – Return of Unused Costs; Equity – Return of Unused Fees; Breach of Contract; and several counts for Breach of Fiduciary Duties. (CT 65-82)

To avoid the one-year statute of limitations, Lee's subsequent pleadings eliminated harmful language from the original complaint, which also brought her claims within section 340.6 (e.g., references to the Rules of Professional Conduct, Rule 3-300 and that Hanley's fees were unconscionable.)

Hanley demurred to the first amended complaint asserting all causes of action, regardless of how named, were barred by the one-year statute of limitations. (CT 83-94) The trial court sustained the demurrer to the first amended complaint with leave to amend, finding all claims were barred by section 340.6. (CT 158)

Lee filed a second amended complaint alleging a host of causes of action, including breach of contract, breach of fiduciary duty, and common

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[5]"At no time before February 28, 2011 (when appellant received the Demurrer to Complaint), did appellant have any knowledge or suspicion that respondent claimed the advances were somehow 'professional services,' or that 340.6 applied." (Appellant's Opening Brief ["AOB"], p. 49)

counts. She did not allege actual fraud or conversion. (CT 161-189) Lee also affirmatively alleged she was satisfied with Hanley's services in relation to the lawsuit and was not making a claim that his legal advice fell below the standard of care. (CT 167 ["defendants provided appropriate legal services . . . ."])

Hanley demurred to the second amended complaint on the same grounds, i.e., Lee's claims, regardless of title, were barred by the one-year statute of limitations. (CT 190-221) The trial court issued a tentative ruling sustaining the demurrer *without* leave to amend.[6]

At oral argument, Lee requested leave to amend, making various arguments how she could cure the defects, including alleging fraud and a basis for tolling. The trial court granted leave to file a third amended complaint. (CT 717; 736-745) Lee, however, chose not to file a third amended complaint, stating she was "unwilling to plead fraud against [Hanley] . . . so was unable to further amend." (AOB 2)

An unopposed ex parte application resulted in an order dismissing the case with prejudice. (CT 792-795)

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[6]"[Lee] claims that defendant failed to return unearned fees she had advanced and also did not return unused funds advanced for experts soon enough. CCP §340.6 provides that an action against an attorney for a wrongful act 'arising in the performance of professional services shall be commenced within one year . . . .' Here, the funds were advanced in connection with the performance of professional services and the attorney was required to return the funds upon his discharge." (CT 774)

V.
PROCEEDINGS IN THE FOURTH DISTRICT

On July 15, 2014, the Fourth District issued its published opinion, reversing the trial court. (Appendix, Exh. 1)

On August 8, 2014, the Fourth District issued an Order Modifying Opinion and Denying Petitions for Rehearing. There was no change in the judgment. (Appendix, Exh. 2.)

The case as modified is *Lee v. Hanley* (2014) 174 Cal.Rptr.3d 489.

VI.
THE CALIFORNIA LEGISLATURE DRAFTED A BROADLY WORDED STATUTE OF LIMITATIONS WHICH WAS INTENDED TO APPLY TO ALL CLAIMS (EXCEPT ACTUAL FRAUD) BY A CLIENT AGAINST HER ATTORNEY

Section 340.6 subdivision (a) 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 . . . ." (Italics added.) Section 340.6 is the exclusive statute of limitations governing a client's claim against an attorney for acts or omissions arising in the performance of professional services to the client. *Levin v. Graham & James* (1995) 37 Cal.App.4th 798, 805 ("*Levin*"); *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 880 ("*Vafi*") [disagreed with on other grounds in *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 668 ("*Roger Cleveland*").]

A. Section 340.6 was intended to eliminate uncertainty by providing a single statute of limitations regarding clients' claims against attorneys

Before section 340.6 was enacted, attorneys were subject to different statute of limitations depending on whether the cause of action was breach of oral contract, breach of written contract, fraud, or negligence. (*Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1367 ("*Stoll*"); *see also,* Lee's Motion for Judicial Notice ("MJN"), Exh. 1, p. 36.)

To make matters worse, attorneys were subject to open-ended liability due to the delayed discovery rule as established in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176.

These factors led to not only an increase in malpractice insurance premiums, but concerns that insurance companies would stop writing policies for attorneys. The Legislature wanted to address these concerns by enacting a single statute of limitations governing attorneys' wrongful acts or omissions. (*Stoll, supra*, 9 Cal.App.4th at p. 1367; *Beal Bank, SSB, supra,* (2007) 42 Cal.4th at p. 510 ["The problems we foresaw in *Neel* and *Budd* began to manifest themselves in the form of rapidly rising malpractice insurance premiums."])

The goal was to make insurance less expensive and easier to obtain. (MJN, Exh. 1, p. 15 ["This bill reduces the cost of legal malpractice, and

limits the open-endedness of current law."])[7] To accomplish this goal the Legislature considered different versions of a statute of limitations for attorneys.

First, according to several courts, the Legislature "reviewed and considered Mallen, Panacea or Pandora's Box? A Statute of Limitations for Lawyers (1977) 52 State Bar Journal 22." (*Stoll, supra,* at p. 1367; *Beal Bank, SSB, supra,* at p. 510.)

Mallen's article suggested language for the statute, including a version which excluded from the one-year period claims of "actual fraud" *and* "breach of contract." Ultimately, the Legislature rejected a reference to "breach of contract," which left "actual fraud" as the *only* exception to the one-year statute of limitations. (*Stoll, supra,* at p. 1368.)

As stated in *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 429 (superseded by statute on another point) ("*Southland Mechanical Constructors*"), the Legislature "deleted the breach of a written contract exception from the proposal because it intended that section 340.6 apply to both tort and breach of contract malpractice actions."

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[7] As originally proposed the bill required that the savings to insurance companies should be passed on to the attorneys. (See, MJN, Exh. 3, p. 49) This provision did not make it in the final version of the statute.

Second, a draft version of the statute also included the phrase "alleged professional negligence." (See MJN, Exh. 3, p. 49) The Legislature chose *not* to include limiting phrases such as "professional negligence" or "legal malpractice," but instead used more encompassing language.

As stated in *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 196 ("*Yee*")[8]

> ...the term 'malpractice' does not appear anywhere in the statute. If the Legislature had wanted to limit section 340.6 to malpractice actions . . ., it could have done so . . . . The Legislature did not do this, and instead, enacted a broadly worded statute that limits the time within which any plaintiff may bring an action against an attorney for the attorney's conduct 'arising in the performance of professional services.'

The Legislature considered and rejected not only additional *exceptions* to the statute (i.e., breach of contract), but limiting language such as "professional negligence" and "legal malpractice" in favor of broader language: "wrongful act or omissions" "arising in the performance of professional services." Thus, section 340.6 is not limited to traditional notions of "malpractice" (e.g., proving substandard legal advice), but includes a broader range of attorney misconduct arising in the attorney-

[8] Disagreed with in *Roger Cleveland Golf Co., Inc., supra,* (2014) 225 Cal.App.4th 660.

client relationship.[9] This is consistent with the Legislature's concerns when the statute was drafted. As stated in *Stoll*:

> [The] Legislature intended to enact a comprehensive, more restrictive statute of limitations for practicing attorneys facing malpractice claims. The limitation of one year was designed to counteract the potential of lengthy periods of potential liability wrought by the adoption of the discovery rule, and thereby reduce the costs of malpractice insurance. The only limitation of the one-year period was for actual fraud. (*Stoll, supra*, at p. 1368.)

Although Hanley has not found a case directly addressing the language "arising in" in section 340.6, the phrase in other contexts has been given broad application. (*See, e.g., Simula, Inc. v. Autoliv, Inc.* (9th Cir.1999) 175 F.3d 716, 721 ["Every court that has construed the phrase 'arising in connection with' in an arbitration clause has interpreted that language broadly. We likewise conclude that the language 'arising in connection with' reaches every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract."])

The phrase "arising in" does not imply a particular standard of causation, but links "a wrongful act or omission" (other than actual fraud) with the "performance of professional services." The phrases "arising in" and "performance of professional services" should be interpreted broadly,

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[9] Section 340.6 is not a "catch all" statute of limitations such as section 343.4.

which is consistent with the fact that (1) there is only one statutory exception to section 340.6, and (2) the legislative intent was to create a single statute of limitations governing an attorney's breach of professional duties to a client.

B. Courts have interpreted section 340.6 broadly and applied it to any action against an attorney (except for fraud) including disputes involving client funds

Although the Fourth District takes a narrow view of section 340.6, many courts have broadly interpreted the phrase "wrongful act or omission . . . arising in the performance of professional services." Regardless of whether the client alleges breach of contract or breach of fiduciary duty, or whether the client claims to be *satisfied or dissatisfied* with the attorneys' services, section 340.6 applies to any claim (except actual fraud) against an attorney arising in the performance of professional services. (*See, e.g., Stoll, supra*, 9 Cal.App.4th 1362 [applying section 340.6 to breach of fiduciary duty and other ethical violations]; *Southland Mechanical Constructors Corp., supra*, 119 Cal.App.3d at pp. 428-431 [applying section 340.6 to breach of contract cause of action; "the phrase 'wrongful act or omission' has no single, settled legal meaning. It is sometimes used interchangeably as a reference to both tortious and contractual wrongdoing."]; *Vafi, supra,* (2011) 193 Cal.App.4th at p. 880 ("*Vafi*"); *Yee, supra*, 220 Cal.App.4th at p. 194 [disagreed with in *Roger Cleveland Golf Co., Inc., supra,* (2014) 225 Cal.App.4th 660]; *Quintilliani v. Mannerino*

(1998) 62 Cal.App.4th 54, 67-69 ("*Quintilliani*") [causes of action for breach of contract, breach of fiduciary, and negligent misrepresentation for *pre-engagement* promises were subject to section 340.6.])

In *Yee*, the court stated:

> The plain language of section 340.6 applies to all actions, with the exception of those actions asserting actual fraud, that are brought against an attorney for that attorney's wrongful act or omission ... arising in the performance of professional services.' [Citation.] The phrase 'wrongful act or omission' is 'used interchangeably as a reference to both tortious and contractual wrongdoing.' [Citation.] The words of the statute are quite broad, but they are not ambiguous: any time a plaintiff brings an action against an attorney and alleges that attorney engaged in a wrongful act or omission, other than fraud, in the attorney's performance of his or her legal services, that action must be commenced within a year . . . .' (*Yee, supra*, 220 Cal.App.4th at p. 194.)[10]

Roger Cleveland disagreed with the holdings in *Yee* and *Vafi* that *malicious prosecution actions* are governed by section 340.6.[11] However, *Roger Cleveland* acknowledged:

> [T]he Legislature's use of 'wrongful act or omission' by an attorney **arising in the performance of professional services was intended to include any legal theory** related to a claim by a client or former client against his or her attorney.

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[10] *See also, Vafi, supra*, 193 Cal.App.4th at p. 881 (section 340.6 applies to all actions, except those for actual fraud, brought against an attorney "for wrongful act or omission," which arise "in the performance of professional services.")

[11] *Roger Cleveland* involved a malicious prosecution claim against an attorney by a third party, and as such is factually inapposite to Lee's case.

. . . (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 680 [emphasis added].)

Other courts applying section 340.6 to disputes over client funds and ethics violations have held that section 340.6 applies to such claims, regardless of the title of the cause of action. (*See, e.g., Stoll, supra*, 9 Cal.App.4th 1362; *Levin v. Graham & James* (1995) 37 Cal.App.4th 798 ("*Levin*"); *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105 ("*Prakashpalan*").)

In *Stoll*, an attorney was retained by a corporation to help locate and purchase a ski resort. The attorney did not disclose to the client that he had already entered into a finder's fee agreement with the owner of a ski resort for the sale of the resort. After the sale was complete, the attorney obtained his finder's fee. The corporation sued the attorney alleging he breached his fiduciary duties in violation of California Rules of Professional Conduct because of a pre-existing financial conflict of interest; an undisclosed relationship with another party; failing to disclose a conflict of interest; and charging an "'unconscionable fee'" to the corporation. (*Stoll, supra,* 9 Cal.App.4th at pp. 1365-1366.)

The plaintiff in *Stoll* sued for "breach of fiduciary" – a cause of action subject to a different limitations period – to get around the one-year period. (*Stoll* at pp. 1365-1366.) Even though the plaintiff in *Stoll* did not allege bad legal advice, the *Stoll* court concluded: "although styled as a

breach of fiduciary duty, the misconduct alleged ... is nothing more than professional malpractice subject to the one-year statute." (*Id.* at p. 1366.)

In *Levin*, the client, trying to avoid losing a summary judgment motion, stated in oral argument that the case was "not a malpractice case at all, but merely a suit to recover unconscionable fees charged and paid." (*Levin, supra*, 37 Cal.App.4th at pp. 802, 804-805.) This creative plea (which is also similar to Lee's amended pleading to avoid the statute) was rejected. The appellate court stated:

> Levin's repeated assertion that **one can assert a claim or state a cause of action for refund of unreasonable attorney fees (e.g., quantum meruit, money had and received) without also alleging malpractice** is the first of a sea of red herrings beached on the pages of his briefs.
>
> [¶] **In all cases other than actual fraud, whether the theory of liability is based on the breach of an oral or written contract, a tort, or a breach of a fiduciary duty, the one-year statutory period applies.** (*Id.* at p. 805, citing *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417. [Emphasis added.])

In *Prakashpalan,* the court found the plaintiffs' professional negligence and breach of fiduciary duty claims, arising from taking client settlement funds, were barred by section 340.6. The plaintiffs claimed, as does Lee, that "holding of client trust funds" is not the "rendering of professional services to which Code of Civil Procedure section 340.6 would apply." (*Prakashpalan*, 223 Cal.App.4th at p. 1122.)

The court rejected this argument, stating "the funds in the trust account are settlement proceeds" and the attorneys conduct in holding such funds "arise out of the provision of professional services, namely, the settlement of the case on plaintiffs' behalf." (*Id.* at fn.4.) Such an interpretation is consistent with the intent of the statute.

Although not addressed by the Fourth District, Lee contends *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884 ("*David Welch*") should control. However, that case is inapposite because, unlike here, the acts sued upon in *David Welch* did not arise from the attorney-client relationship. (*Id.* at p. 888-889.) Other courts have declined to follow *David Welch* based on its failure to (1) discuss the legislative history of section 340.6 and (2) provide any analysis regarding the interplay between the breach of fiduciary duty and legal advice. (*See, e.g., Stoll* at p. 1369; *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 68 ("[W]e agree that *Welch* should not be followed, since it did not cite any authority dealing with a breach of fiduciary duty in the context of attorney malpractice. [citations].")]

Based on the legislative history and cases interpreting section 340.6 the statute was intended to have application to all acts or omissions (except actual fraud) of an attorney arising in performance of professional services This is so regardless of the title given to the cause of action or the client's satisfaction with the legal advice.

VII.
A CLAIM FOR THE RETURN OF UNEARNED FEES ADVANCED IN CONNECTION WITH LITIGATION IS SUBJECT TO SECTION 340.6

Lee alleges she advanced funds to Hanley for litigation under a written fee agreement; that Hanley failed to return unearned fees; and that Hanley told her there was no balance remaining. (CT 177) Despite Lee's efforts to allege different causes of action, the gravamen of this fee dispute arises in the performance of the professional services Hanley provided.

For example, in the second amended complaint, Lee alleges Hanley was an attorney representing her in a lawsuit (CT 164, 165), Lee and Hanley entered into a "WRITTEN AGREEMENT" (CT 164) for Hanley to represent Lee in the lawsuit, Hanley sent monthly billing statements with attorney fee calculations titled for "Professional Services" (CT 165), and Hanley "charged, and plaintiff paid approximately $131,000 ... for 'professional services.'" (CT 167) She alleges "[b]y virtue of the attorney-client relationship . . ." Hanley owed plaintiff fiduciary duties, including the duty to inform her of unused costs. (CT 169) He was entitled to "reasonable attorney's fee" and that failing to return funds was "unconscionable." (CT 179) Lee then alleges three claims (CT 164-169) arising in the performance of professional services.

The other claims, titled "For Unused Advances" (CT 170-174), each state the breach is not returning the credit balance on March 1, 2010 (CT

172); or that "On or about March 1, 2010, defendants and each of them breached their fiduciary duty as attorneys by keeping and failing to return to plaintiff said unearned funds of $46,321" (CT 172-173); or as alleged in the Third Cause of Action " ... Hanley breached the agreement ... by failing to return plaintiff's monies which had not been used for fees and costs." (CT 175 ¶ BC-2) All other claims are for the return of unearned fees arising in the performance of professional services of an attorney. (CT 172-173, 177-179, 181-182; *see also* CT 30-35.)

Lee does not allege that Hanley agreed to provide non-legal services or that he failed to perform non-legal services. (*See, e.g., Quintilliani, supra,* (1998) 62 Cal.App.4th at p. 64 [when attorney becomes involved in non-legal business activities (concert promoting) the attorney cannot benefit from section 340.6.])

The Fourth District declined to find that Lee's dispute arises in the performance of professional services, but instead posited alternative theories of recovery which may be alleged, e.g., conversion. The Fourth District stated:

> For example, if a client leaves her purse unattended in the attorney's office and the attorney takes money from it, would we say that act arose in the performance of legal services? How different is it if, when the legal services have been completed and the attorney's representation has been terminated, the attorney keeps the unearned fees belonging to the client? To steal from a client is not to render legal services to him or her. We hold that, to the extent a claim is construed as a wrongful act not arising in the performance of legal

> services, such as garden variety theft or conversion, section 340.6 is inapplicable.
>
> [¶] We do not know whether, on remand, the facts as ultimately developed will show a theft of funds, an accounting error, or something else. While a cause of action based on the theft or conversion of client funds, for example, would not be subject to the section 340.6 statute of limitations, a cause of action predicated on an accounting error could be. (*Lee,* 174 Cal.Rptr.3d at p. 492)
>
> [¶] When we liberally construe the second amended complaint we see that, despite Lee's form of pleading, she has made factual allegations adequate to state a cause of action for conversion, for example. [Citations] . . . . We do not mean to imply that Lee's causes of action other than conversion are necessarily barred by the section 340.6 statute of limitations. (*Id.* at p. 498)

In justifying the judgment of reversal, the Fourth District created an exception to section 340.6 which is inconsistent with the legislative intent behind the broadly worded statute.

A. The "stolen-money-from-a-purse" analogy is flawed

Garden variety theft, such as stealing money from a purse when a client leaves the room, would not be conduct that arises "in the performance of professional services." There is no professional relationship in place where the client agrees to voluntary and knowingly advances fees to the attorney for legal services.

If the hypothetical is taken to its logical conclusion, most fee disputes would be outside section 340.6 because, at their core, most disputes over client money, at least from the client's perspective, involve an element of stealing a client's money (e.g., padding, double billing, billing

for unperformed work.) Although the client may have causes of action for breach of contract, breach of fiduciary duty, or conversion, since the acts forming the basis of the counts arise in the performance of the attorney's professional services, *the causes of action are governed by section 340.6.*

B. How an attorney handles client funds is part of the attorney's professional duties to the client which arise in the performance of professional services to the client

Although not addressed by the Fourth District, an attorney owes a host of duties to the client, a violation of which can form the basis of legal malpractice and other theories of recovery.

An attorney's duty to the client is "governed by the Rules of Professional Conduct, and that those rules, together with statutes and general principles relating to other fiduciary relationships, 'help define the duty component of the fiduciary duty which an attorney owes to his client.'" (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1032 (quoting *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 45.)

An attorney's duties include ethical and fiduciary duties to manage client funds. (See, e.g., Cal. Rules of Prof. Conduct ("RPC"), Rule 3-700 (D)(2) [failure to return advanced fees that have not been earned]; Rule 4-200 (A) [charging an unconscionable fee]; Rule 4-100 (B)(1) [failure to notify client of receipt of funds]; Rule 4-100 (B)(3) [failure to render accounting]; *Stoll, supra*, at p. 1365; *Schultz v. Harney* (1994) 27

Cal.App.4th 1611, 1621 ("*Schultz*"); *Quintilliani, supra,* at p. 67 ["Since the fiduciary obligations arose solely from these attorney-client relationships, we agree with Mr. Mannerino that the statute of limitations for legal malpractice is applicable."]

These duties arise from the attorney-client relationship, and by their origin a breach of these duties to the client arises in performance of the attorney's professional services.

First, section 340.6 does not contain limiting phrases such as "professional negligence" or "legal malpractice" because the wrongful acts of an attorney may include other acts of misconduct beyond providing incompetent legal advice. "There is ***no single, settled legal meaning of 'wrongful' act*** for purposes of the statute." (*Southland Mechanical Constructors Corp., supra,* 119 Cal.App.3d at p. 431 [emphasis added.])

Second, even if the statute was limited to "legal malpractice," it is established that a violation of an attorney's ethical duties to a client, including a claim of misappropriation of client funds, is a breach of the attorney's duties to the client. This includes alleged double billing, padding, billing for unperformed work, or failing to return unearned fees, all of which are "wrongful acts" of an attorney "in the performance of his professional services." (*See, e.g., Schultz, supra,* 27 Cal.App.4th 1611 at p. 1621; *Knight v. Aqui* (2013) 966 F.Supp.2d 989, 997.)

The question in *Schultz* was whether the client sufficiently alleged "legal malpractice" against an attorney for charging excessive fees. The client *did not allege* the attorney negligently performed legal services, but rather that he engaged in "self-dealing" by charging an "excessive and unlawful fee." (*Schultz, supra*, 27 Cal.App.4th 1611 at p. 1621.)

In addressing whether an ethics violation over fees can support *legal malpractice* the court held:

> **Schultz does not allege that Harney negligently performed legal services in the handling of the medical malpractice action itself**, but rather, in effect, that he engaged in self-dealing to the detriment of his client by charging an excessive and unlawful fee for what Schultz does not deny was an otherwise satisfactory settlement, amounting in total to $1.6 million before costs and fees were deducted.
>
> While not a model of pleading, **such an allegation is sufficient to charge an act of professional negligence. An attorney's breach of the ethical duties of good faith and fidelity, which are owed by an attorney to his or her client, amounts to legal malpractice and is actionable.** (*Id.* at p. 1621 [emphasis added].)

Although *Schultz* did not address section 340.6, it illustrates that an alleged violation of fiduciary duties related to client money is a form of legal malpractice. (*See also Knight v. Aqui* (N.D. Cal. 2013) 966 F.Supp.2d 989, 996-997 [legal malpractice supported even though no claim that attorney's advice was below the standard of care. "An attorney who misapplies the law of attorney's fees to the client's financial detriment breaches the duty of care to the client."])

The Fourth District failed to address cases that find a legal malpractice claim can be based on an ethics violation, which is exactly what Lee is alleging against Hanley. It is not necessary to go beyond the pleading to see that Lee alleges Hanley violated fiduciary duties for the way he handled her money. This is an alleged breach of the duty of care and a form of legal malpractice within section 340.6.

Significantly, although such allegations may support the elements of other causes of action (e.g., breach of contract, breach of fiduciary duty), the claim *still must be brought within one year* because the alleged facts arise in performance of the attorney's professional services and are covered by section 340.6. Applying a longer statute of limitations for breach of contract or other claims, directly conflicts with the legislative intent of section 340.6. (*See, e.g., Stoll, supra*, 9 Cal.App.4th 1362; *Levin, supra,* 37 Cal.App.4th 805.)

C. Regardless of whether the client was "satisfied" with the attorney's services, an act or omission regarding a fee dispute arises in the performance of professional services

In finding Lee's claims potentially outside section 340.6, the Fourth District found it significant that Lee was satisfied with Hanley's "services" and the fee dispute occurred after the litigation ended. (*Lee*, 174 Cal.Rptr.3d at p. 495.) These factors do not limit the reach of section 340.6.

First, the funds were delivered as an advance for litigation and expert costs. The litigation settled and there was a dispute whether Lee had a balance. (CT 177) The genesis of this dispute arises from the attorney-client relationship, and implicates not only the attorney's services to the client, but continuing duties and obligations regarding client funds even after the litigation is over.

Second, although Lee may claim she was satisfied with Hanley's services, the inquiry whether Hanley's fees were unearned or earned requires an analysis of what he did for her.[12] The duties are intertwined,[13] and it is immaterial whether or not she alleges his services were satisfactory because the analysis still requires an audit of the attorneys' work.

Most disputes over client funds will involve, to a greater or lesser degree, an analysis of the attorney's legal advice or work product to the client. However, requiring this type of audit (e.g., comparing the work to the bills) defeats the purpose of the section 340. It will allow parties to resurrect time-barred claims by pleading around the statute of limitations: allege the attorney's services were adequate, but the over-billing was conversion, breach of fiduciary duty, or some other cause of action which has a longer statute of limitations.

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[12] Lee alleges that when she discussed the issue on the phone with Hanley he said there is no "balance" to her. (CT 177)

[13] *See, e.g., Levin, supra*, 37 Cal.App.4th at p. 805.

Lee did that here. She filed an untimely complaint alleging an unconscionable fee; her lawyer discovered the lawsuit was untimely only after receiving Hanley's demurrer; and then Lee scrambled to resurrect her claim by carefully alleging facts and causes of action specifically designed to avoid application of section 340.6.

Second, and as discussed above, attorneys have continuing ethical duties to account to clients and return unused funds, which, according to Lee, Hanley failed to do. Such allegations constitute a breach of the duty of care to the client and a legal malpractice claim.

Again, it makes no difference whether the client claims she was satisfied with the services or the litigation ended. To the contrary, Lee's claim that she was "satisfied" with the services plays to the erroneous assumption that section 340.6 applies *only* when an attorney performed services below the standard of care. But, it is well settled that section 340.6 is not limited to "alleged professional negligence," but includes any act or omission of an attorney arising from his professional services to the client.

D. Fourth District carves out exceptions to section 340.6

The Fourth District reasoned that an attorney's failure to return unearned fees may give rise to a longer limitations period, depending on the claim (e.g., conversion.) This creates an exception to the statute even though the only statutory exception is actual fraud. "[I]f exemptions are specified in a statute, we may not imply additional exemptions unless there

is a clear legislative intent to the contrary." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230; *Stoll* at p. 1369 ["the trial court essentially engrafted a second limitation on the one-year period for malpractice which happens to involve a breach of fiduciary duty."])

Here, Lee alleges she contracted with Hanley for legal services whereby she would advance fees and he would bill against those advances. As previously stated, a failure to return unearned fees may support breach of contract or other theories, but it is well settled that any other theory (except fraud) against an attorney arising in the performance of professional services is subject to the one-year statute of limitations. The Legislature did not include "breach of contract" or "conversion" as an exception to the one-year period. (*Southland Mechanical Constructors Corp., supra,* 119 Cal.App.3d at p. 429.)

Merely because the client can state a claim for conversion, breach of contract, or breach of fiduciary duty, does not mean that a longer statute of limitations applies. The claims are still governed by section 340.6. The only exception to this rule is actual fraud. If the client believes the attorney stole money advanced in the litigation, as here, the client can allege fraud.[14]

[14] Lee chose not to allege "fraud" against Hanley even though the trial court gave her numerous opportunities to do so.

E. The Fourth District's fine distinction of *Levin* and *Prakashpalan* is contrary to the legislative intent

Although the Fourth District did not address *Stoll*, it tried to distinguish *Levin* and *Prakashpalan* to support its conclusion. (*Lee, supra,* 174 Cal.Rptr.3d p. 496.)

The Fourth District distinguished *Prakashpalan* because that case dealt with a failure to properly deliver client settlement funds which arose from the attorney's duty to distribute settlement proceeds. (*Lee,* 174 Cal.Rptr.3d p. 496.)

First, although the reason the money was in the attorney's account may be different (settlement proceeds), the duties to the client regarding maintaining client funds and charging a reasonable fee are essentially the same. Moreover, the attorney's refusal to reimburse the client occurred after the litigation ended.

Second, according to the stolen-money-from-a-purse analogy, the attorney in *Prakashpalan* "stole" the client's "money," which, but for section 340.6, could support several causes of action with a longer statute of limitations, including "conversion."[15] Arguably, this situation does not differ from many fee disputes where the client alleges improper billing or

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[15] The elements of conversion are (1) plaintiff owned or had a possessory right to property, (2) defendant substantially and intentionally interfered with plaintiff's property, (3) plaintiff's lack of consent, and (4) damages. (CACI 2100.)

disbursement of client funds, and as such illustrates the problem with a narrow interpretation of section 340.6.

The Fourth District distinguished *Levin* because it "did not address either a demurrer or a situation where the plaintiff had asserted a cause of action other than malpractice. Furthermore, it did not purport to address all possible claims with respect to attorney fees, such as claims of theft or conversion." (*Lee, supra,* at p. 495) This is a problematic distinction.

First, distinguishing *Levin* because the plaintiff failed to allege a cause of action other than "malpractice" is based on an erroneous assumption that "malpractice" is limited to bad legal advice.

Second, such a distinction also illustrates the concern that a claimant with an otherwise time-barred "malpractice" claim can allege another cause of action (e.g. conversion) to avoid the one-year statute. Under Fourth District's reasoning, if the plaintiff in *Levin* had asserted conversion, it may have been more difficult to distinguish *Levin* from Lee's case.

The court in *Levin* presumably could have given the plaintiff leave to amend the complaint, but the court apparently saw through what the plaintiff was trying to accomplish and rejected the argument.

F. Based on the allegations of the second amended complaint, a court can conclude that section 340.6 applies to Lee's claims

Even though the case was decided on demurrer, it is not too early to conclude this case is subject to section 340.6. The allegations of second

amended complaint (and prior versions of the complaint) show the fee dispute arose in the performance of Hanley's professional services to Lee. She hired Hanley to represent her in a lawsuit and after the lawsuit ended she claims she had a remaining balance. She alleges a violation of professional and fiduciary duties for the way he handled client funds.

When applying Lee's own allegations to the statute, and cases interpreting the section 340.6, a court can determine from the face of the complaint the claims arise in the performance of professional services.

G. Back to pre-section 340.6 days

Before section 340.6 was enacted, multiple limitation periods applied to claims against attorneys. This led to increased premiums and other concerns, discussed *supra*. Section 340.6 was intended to eliminate or at least minimize these concerns.

Any decision which allows a fee dispute to proceed under guise of different legal theories with a longer statute of limitations, undermines section 340.6 and risks going back to the days of multiple limitation periods and attendant uncertainty. If a client sues a former lawyer over a billing dispute but does not allege "professional negligence," it is conceivable there will be disputes as to coverage for the claims and increased premiums to address expanded exposure.

VIII.
LEE SHOULD NOT HAVE BEEN GIVEN LEAVE TO ADD CONVERSION OR ANY OTHER THEORY

While it is not entirely clear from the opinion, it appears the Fourth District gave Lee an opportunity to plead conversion and other theories,[16] even though she chose not to amend.

Lee should not be given leave to amend. Lee had multiple opportunities to allege fraud, but she chose not to, allowing the case to be dismissed with prejudice. "When a demurrer is sustained with leave to amend but plaintiff elects not to amend, it is presumed on appeal that the complaint states as strong a case as possible." (*Giraldo v. California Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 252 [emphasis added]; *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.)

IX.
CONCLUSION

The one-year statute of limitations for actions against attorneys set forth in California Code of Civil Procedure section 340.6 applies to a former client's claim against an attorney for reimbursement of unearned attorney fees advanced in connection with a lawsuit.

Respondent William B. Hanley requests that the Court reverse the Fourth District and affirm the judgment of the trial court.

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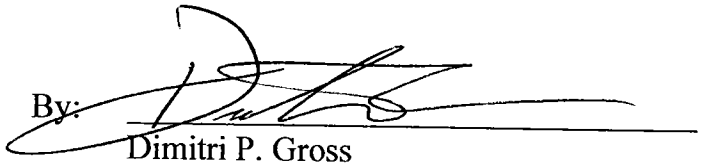
[16] (*Lee, supra*, 174 Cal.Rptr.3d p. 498.)

Dated: October 31, 2014

LAW OFFICES OF DIMITRI P. GROSS

By: 

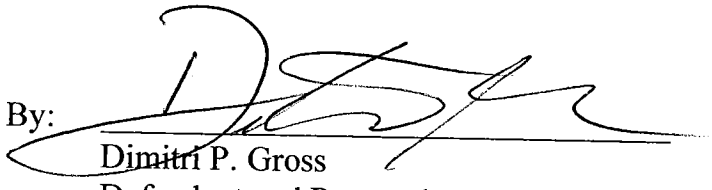
Dimitri P. Gross
Defendant and Respondent William B. Hanley

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504 of California Rules of Court, the enclosed brief of Respondent was produced using 13-point type, including footnotes and contains approximately 7,126 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 31, 2014

LAW OFFICES OF DIMITRI P. GROSS

By: 

Dimitri P. Gross
Defendant and Respondent William B. Hanley

COURT OF APPEAL - 4TH DIST DIV 3

FILED

Jul 15, 2014

Deputy Clerk: D. Massey

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NANCY F. LEE, Plaintiff and Appellant, v. WILLIAM B. HANLEY, Defendant and Respondent.	G048501 (Super. Ct. No. 30-2011-00532352) OPINION

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Reversed.

Walter J. Wilson for Plaintiff and Appellant.

Law Offices of Dimitri P. Gross and Dimitri P. Gross for Defendant and Respondent.

* * *

Plaintiff and appellant Nancy F. Lee hired Attorney William B. Hanley to represent her in certain civil litigation. After the litigation settled, Lee sought a refund of unearned attorney fees and unused expert witness fees she had advanced to Attorney Hanley. Not having received a refund, Lee hired Attorney Walter J. Wilson and terminated the services of Attorney Hanley. Attorney Hanley thereafter refunded certain expert witness fees, but no attorney fees. More than a year after hiring Attorney Wilson, Lee filed a lawsuit against Attorney Hanley seeking the return of attorney fees.

Attorney Hanley filed a demurrer to Lee's second amended complaint, based on the one-year statute of limitations contained in Code of Civil Procedure section 340.6.[1] The court sustained the demurrer and dismissed the action with prejudice. Lee appeals. We reverse.

Section 340.6 provides the statute of limitations for an action based on "a wrongful act or omission, other than for actual fraud, arising in the performance of professional services . . . ." According to the plain wording of the statute, to the extent the wrongful act or omission in question arises "in the performance of professional services," the statute applies; to the extent the wrongful act or omission in question does not arise "in the performance of professional services," the statute is inapplicable.

This notwithstanding, it seems that almost any time a client brings an action against his or her attorney the wrongful act in question is construed as one arising in the performance of legal services, such that section 340.6 applies. But surely it cannot be the case that every conceivable act an attorney may take that affects his or her client is one arising in the performance of legal services. For example, if a client leaves her purse unattended in the attorney's office and the attorney takes money from it, would we say that act arose in the performance of legal services? How different is it if, when the legal services have been completed and the attorney's representation has been terminated, the

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[1] All subsequent statutory references are to the Code of Civil Procedure unless otherwise specifically stated.

attorney keeps the unearned fees belonging to the client? To steal from a client is not to render legal services to him or her. We hold that, to the extent a claim is construed as a wrongful act not arising in the performance of legal services, such as garden variety theft or conversion, section 340.6 is inapplicable.

The matter before us was resolved at the demurrer stage, before the facts were developed. However, the "[r]esolution of a statute of limitations defense normally is a factual question . . . . [Citation.]" (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 582; *Baright v. Willis* (1984) 151 Cal.App.3d 303, 311.) Here, the facts alleged in Lee's second amended complaint could be construed as giving rise to a cause of action for the theft or conversion of an identifiable sum of money belonging to her. This being the case, we cannot say that Lee's second amended complaint demonstrates clearly and affirmatively on its face that her action is necessarily barred by the section 340.6 statute of limitations. (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 321 (*Stueve Bros. Farms*).) Because this action has not reached a point where the court can determine whether the wrongful act in question arose in the performance of legal services, and thus, whether or not section 340.6 applies, the demurrer should not have been sustained.

I

FACTS

In her second amended complaint, Lee alleged that the litigation Attorney Hanley had handled for her settled on January 25, 2010, the lawsuit was dismissed three days later, and Attorney Hanley did no further work on the matter thereafter. Attached to her second amended complaint were copies of a February 1, 2010 letter from Attorney Hanley to Lee and a February 1, 2010 invoice for legal services. The letter stated that Lee had a credit balance of $46,321.85 and the invoice so reflected. The invoice itemized work performed in January 2010, including the drafting of a settlement agreement and cover letter on January 18, 2010. Lee also alleged that in April 2010, she telephoned

Attorney Hanley and asked for a final billing statement and a return of her unused funds but that Attorney Hanley, in a harsh manner, told her she had no credit balance and would receive no refund.

On December 6, 2010, Lee and Attorney Wilson each sent a letter to Attorney Hanley demanding the refund of $46,321.85 in unearned attorney fees plus approximately $10,000 in unused expert witness fees. By these letters, Lee terminated the services of Attorney Hanley and she and Attorney Wilson each informed him that Attorney Wilson would pursue the collection of the monies owed by Attorney Hanley to Lee and also would handle any remaining matters associated with the settled litigation.

In her second amended complaint, Lee also alleged that, on or about December 28, 2010, Attorney Hanley returned $9,725 in unused expert witness fees. However, he never returned the $46,321.85 in unearned attorney fees.

On December 21, 2011, Lee filed her initial complaint against Attorney Hanley. Attorney Hanley filed a demurrer based on the one-year statute of limitations. (§ 340.6.) However, before that demurrer was heard, Lee filed a first amended complaint. The court ruled that the demurrer was moot.

Attorney Hanley filed a demurrer to the first amended complaint, also on the basis of the statute of limitations. The court sustained the demurrer with leave to amend.

Lee then filed her second amended complaint and Attorney Hanley filed another demurrer, again based on the statute of limitations. The court sustained the demurrer with leave to file a further amended complaint. In her opening brief on appeal, Lee represents, albeit without citation to the record, that the court sustained the demurrer with respect to all grounds other than fraud, but gave Lee leave to amend with respect to allegations based on fraud. Lee also states that because she "was unwilling to plead fraud against" Hanley, she did not file a further amended complaint. The court dismissed her action with prejudice.

II

DISCUSSION

A. Preliminary Matter—Request for Judicial Notice:

Lee has filed a request for judicial notice, in which she asks this court to take notice of (1) certain portions of the legislative history of section 340.6, and (2) certain correspondence concerning her complaint to the State Bar of California about Attorney Hanley. Attorney Hanley opposes the motion. He says Lee failed to put the documents in question before the trial court and they are, in any event, irrelevant to the issues raised in this appeal.

The fact that Lee did not address the legislative history of section 340.6 in the trial court does not mean she may not raise it on appeal from a judgment of dismissal following the sustaining of a demurrer. "An appellate court may . . . consider new theories on appeal from the sustaining of a demurer to challenge or justify the ruling. As a general rule a party is not permitted to . . . raise new issues not presented in the trial court. [Citation.] . . . However, 'a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts.' [Citations.] A demurrer is directed to the face of a complaint (Code Civ. Proc., § 430.30, subd. (a)) and it raises only questions of law [citations]. Thus an appellant challenging the sustaining of a general demurrer may change his or her theory on appeal [citation], and an appellate court can affirm or reverse the ruling on new grounds. [Citations.] After all, we review the validity of the ruling and not the reasons given. [Citation.]" (*B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 959.)

In this case, the proper interpretation of section 340.6 is a question of law and this court may consider the legislative history of section 340.6 in addressing the issue. Consequently, we grant Lee's request to take judicial notice of the portions of the legislative history attached as exhibits 1 through 3 to her request.

However, the correspondence concerning the State Bar investigation of Lee's complaint about Attorney Hanley is irrelevant to the determination of the issues on appeal. Consequently, we deny Lee's request to take judicial notice of the documents attached as exhibit 4 to her request.

B. Standard of Review:

"We review de novo an order sustaining a demurrer to determine whether the complaint alleges facts sufficient to state a cause of action. [Citation.]" (*Yee v. Cheung* (2013) 220 Cal.App.4th 184, 192 (*Yee*), criticized on another point in *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 668, 677 (*Roger Cleveland*) [statute inapplicable to malicious prosecution claims].) "When a demurrer is sustained without leave to amend, 'we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citation.]" (*Yee, supra*, 220 Cal.App.4th at p. 193.)

"'"'"A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and affirmatively appear of the face of the complaint; it is not enough that the complaint shows that the action may be barred. [Citation.]' [Citation.]" [Citation.]' [Citations.]" (*Stueve Bros. Farms, supra*, 222 Cal.App.4th at p. 321.[2])

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2 We address the issues framed by the parties. In *Stueve Bros. Farms, supra,* 222 Cal.App.4th 303, we were not asked to address whether section 340.6 was simply inapplicable to causes of action based on the misappropriation of client assets.

C. Section 340.6:

Section 340.6, subdivision (a) 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. . . . [I]n 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: [¶] . . . [¶] (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. . . ."

D. Performance of Professional Services:

(1) Levin and Prakashpalan Cases—

Lee argues that the plain wording of section 340.6 shows the statute is inapplicable to her case. She says Attorney Hanley completed his legal work when the litigation he was handling was settled and the case was dismissed. Any actions he took thereafter, including the wrongful keeping of the money belonging to her, were not part of the performance of professional services, because the performance of professional services had terminated. She also contends that the misappropriation of client funds cannot be construed as the performance of professional services, no matter what the timing.

Attorney Hanley disagrees, citing *Levin v. Graham & James* (1995) 37 Cal.App.4th 798 (*Levin*) and *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105 (*Prakashpalan*). In *Levin*, the plaintiff stated causes of action for

malpractice, identified unconscionable attorney fees as an aspect of malpractice, and requested a refund of unconscionable attorney fees as a remedy for malpractice. Under the facts of the case, the court rejected the assertion that a claim of unconscionable attorney fees was anything other than a claim for malpractice, subject to section 340.6. The court observed that the plaintiff had asserted no claim independent of attorney malpractice, such as money had and received, and had not suggested another statute of limitations. (*Levin, supra*, 37 Cal.App.4th at pp. 804-805.)

According to Attorney Hanley, *Levin, supra*, 37 Cal.App.4th 798 shows that Lee's claim for a refund of attorney fees is subject to the one-year statute of limitations contained in section 340.6. However, that case is distinguishable from the one before us. The court in *Levin* did not address either a demurrer or a situation where the plaintiff had asserted a cause of action other than malpractice. Furthermore, it did not purport to address all possible claims with respect to attorney fees, such as claims of theft or conversion.

Here, Lee expressed her general satisfaction with Attorney Hanley's performance of services. Her claim that the credit balance belonged to her was not based on either malpractice or the unconscionability of the fee. Rather, she simply sought the return of money belonging to her, on various causes of action, including money had and received. *Levin, supra*, 37 Cal.App.4th 798 simply does not control.

We turn now to *Prakashpalan, supra*, 223 Cal.App.4th 1105. In that case, the plaintiffs alleged that the defendant law firm settled a class action lawsuit for 93 insureds in November 1997, but that the plaintiffs, as class members, did not learn until February 2012 that the defendant had failed to fully and properly distribute $22 million of the settlement funds. (*Id.* at pp. 1114-1115.) The trial court sustained the defendant's demurrer to the second amended complaint. (*Id.* at p. 1119.) The appellate court affirmed in part and reversed in part. (*Id.* at pp. 1137-1138.)

The appellate court held that the plaintiffs' malpractice and breach of fiduciary causes of action, based on the alleged wrongful withholding of the settlement funds, were barred by section 340.6. (*Prakashpalan, supra*, 223 Cal.App.4th at p. 1122.) The court stated: "Plaintiffs assert that the holding of settlement funds does not arise out of the provision of professional services and thus that section 340.6 does not apply for that reason. We disagree, as in this case, the funds in the trust account are settlement proceeds, [defendant's] conduct in holding such funds arises out of the provision of professional services, namely, the settlement of the case on plaintiffs' behalf." (*Id.* at p. 1122, fn. 4.)

According to Attorney Hanley, *Prakashpalan, supra*, 223 Cal.App.4th 1105 shows that when an attorney collects monies in the performance of professional services and a claim later arises over the retention or disbursement of those monies, the claim is one subject to section 340.6. Where in *Prakashpalan* the issue was the attorneys' failure to properly or fully distribute settlement funds collected in the performance of professional services, in the matter before us, Attorney Hanley observes, the issue is the attorney's failure to properly or fully distribute legal fees collected in the performance of professional services.

We see a difference in the two situations, however. An attorney's collection of settlement funds and distribution of those funds to the litigants entitled thereto is clearly part of the performance of the legal service of settling the lawsuit. However, 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.

True enough, various cases have broadly stated that section 340.6 applies irrespective of whether the theory of liability is based on breach of contract or tort. The court in *Levin*, for example, stated: "Indeed, for any wrongful act or omission of an attorney arising in the performance of professional services, an action must be commenced within one year after the client discovers or through the use of reasonable

diligence should have discovered the facts constituting the wrongful act or omission. In all cases other than actual fraud, whether the theory of liability is based on the breach of an oral or written contract, a tort, or a breach of a fiduciary duty, the one-year statutory period applies. [Citation.]" (*Levin, supra*, 37 Cal.App.4th at p. 805.) Similarly, the court in *Yee, supra*, 220 Cal.App.4th 184, stated: "The phrase '"wrongful act or omission"' is 'used interchangeably as a reference to both tortious and contractual wrongdoing.' [Citation.]" (*Id.* at pp. 194-195.)

The critical point, however, is that those cases do not state that the statute applies whenever an attorney commits any tort of any nature. Rather, they include the qualification, as set forth plainly in the statute, that the wrongful act or omission must be one "arising in the performance of professional services." (See, e.g., *Levin, supra*, 37 Cal.App.4th at p. 805; *Yee, supra*, 220 Cal.App.4th at pp. 194-195.)

(2) Legislative history—

Lee argues that the legislative history of section 340.6 shows the statute was intended to apply only to malpractice claims. We observe that the point was recently addressed in *Roger Cleveland, supra*, 225 Cal.App.4th 660.

The court in *Roger Cleveland, supra*, 225 Cal.App.4th 660 criticized the decisions in *Yee, supra*, 220 Cal.App.4th 184 and *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874 (*Vafi*) to the effect that section 340.6 applies to malicious prosecution claims. The *Roger Cleveland* court held, for various reasons not important here, that the statute of limitations of section 335.1 is the one that applies to those claims. (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 668.) It stated, inter alia: "Based upon the plain language of section 340.6, subdivision (a), we conclude the Legislature's use of 'wrongful act or omission' by an attorney arising in the performance of professional services was intended to include any legal theory related to a claim by a client or former client against his or her attorney, and not a claim by a third party, alleging the attorney

maliciously prosecuted an action against the plaintiff." (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 680.)

In addition, the court in *Roger Cleveland, supra*, 225 Cal.App.4th 660 observed that its interpretation was consistent with the legislative history of section 340.6. It construed the legislative history of the statute, despite the plain wording of the statute, to reflect a legislative intent to apply the one-year statute of limitations to malpractice claims specifically. (*Id.* at pp. 680-682.)

The court noted that Assembly Bill No. 298 ((1977-1978 Reg. Sess.) as introduced Jan. 25, 1977) originally proposed a limitations period applicable "'[i]n any action for damages against an attorney based upon the attorney's alleged professional negligence.'" (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 681, fn. omitted.) However, commentator Ronald E. Mallen suggested using the phrase "'wrongful act or omission occurring in the rendition of professional services'" because the concept of attorney malpractice was difficult to define. (*Ibid.*) He further suggested that the limitations period be inapplicable to acts of actual fraud. (*Ibid.*)

As the court in *Roger Cleveland, supra*, 225 Cal.App.4th 660 explained in some detail, the suggested language "wrongful act or omission" was thereafter included in the proposed legislation, although various communications and legislative materials regarding the proposed legislation continued to refer to the bill as pertaining to the statute of limitations for attorney malpractice actions. (*Id.* at pp. 681-682.) The court concluded: "Our review of the legislative history indicates the Legislature intended to create a specially tailored statute of limitations for legal malpractice actions . . . ." (*Id.* at p. 682.)

(3) Plain meaning—

This notwithstanding, the courts have for years looked to the wording of the statute as ultimately adopted, pertaining to "a wrongful act or omission, other than for actual fraud, arising in the performance of professional services" (§ 340.6), and applied it

to allegations of wrongful acts or omissions other than malpractice. (See, e.g., *Vafi, supra*, 193 Cal.App.4th 874 [malicious prosecution].) "The principles of statutory analysis are well established. '"[W]e must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.' [Citation.] If the statutory language is clear and unambiguous our inquiry ends. 'If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.' [Citations.] In reading statutes, we are mindful that words are to be given their plain and commonsense meaning. [Citation.]" [Citation.] Thus, we "avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend. [Citation.]" [Citation.]' [Citation.]" (*Id.* at p. 880.)

Here, we find the words of the statute to be plain and unambiguous. They provide the applicable statute of limitations for an action based on "a wrongful act or omission, other than for actual fraud, arising in the performance of professional services . . . ." (§ 340.6.) So, if the wrongful act or omission at issue arises "in the performance of professional services," the statute applies. If the wrongful act or omission at issue does not arise "in the performance of professional services," the statute is inapplicable. As we have already stated, an attorney does not provide a service to the client by stealing his or her money.

As we have stated, the second amended complaint in the matter before us included causes of action for breach of contract, breach of fiduciary duty, unjust enrichment, money had and received, and an equitable right to the return of unused funds. It did not assert causes of action for theft, conversion, or fraud.

However, we bristle against cutting off a litigant's claims because of inartful or sloppy pleading. (See, e.g., *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103 (*Barquis*); *MacIsaac v. Pozzo* (1945) 26 Cal.2d 809, 816 (*MacIsaac*).) Rather, we liberally construe his or her pleading with a view to achieving substantial justice. (*Yue v. City of Auburn* (1992) 3 Cal.App.4th 751, 756-757.) Even if a litigant is

inarticulate with respect to the relief sought, he or she is "nevertheless entitled to any relief warranted by the facts pleaded, and [the] failure to ask for the proper relief is not fatal to [his or her] cause. [Citations.]" (*MacIsaac v. Pozzo*, *supra*, 26 Cal.2d at p. 815.)

Moreover, "we are not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the *factual* allegations of the complaint are adequate to state a cause of action under any legal theory. The courts of this state have, of course, long since departed from holding a plaintiff strictly to the 'form of action' he has pleaded and instead have adopted the more flexible approach of examining the facts alleged to determine if a demurrer should be sustained. [Citations.]" (*Barquis*, *supra*, 7 Cal.3d at p. 103.)

The second amended complaint in the matter before us alleged that, after Attorney Hanley's services with respect to the settled litigation had been fully completed, he knowingly refused to release money belonging to Lee, which he himself had characterized as her "credit balance." When we liberally construe the second amended complaint we see that, despite Lee's form of pleading, she has made factual allegations adequate to state a cause of action for conversion, for example. (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208-209, 215-216 [wrongful exercise of dominion over identifiable sum of money belonging to another].)

As we have already noted, "'"'A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and affirmatively appear of the face of the complaint; it is not enough that the complaint shows that the action may be barred. [Citation.]' [Citation.]" [Citation.]' [Citations.]" (*Stueve Bros. Farms*, *supra*, 222 Cal.App.4th at p. 321.) Here, we cannot say that Lee's second amended complaint demonstrates clearly and affirmatively on its face that her action is necessarily barred by the statute of limitations. It is simply premature at this point to conclude that Lee cannot allege "facts sufficient to state a cause of action under any possible legal

theory" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 870) that will survive the bar of the one-year statute of limitations.

E. Remaining Arguments:

(1) Introduction—

We address Lee's tolling and date of discovery arguments, in case on remand and further development of the facts, she continues to assert causes of action to which section 340.6 applies. However, we do not address Lee's argument that section 340.6 is unconstitutional as applied, due to her failure to provide any legal authority in support of that argument. (*Roden v. AmerisourceBergen Corp.* (2010) 186 Cal.App.4th 620, 648-649.) We also do not address arguments Lee raised for the first time in her reply brief. (*Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 108.)

(2) Tolling—

Lee says that, even though she and Attorney Wilson each sent termination letters to Attorney Hanley on December 6, 2010, Attorney Hanley continued to represent her until he delivered to her the December 28, 2010 check for the refund of unused expert witness fees, because the delivery of the check was an act in representation of her as her attorney. This is, of course, contrary to her assertion, in other portions of her briefing on appeal, that all professional services were terminated when the settled litigation was dismissed. In any event, it is clear, for the purposes of the tolling provision of section 340.6, that Attorney Hanley's services were terminated no later than December 6, 2010, and that the one-year statute began to run no later than that date. (*Stueve Bros. Farms, supra*, 222 Cal.App.4th at p. 314.)

(3) Date of Discovery—

Lee also states she did not discover Attorney Hanley claimed that the taking of her money arose in the performance of professional services and that section 340.6 applied, until Attorney Wilson received the February 29, 2012 demurrer to her complaint.

Although Lee does not articulate the significance of her statement, we gather she views the date she discovered Attorney Hanley's legal theory as having some bearing upon the triggering of the statute of limitations. It does not. While the date of discovery of an attorney's alleged wrongful act is relevant to a determination of the running of the statute of limitations under section 340.6, the date of discovery of the attorney's legal defense is not. (Cf. *Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1146 [plaintiff's ignorance of legal theories is irrelevant].)

III

DISPOSITION

The judgment of dismissal is reversed. Lee shall recover her costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.

COURT OF APPEAL - 4TH DIST DIV 3

FILED

Aug 08, 2014

Deputy Clerk: A. Reynoso

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NANCY F. LEE, Plaintiff and Appellant, v. WILLIAM B. HANLEY, Defendant and Respondent.	G048501 (Super. Ct. No. 30-2011-00532352) ORDER MODIFYING OPINION AND DENYING PETITIONS FOR REHEARING [NO CHANGE IN JUDGMENT]

On the court's own motion, the opinion filed in this case on July 15, 2014 is hereby ORDERED modified as follows:

1. On page 3 of the opinion, after the sentence reading, "We hold that, to the extent a claim is construed as a wrongful act not arising in the performance of legal services, such as garden variety theft or conversion, section 340.6 is inapplicable[,]" add the following footnote: "Of course, by so stating, we do not mean to imply that those are the only two causes of action to which the statute does not apply."

2. On page 3, delete the first full paragraph. Substitute the following paragraph: "The gist of Lee's second amended complaint was that, after Attorney Hanley's services to her had been terminated, he wrongfully refused to return money belonging to her. In other words, her lawsuit as framed was based on the purported acts or omissions of Attorney Hanley that did not arise in the performance of professional services to her. The matter before us was resolved at the demurrer stage, before the facts

were developed. We do not know whether, on remand, the facts as ultimately developed will show a theft of funds, an accounting error, or something else. While a cause of action based on the theft or conversion of client funds, for example, would not be subject to the section 340.6 statute of limitations, a cause of action predicated on an accounting error could be. The '[r]esolution of a statute of limitations defense normally is a factual question . . . . [Citation.]' (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 582; *Baright v. Willis* (1984) 151 Cal.App.3d 303, 311.) Here, we cannot say that Lee's second amended complaint demonstrates clearly and affirmatively on its face that her action is necessarily barred by the section 340.6 statute of limitations. (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 321 (*Stueve Bros. Farms*).) This being the case, the court erred in sustaining the demurrer."

3. On page 6, add the following sentence as the last sentence of the second full paragraph: "'When a demurrer is sustained with leave to amend, and the plaintiff chooses not to amend but to stand on the complaint, an appeal from the ensuing dismissal order may challenge the validity of the intermediate ruling sustaining the demurrer. [Citation.]' (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.)"

4. On page 9, in the first sentence of the first full paragraph, insert the word "duty" between the words "fiduciary" and "causes."

5. On page 12, delete the paragraph reading: "As we have stated, the second amended complaint in the matter before us included causes of action for breach of contract, breach of fiduciary duty, unjust enrichment, money had and received, and an equitable right to the return of unused funds. It did not assert causes of action for theft, conversion, or fraud."

6. On page 12, delete the first two words of the paragraph beginning, "However, we" and substitute the word "We."

7. Change the first citation appearing on page 13 to read: "(*MacIsaac, supra,* 26 Cal.2d at p. 815.)"

8. On page 13, add the following language at the end of the second full paragraph: "Given this, her second amended complaint was sufficient to withstand a demurrer. We do not mean to imply that Lee's causes of action other than conversion are necessarily barred by the section 340.6 statute of limitations. As we stated at the outset, whether the facts ultimately will show that Attorney Hanley's acts or omissions supporting Lee's various causes of action were acts or omissions arising in the performance of professional services is a matter yet to be determined."

9. Delete the last sentence of the paragraph which begins on page 13 and ends on page 14.

There is no change in the judgment.

Appellant Nancy F. Lee and respondent William B. Hanley each filed a petition for rehearing on July 30, 2014. Each of the petitions for rehearing is DENIED.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in Orange County, California. I am over the age of 18 and not a party to the within action; my business address is: 19200 Von Karman Avenue, Suite 900, Irvine, California 92612.

On October 31, 2014, I served the **OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

Walter J. Wilson, Esq.
333 West Broadway, Ste. 200
Long Beach, California 90802
Attorney for Appellant Nancy F. Lee

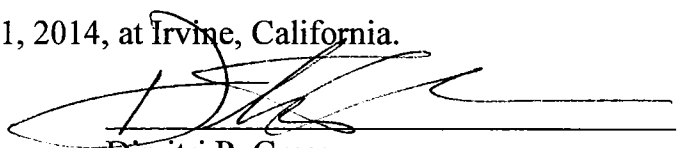
Clerk of Court of Appeal
P.O. Box 22055
Santa Ana, CA 92702

Clerk of the Court
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

I am readily familiar with Law Offices of Dimitri P. Gross' practice for collection and processing of correspondence for mailing with the United States Postal Service. Pursuant to such practice, all correspondence is deposited with the United States Postal Service in the ordinary course of business on the date it is generated. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices in the United States and mailed at Irvine, California.

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

Executed October 31, 2014, at Irvine, California.



Dimitri P. Gross