SUPREME COURT CASE NO. S220775

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NANCY F. LEE,
Plaintiff and Appellant,

v.

WILLIAM B. HANLEY,
Defendant and Respondent.

After a Decision of the Court of Appeal
Fourth Appellate District, Division Three
Court of Appeal Case No. G048501

On Appeal from the Superior Court of Orange County
Honorable Robert J. Moss, Judge
Case No. 30-2011-00532352

APPELLANT'S ANSWER BRIEF ON THE MERITS

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SUPREME COURT
FILED

DEC - 4 2014

Frank A. McGuire Clerk

Deputy

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I. INTRODUCTION

A. Crisis. There is a crisis in the judiciary – appellate courts are cheerleaders for the bar (applying a legal Rorschach test, instead of the plain language, to section 340.6 actions); trial judges are "cowed," "covered" or "confused," and don't define terms or legitimately attempt to apply the targeting phrase (when a *Von Rott* analysis is available) to their facts; members of the bar assert section 340.6 in bad faith (and trial courts reward them); and the State Bar ignores seemingly legitimate complaints that "my lawyer stole my money," allowing predators in "sheep's clothing" to continue culling flocks.

The crisis is of this Court's making.

B. Legislature's Intent. The Legislature intended to regulate "Neel defined" "legal malpractice," and enacted "a specially tailored statute of limitations for legal malpractice,"[1] which statute demands a three-step process. Mallen described the target of the process as: a wrong "... occurring in the **rendition of professional services**. Thus, the statute proposed here **does not include wrongs where the defendant was not acting as an attorney**."[2] By this statement, Mallen acknowledged the breadth of an attorney's services and his/her various "roles," but specified

[1] Mallen, *Panacea or Pandora's Box? A Statute of Limitations For Lawyers* 52 State Bar Journal 22, p. 22 ("Mallen, *A Statute of Limitations*").

[2] Mallen, *A Statute of Limitations*, *supra*, p. 77.

the statute would have application only to claims against the attorney's "attorney role," that is, when an attorney is "acting as an attorney," under her license to practice law. Mallen and the Legislature defined "professional services" as the services performed:

(1) by an attorney when she is "acting as an attorney,"

(2) which require an attorney's license to practice law, and

(3) which were implied/necessary to the retainer.

This is the *Von Rott* (*v. Johnson* (1983) 148 Cal.App.3d 608, 612-13) analysis.

Herein, despite section 340.6's "plain" language, and Mallen's explanation, the courts do not employ definitions, or a process, or any analysis/test regarding the targeting phrase, opting instead to "read ink spots" or "tea leaves" – and then to invariably conclude the statute applies to the action.

C. <u>Entrustee Still Holds Entrustor's Funds – He's Still Trustee.</u> In this action, appellant entrusted her monies to a fiduciary, Hanley. Attorney received title to, and possession of, appellant's monies, while the equitable/beneficial interest – ownership – **purportedly remained in appellant**. Here, however, without any legislative action, without discussion or legislative intent to "lessen entrustor protections," the trial court read ink spots and perceived that section 340.6 applied – that somehow there was a "professional service" in the nature of: "take client's

money," or "ignore client's request for return of advanced money," or "buy yourself a Rolex with client funds." The ruling holds appellant has no legal remedy in California to take back her property.

Here, the ink spots spoke to the trial court, telling him that misappropriation was "professional services." In the current state of this Court's bar, Prince Valiant is a thief, and a misappropriation by the Prince is a "professional service." Nowhere in the Legislative History is there any indication the Legislature intended what the trial court has done – what the courts do.

The Fourth Appellate District, Division Three, was only slightly better; while the court excluded misappropriation from professional services, as to all other claims, it instructed the trial court to reread the ink spots – "but make sure you read all the ink spots" ("arising in the performance of professional services," still without definition, or guidance) "before you make your [unreasoned] conclusion."

The Fiduciary (an Attorney) had – and has – continuing duties (he received money) **despite the termination of the attorney-client relationship**.

As an entrustor, appellant was entitled to an accounting of her monies, full and fair disclosures of all activities effecting her money and return of her money. She continues to possess all these rights until the entrusted property is returned to her. Although defendant said you have no

balance, he didn't account for her monies; he didn't disclose what happened to the monies or in what bank account or under what mattress they are sitting, etc. and he didn't return the funds.

The trial court's ruling, that appellant has no remedy in California, that her "ownership" was legally taken one year after the attorney-client relationship ended (although attorney still holds/is still chargeable with her money; has not accounted for the decrease from $46,321 to $0, has not disclosed what happened to her money (in what bank, or under what mattress; or the fact the money was simply gone) is legally and equitably wrong – and immoral.

In effect, the trial court held that attorney adversely possessed "her" monies; a "possession" which was never declared adverse (never a hostile claim); and a possession measured from the **end of the attorney-client relationship**.

D. Egregiously, Morally, Wrongful Conduct – Misappropriation. Before her dealings with attorney, appellant owned $46,321, and now she doesn't. Irrespective of the name given, attorney's conduct was egregious, wrongful and shameful. Attorney blatantly flaunted his continuing duties (deposit in trust, account for, disclose about, and return), but the trial court gave no remedy.

However, by definition and Legislative Intent, the plain language does not apply to the facts at bar:

- there is no professional service in the nature of, "take client's money for yourself," or "ignore client's 'return my money' request and use the funds for yourself";
- in receiving and holding the money, or spending it on himself, attorney was not acting "as an attorney," or performing acts under his license to practice law, and so he was not performing "professional services" (and so nothing connected with such services – even a possibly legitimate "acceptance" of such monies for a specific purpose – could be characterized as "professional services") – and, the wrong was a misappropriation, and could never be a "professional service";

Also, all professional services had been completed as of January 28, 2010, that is, every "professional services" task had been performed and there were no other such tasks to perform, and so the wrong which arose thereafter could never be "arising in the performance of professional services."

Although the formal "attorney-client relationship" ended on December 6, 2010, attorney was still trustee to appellant, and owed fiduciary duties, connected with his acceptance of such monies; in attorney's continued holding (or not), in his failure to account and failure to disclose, attorney was still trustee of appellant's funds – and is through this day.

E. The Implied Representation – "I'm a Fiduciary, I Will Not Harm You!"

In every fiduciary relationship, the fiduciary impliedly represents and oftentimes says straight out, "I'm trustworthy, you can trust me, I will not harm you." This implied/stated promise (and, in the case of an attorney, a seemingly State-sponsored (licensed) promise) is instrumental in the transfer of property to the fiduciary. The transaction is a transfer from the weak and vulnerable, to the powerful and dominant – transferring to the dominant the power to "abuse" and to take full ownership. To believe the Legislature would remove protections for the vulnerable – a blow to the very fabric of a complex, attorney-dependent society (how does anyone trust/rely on an attorney when the courts favor attorney's and don't protect entrustors) – without discussion – is simply ludicrous!

This is not a claim the Legislature intended to extinguish via section 340.6.

F. No Insurance Coverage – No effect on Malpractice Premiums.

The misappropriation herein is not a malpractice insurance covered act, and the only savings in fees and settlement costs will be to the alleged wrongdoer, respondent attorney, with no insurer savings, and so no effect on the malpractice insurance premiums. This is not what the Legislature intended via section 340.6.

II. THE PROPER APPLICATION OF SECTION 340.6.

Professional services are services wherein an attorney is "acting as an attorney"; such services require a license to practice law. This definition distinguishes the "attorney" role – "acting as an attorney" – from all of attorney's other roles (acting as a trustee or escrow, acting as a "no license to practice law needed" agent, or attorney-in-fact, acting as an accountant, acting as a businessman, etc.) Only when attorney is "acting as an attorney" does CCP section 340.6 have application.

This analysis/test ("analysis") was employed in *Von Rott v. Johnson* (1983) 148 Cal.App.3d 608, 612-13.. Although the analysis was inappropriately applied to determine tolling, the analysis was, in fact, whether the gravamen of attorney's function therein (as pledgeholder) was "professional services."

The implied but not written conclusion was that in performing the original services provided by attorneys, attorneys were "acting as attorneys," under a license to practice law (attorney was acting in his "attorney role") and so the original services were "professional services"; in the continuing representation, however, the attorney was only "acting as a pledgeholder," that no license to practice law was required (and so attorney was not acting in his "attorney role"), that anyone could do it, and so the services being rendered were not "professional services," and were only

tangential to the original services; tolling (a remedy for the client, allowing a trial on the merits) was disallowed.

Appellant asserts that for purposes of "continued representation," the attorney's "role" in performing services is irrelevant, and the inquiry is simply: did the attorney continue to represent the client? If so was it regarding the "specific subject matter in which the alleged wrongful act or omission occurred"? The inquiry is not, did attorney continue acting in his "attorney role," performing professional services.

Von Rott's analysis (for tolling) is the Legislature's "professional services" analysis – focusing on the nature of the attorney's services: requiring she act in her role as an "attorney" (and excluding all other "roles"/services); requiring that she be providing the specialized "attorney services" for which a license to practice law is required.

In this way, the Legislature applied section 340.6 solely to wrongs of a special nature, those wherein the attorney was acting only as an attorney; the Legislature intended only to curtail the societal benefits (trial to determine the right/wrong of client's claims, and compensation) only to the victims of attorney's **negligent performance** of his special services – which client claims would all be fully covered by malpractice insurance, saving the defense insurers money, thereby effecting the malpractice

premium crisis. The malpractice premium crisis was the Legislature's only concern, and its sole target.

Appellant asserts it is only professional negligence claims which are (generally) 100% covered by malpractice insurance.

In effect, *Von Rott* held that the defendant attorney needed to still be performing "the original professional services" for the continuous representation provision to toll the statute, and that acting as pledgeholder was not "acting as an attorney," and so attorney was not **still performing** section 340.6 "professional services."

If appellant's evaluation of *Von Rott*,[3] is reasoned and reasonable, then the courts have a simple test for "professional services" – but they don't use it **against attorneys seeking the protections** of section 340.6, **only against a client seeking a trial**. In every other matter that appellant is aware of, the courts employ definitions, precisely recited language, and logic to follow the facts to a conclusion. Here, however, when attorneys seek section 340.6 protection, the courts opt to read "ink spots" – and then to conclude section 340.6 **does apply** – without even the pretense of an evaluation!

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[3] Irrespective of the purpose, or use, of the analysis in *Von Rott,* appellant asserts that such analysis is the test for "professional services" as intended by the Legislature.

This challenges the concept that justices of the courts of appeal "are just good men and women trying to get it right." The justices appear to be "men and women trying to get it right for attorneys."

III. TWO DISTINCTIONS: THE "ROLES" AN ATTORNEY PERFORMS; THE IDENTIFICATION OF THE SPECIFIC "ARISING IN" PROFESSIONAL TASK.

In section 340.6, only the "professional services" (wherein attorney is "acting as an attorney," and wherein he must be licensed to practice law to perform the services, see Section IX, A, 1, (a), *infra.*) are of import for the targeting phrase;[4] none of attorney's other "roles" are of concern to a "professional services" inquiry. Also, the "professional services" are only of import in identifying the collective tasks of "professional services" to determine if one of these tasks, "**the** professional service" (a singular "professional task" (within the professional services)) was the "arising in" source of the wrongful act/omission – the task attorney performed to a lesser standard or omitted e.g., "prepare and file the complaint"; or "prepare and execute settlement agreement"; etc. Section 340.6 only applies if "performance" of **the** professional task is an omission (failure to do **the**

[4] For purposes of tolling provision 2 (continuous representation) if attorney is acting in another role, but in the "same subject matter") application of the statute should be appropriately tolled.

particular task and the deadline passes) or wrongful act (the task was done, but done incorrectly).

In **no case**, is there a professional task in the nature of:

"take client's money," or

"ignore client's request for the return of unused advances," or

"buy yourself a Rolex with client's money."

The "professional tasks" are only those attorney tasks deemed necessary to the particular retention, and, as the Fourth District held, professional services must provide a service to the client.

IV. APPELLANT'S PRIMARY RIGHT – TO BE FREE FROM MISAPPROPRIATION BY HER FIDUCIARY, AND HER STATUTE OF LIMITATIONS.

Her Primary Right. Appellant entrusted her $46,321 to a fiduciary/entrustee ("entrustee") from which monies the entrustee was to pay himself if his work was necessary; the entrustee promised to return all unused monies. Some work wasn't necessary, but entrustee didn't return any money.

Entrustee had a duty of loyalty – to protect, account for and return to appellant her unused monies; Appellant had the right that her money be

protected, and that entrustee account for her funds, disclose material facts about her funds, and return her funds.

Insofar as the entrustee was an "attorney," attorney was not "acting as an attorney," or "practicing law" and his activities were not "professional services" for purposes of section 340.6.

Appellant's Primary Right Was to Be **Free from Misappropriation by Her Fiduciary**.

Her Statute of Limitations.

> "The statute of limitations to be applied is determined by the nature of the right sued upon, not by the form of the action or the relief demanded." *Day v. Greene* (1963) 59 Cal.2d 404, 411.

Appellant's statute of limitations is either: Probate Code section 16460 (*Prakashpalan v. Engstrom, Lipscom & Lack* (2014) 223 Cal. App. 4th 1105, 1119; Discussion, *infra*, Section XV; additionally, appellant urges the holding that Probate Code section 16460 is the more specific, more appropriate statute of limitations than section 340.6, which only applies to "professional services"; Discussion, *infra*, Section XVI); or CCP section 343 (*Di Grazia v. Anderlini (*1994) 22 Cal.App.4th 1337, 1344 ('There are two limitations periods potentially applicable to the claims against Anderlini [trustee]; first, the three-year limitations period on claims made by beneficiaries against trustees of express trusts (Prob. Code, §

16460)[footnote omitted] and second, the four-year statute applicable to breaches of fiduciary duty in general. (Code Civ. Proc., § 343)")

CCP section 340.6 has no application to the facts at bar: because the entrustee, although an attorney, was not "acting as an attorney" – no "professional services," and so entrustee could not be in the "performance of professional services"; and because entrustee misappropriated funds and there is no "professional service" in the nature of misappropriation (nothing akin to, "take client's $46,321," or "refuse to give back client's $46,321," or "buy a Rolex with client's money." Misappropriation is not one of attorney's "professional services."

V. APPELLANT DOES NOT HAVE HER MONEY ($46,321), BUT ATTORNEY DOES: THIS IS MISAPPROPRIATION.

The fiduciary's failure to return was a "misappropriation" (she gave him $46,321; upon termination of the trust: she received nothing, while the entrustee/fiduciary, who personally received the money, either still has $46,321, or used it, or lost it). The fiduciary accepted the $46,321 as either an equitable, "relationship of trust and confidence" fiduciary, or a trustee of an "express trust" (by accepting money for a specific purpose), and c) or as an attorney (but only "acting as" a moneyholder, trustee or businessman). Irrespective of source, however, entrustee was a fiduciary, and she does not have her money.

As the $46,321 was transferred to attorney's possession, appellant does not know what was done with it; she has alleged, however, that she doesn't have her money. This is misappropriation.

VI. ONLY THE LEGISLATURE IS EMPOWERED TO "EXTINGUISH" CLAIMS – TO BALANCE SOCIETAL INTERESTS.

In *Samuels v. Mix* (1999) 22 Cal. 4th 1, 7, this Court stated:

> ... to "establish any particular limitations period under any particular statue of limitations entails the striking of a balance" between the public policy favoring extinction of stale claims and that favoring resolution of disputes on their merits. [citation] **Because it involves such policymaking, to establish a statute of limitations "belongs to the Legislature alone [citation], subject only to constitutional constraints [citation]."** (*Id.* at pp. 396-397; bold added.)

> "While our judicially engrafting section 340.6(a) with the common law discovery rule's exception to the normal burden of proof might not directly invade the Legislature's **exclusive province to specify limitations periods**, it well might indirectly do so. This is because such a judicially recognized exception risks disturbing the policy balance among the various societal interests that the Legislature achieved when enacting the statute, including the interests in **hearing meritorious malpractice suits, extinguishing stale claims,** and **avoiding consumer costs attendant on indefinite malpractice exposure**. (See generally, Mallen, *A Statute of Limitations, supra*, 52 State Bar J. 22.)" (Bold added.)

Under *Samuels*, the court's inquiry is, **what claims** did the **1977 Legislature intend** to **extinguish?** That is, apply section 340.6, to those claims– **and no others.**

VII. CCP SECTION 340.6 IS A STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE INSURERS – INTENDED ONLY TO CONTAIN THE 1977 MALPRACTICE INSURANCE CRISIS.

The **1977** Legislature's primary purpose in enacting section 340.6 was to **contain within tolerable limits** the "legal malpractice insurance" crisis, as it existed in 1977, which presented itself via **runaway malpractice insurance premiums** and fewer insurers writing malpractice policies[1]; that is, the Legislative intent was **not to benefit attorneys** in any way – not to "settle affairs," or resolve "stale" claims, not to save "attorney money" from defending malpractice suits, not to spare attorneys the stigma/publicity associated with charges of malpractice, or a trial for malpractice, not to remove the irritation/inconvenience to attorneys from such suits.

Section 340.6 is a statute of limitations for insurers, not for attorneys. Although the statutory language had to be written through the "medium of attorneys," and through the medium of an attorney's license "to practice law," section 340.6 **was only intended to benefit insurers, without any consideration whatever as to benefit/detriment to attorneys** – other than that attorneys were to be treated "the same as physicians." RJN, p. 2 ("Pros," second item).

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[1]Mallen, *A Statute of Limitations*, *supra*, p. 22.

To effect this singular benefit to insurers, the 1977 Legislature enacted a statute: (1) to limit the effect of the discovery rule by capping it with an occurrence provision (subject to some tolling); and (2) to extinguish (via an **arbitrary-by-time** dividing line) certain specific claims which, by circumstances, had to be targeted through the "attorney medium."

The 1977 Legislature also intended that all targeted claims be for attorney acts which would be 100% legal malpractice insurance covered (hereafter an attorney's act which is insured ("covered," and "not excluded," in the fullest sense of both terms, under a policy), is referred to as a "Malpractice Covered Act"). Via this latter containment effort, the Legislature intended "bang for the buck," intending that every dollar saved on extinguished claims (saved defense attorney's fees/costs, settlements, judgments, etc.) was for a Malpractice Covered Act, thereby a **saving for the insurer** (not the attorney), hopefully resulting in "contained" malpractice insurance premiums.

Presumably, the Discovery Rule of *Neel* applied to **every** professional/legal transaction (**every** professional task undertaken in: (a) **every** representation, (b) **every** contract, and (c) **every** will/trust, etc), by **every attorney** in California; insurers perceived an "indeterminate liability" on **every preceding** such professional transaction, and on every transaction then to be done, and so insurers determined to increase their

reserves and so increased premiums markedly. Appellant contends it was this increase in reserves which triggered the astronomic increases in malpractice premiums (the malpractice crisis), and that section 340.6's four year cap (and the prior receipt for several years (1972 through 1978) of such "increased reserves" money) reduced "astronomically" the insurance premiums.

Appellant asserts the four year occurrence cap was the Legislature's "heavy lifting" regarding the crisis, and that the one year discovery codification was only the Legislature's "biceps sculpting" effort, that by defining "professional services" only as services wherein an attorney is "acting as an attorney," under her license to practice law, the Legislature intended to extinguish only claims against Malpractice Covered Acts, resulting in malpractice insurers (not attorneys, and not "other" insurers) saving money.[2]

VIII. THE LEGISLATURE'S PURPOSES IN ENACTING SECTION 340.6.

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[2]Although section 340.5 was part of a comprehensive approach to the medical malpractice crisis, and a "redo" (1971 was first, 1975 was the redo) limited to professional negligence claims, it's also a statute of limitations for insurers – but again, for **malpractice** insurers. If a potential 340.5 or 340.6 plaintiff amends his/her pleading, removing all malpractice claims so that the only remaining claim(s) does not allege professional negligence, then neither section 340.5, nor section 340.6 should apply. Neither is a claim targeted by the 1975 Legislature (re medical malpractice) nor the 1977 Legislature (re legal malpractice).

In every version of AB 298, the Legislature had the **exact, identical intentions** as to a legal malpractice statute of limitations:

1. <u>To create a statute of limitations for legal malpractice – only!</u> (In RJN 1-45, the Legislature references only "legal malpractice," acts of negligence, or acts of "professional negligence"; in Assemblyman Brown's "Fact Sheet," dated March 25, 1977 (RJN 2), which preceded the May 9, 1977 amendment of AB 298 (RJN 48-52), he used the word, "plaintiff," meaning client, in stating "… or one year after the plaintiff discovers… the damage …."; also, in Assemblyman Brown's August 31, 1977 letter to the Governor, he also used "plaintiff" to mean client, in stating "…one year from the date of **plaintiff's** discovery of the **negligent act ….**")

Additionally noteworthy, is that Assemblyman Brown appears to be comparing apples to apples with no mention/concern for oranges: a professional negligence/legal malpractice statute for lawyers (AB298) like the professional negligence/medial malpractice statute for medical care providers – without mention of any fiduciary duties – which were not "professional negligence."

2. <u>"The purpose of the bill is to reduce the costs of legal malpractice insurance."</u> (RJN 35) It's noteworthy that nowhere in the Legislative history is there any mention of repose, or stability for attorneys, or that attorneys bear a terrible (or such), unwarranted burden by being sued so often. Rather, the purpose was simply to contain the runaway

malpractice insurance costs, which the Legislature did by enacting an occurrence cap, and by targeting 100% insurance covered wrongs, professional negligence.

The Legislature intended "legal malpractice insurer" favoritism, but not "attorney" favoritism, or "other insurer" favoritism – the Legislature intended solely to contain runaway legal malpractice insurance premiums.

3. To codify a statutory cut off of "later-discovered claims," which the Supreme Court had allowed in 1971 under the "discovery rule" of *Neel* and *Budd.* (RJN 40, 42: Under Comments; "Currently, the statute of limitations in legal malpractice actions is open-ended, since the statute does not begin to run until the negligent act is discovered. This bill places a four-year limit on most causes of action.")

4. To "provide … same treatment for attorneys with reference to statute of limitations as now afforded to physicians …." (RJN 2, 9)

In section 340.5, the Legislature enacted an "action" statute, a "Prince Valiant" statute for physicians, not a "status" statute (the Prince is good and does only good acts; if he errs it will be 100% covered by Prince's insurance and so the statute will save the **insurer** 100% of all costs saved ("legal malpractice insurer" favoritism). Section 340.6 should be interpreted as a Prince Valiant statute, and was until *Stoll* transformed it into a "status" statute. The Legislature intended to treat attorneys the same as physicians.

IX. THE PLAIN LANGUAGE OF CCP § 340.6(A) REQUIRES A THREE STEP PROCESS.

In the plain language of section 340.6's "targeting phrase," the Legislature identified a process to determine whether section 340.6 targeted this action: in this retention, (1) identify those professional tasks necessary to the attorney's "performance of professional services"; (2) identify the alleged "wrongful act" or "wrongful omission"; and (3) determine whether there is the statutorily mandated connection: was the alleged wrongful omission "arising in" "the performance of professional services"; was the alleged wrongful act "arising in" "the performance of [a] professional service[]"? The exact application of this process determines whether the Legislature intended 340.6 to extinguish the action.

The **exact application**, of the **exact language**, is critical[5] – a wrongful act/wrongful omission "arising in the performance of professional services." The language means – only – that a **wrongful omission** was the failure to do a professional task necessary to the retention agreement

[5] Mallen supplied precise, stilted language intending a "specially tailored statute of limitations for legal malpractice"; to have courts and defense counsel (seemingly in tandem) "dummy it down" so it's easy reading, easy writing (and covers unintended claims), subverts Mallen's/the Legislature's intent, with an end result seemingly always in favor of the attorney – a favor granted by the courts, with Supreme Court imprimatur.

Mallen provided, and the Legislature enacted, precise language, and the stilted words are to be used as intended/written.

(attorney omitted a professional task which an attorney of common skill and experience would deem necessary to this retention); a **wrongful act** was the doing of a professional task necessary to the retention, but doing it in a lesser manner or below the standard by which an attorney of common skill and experience would have done it.

This "plain" language has no other application!

A. Two Definitions are Critical to Analysis of the Targeting Phrase.

Appellant asserts that two specific definitions are critical to analysis: the terms "professional services" (in the phrase "performance of professional services") and "arising in" (mandating a specific connection between the wrong and the professional activity being performed).

(1) "Professional Services" Defined.

(a) Mallen. In 1977, before the enactment of section 340.6, in Mallen, *A Statute of Limitations, supra*, at p. 77, Mallen concluded his article by defining the nature of the "wrong" to be effected in his proposed statute (the soon to be section 340.6), stating:

> "***Legal malpractice*** is best stated in terms of the actual wrong: a wrongful act or omission occurring in the ***rendition of professional services***. Thus, the statute proposed here does not include wrongs ***where the defendant was not acting as an attorney***. . . ." (Bold, italics added.)

By these two sentences, Mallen made clear to the Legislature**, the only wrongs** to be effected by the proposed statute were:

- When an attorney **is** "acting as an attorney" (but at no other times), and performing tasks requiring a license to practice law, he is performing "professional services."
- When an attorney **is not** "***acting as an attorney***," under his license to practice law – when an attorney functions in any of his other roles (as a trustee, as a "no license to practice law needed" agent, as an attorney-in-fact, as an accountant, as a businessman, etc.), he is "**not performing professional services**," and section 340.6 does not apply ("... the statue proposed here does **not** include wrongs where the defendant was **not** acting as an attorney ..." Mallen, *A Statute of Limitations, supra*, p. 77 (Bold added.).

Only by defining the terms of the targeting phrase in this manner, is section 340.6 "a specially tailored statute of limitations for legal malpractice." Mallen, *A Statute of Limitations, supra*, p. 22.

(b) *Von Rott* Analysis. In *Von Rott, supra*, p. 612-13, the court made a "professional services" analysis, in a "specific subject matter" inquiry, concluding:

> "**Section 340.6 by its terms applies only to actions arising out of the performance of professional services by attorneys**. Defendant's **role as pledgeholder** was separate and distinct from his **role as attorney**. In his role **as pledgeholder**, defendant **acted simply as an escrow**, holding shares of the corporation for the benefit of plaintiff until Keller had completed the payments due under the contract.

> (See generally Fin.Code, § 17003.) **One need not be an attorney to act as pledgeholder**, and it is clear that one **acting as a pledgeholder is not performing legal services.** (Bold added.)"

In this analysis (**employed against the client's claim** of continued representation), the court found:

a) Pledgeholder services are not "professional services,"

b) Acting as an escrow is not acting as an attorney,

c) The term, "professional services," means only those services performed under an attorney's license to practice law (the "Is/Isn't Determinative Element" of professional services is whether one needs to be a licensed attorney to perform the service),

d) The *Von Rott* defendant attorney's "professional services" ended, presumably when the agreed-upon professional tasks (those which only a licensed attorney could perform) were completed.

In *Von Rott,* the court differentiated among the "various roles" an attorney performs, holding that only in the "role of attorney" is the attorney performing section 340.6 "professional services." In applying the law to the facts, however, the court mistakenly ruled that "continues to represent the plaintiff regarding the specific subject matter ..." required attorney to continue performing "professional services" ("acting as an attorney," not a

pledgeholder) in the specific subject matter. That, however, is not an accurate reading or understanding of the statute.[6]

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[6] Tolling provision 2 only requires that the attorney and client remain in an attorney-client relationship in the "specific subject matter," without mention, or regard, to the role in which the attorney acts.

The courts have been quick to cite the two enumerated reasons for tolling provision 2 (RJN, p. 35, Senate Committee on the Judiciary, AB 298, As amended May 17, under "Continuous representation rule"; and immediately established the enumerations as the only reasons for tolling provision 2. However, fairness to tolling provision 2 requires two caveats:

- first, in the case of a wrongful omission, the deadline has generally passed and the continuing attorney can do nothing to "correct or minimize" his error – it is simply that the attorney-client relationship continues which warrants tolling.

- second, so many other provisions in the Legislative history provide balance – and concern for the interests of the client:
RJN, p. 38: Under "Statute of Limitations for medical malpractice," "Proponents argue that the time for legislation providing an outer limit for legal malpractice actions has come, and that the **special circumstances** requiring the tolling of such statute **serve both attorney and client interests**." It's noteworthy at this point that **the Legislature intended the tolling provisions to serve the clients' (un enumerated) interests, also.** It's clear the current interpretations serve attorney interests, and it's clear the courts found an enumeration of two client interests, but to limit the application of the tolling provision to only those two enumerated reasons, which enumeration appears only in the Senate Committee On Judiciary, **when so many other writings speak differently, ignores the client's interest,** and the fact the attorney-client relationship continues. The other expressions are:

(a) concern for injustice to the client, and the integrity of the legal profession; (RJN, p.4, under Background, in the quoted paragraph)
(b) "Assembly Bill 298 provides that where a continuous attorney-client relationship exists the statute of limitations commences to run only upon the termination of the relationship." (RJN, p. 5) [No mention is here made of any reason for continuation, nor that the "professional services" must continue, only that the "attorney-client relationship" continues – presumably in any of attorney's roles, so long as it's in the "same" specific subject matter.]
(c) "The attorney continues to represent the plaintiff regarding the matter in which malpractice occurred; RJN, p. 7, 12, 39, 41, 43, 44, at tolling provision 2, on each page.

As noted immediately above, Mallen specified that the attorney "acting as an attorney" was the test for "professional services"; *Von Rott* (and *Quintilliani*) provide ready tests/analysis for the determination, but courts disdain tests in this area (seemingly in this area only) and instead read ink spots and "apply" a legal Rorschach "test." When bright people do "non bright" things, motive must be suspected. Here, the bright people are attorneys now sitting on the bench, ruling in favor of other attorneys.

It is only when the attorney is "acting as an attorney" that section 340.6 has application; it is only then that section 340.6 works as "a specially tailored statute of limitations for legal malpractice," corralling legal malpractice claims.

The *Von Rott* court failed to understand either the context in which section 340.6 was enacted, the fact that the four year occurrence provision was the "heavy lifting" and the one year from discovery the "biceps sculpting," or Mallen and the Legislature's intent to respect and

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(d) tolled "during the time that the attorney still represents the plaintiff in the same matter; RJN, p. 15, "Summary of Legislation," second para., p. 21, second para.,

(e) "However, the four-year period may be tolled for a variety of specific reasons relevant to legal malpractice actions." RJN, p. 27, third para.

(f) In Assemblyman Brown's letter, subsection (b), "the statute is tolled where: 'there is a continuous attorney/client relationship regarding the specific matter in which the alleged wrongful act or omission occurred;'" RJN, p. 29

accommodate the attorney-client relationship, including the client's interests. The Legislature intended only: that the "professional services" in the targeting phrase be limited to an attorney "acting as an attorney," which services would require a license to perform; that tolling provision 2 would accommodate the attorney-client relationship by a less restrictive standard (so that "non professional services," would allow tolling of the statute, so long as the attorney-client relationship continued, and attorney's services were in the same "specific subject matter").

It appears that "thoughtful analysis," and specified tests, are only employed if it will benefit an attorney.

(c) Various Usages.

In the 1975 revision of section 340.5, in subsection 2, defining "Professional negligence," the Legislature enacted, "... in the **rendering of professional services**, ... provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." Under 1975 section 340.5, medical "professional services" are only those services for which the medical healthcare provider is licensed. In providing the "same treatment for attorneys, as previously provided for physicians," one would think the Legislature was defining an attorney's "professional services" the same, services rendered under a license to practice law.

In *Quintilliani v. Mannerino* (1998) 62 Cal. App. 4th 54, 64, the court said:

> "... Thus, the term, 'professional services' must mean services performed by an attorney which can be judged against the skill, prudence and diligence commonly possessed by other attorneys ..."

"Professional services" appear to be those services in the practice of a profession which must be exercised with the skill and knowledge normally possessed by members of that profession.

(d) <u>The Three Timing Elements.</u>

i. Every attorney's "performance of professional services" will be contained entirely within the "attorney-client relationship." If the attorney services are terminated or he withdraws, his "performance" will be from the time he started until the time he's terminated and stopped. Although attorney's "professional services" so end, his trustee-fiduciary duties continue.

ii. Assuming attorney's representation continues without interruption, at some point he will finish all the tasks in the "professional services" and such collective of services will have a specific ending.

ii. For every individual task within the collective of all "professional services," that specific, individual task will have a specific ending.

In *Lockton v. O'rourke* (2010) 184 Cal.App.4th 1051, 1063, the court stated:

> "... Despite the lack of statutory guidance, courts have articulated helpful principles which we apply.
> 'The test for whether the attorney has continued to represent a client on the same specific subject matter is objective, and ordinarily the representation is on the same specific subject matter **until the agreed tasks have been completed or events inherent in the representation have occurred.**' (Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1528, 80 Cal. Rptr. 2d 94.)"

Again, this is the standard used to determine client's tolling of the statute; however, it would also appear to be the appropriate, objective standard regarding "the performance of professional services." In the case at bar, by this standard, the professional services had ended and ***no wrongful act*** (whatever it might be) could thereafter be "arising in the performance of professional services."

2. **"Arising in" Defined**. Significantly, in crafting this "specially tailored statute of limitations for legal malpractice,"[1] Mallen proposed, and the Legislature enacted added, the connector, "arising in" –

[1]In Mallen, *A Statute of Limitations for Lawyers, supra*, at p. 22 ("Mallen, *A Statute of Limitations*"), Mallen described his proposal for a lawyer only malpractice statute as "... a specially tailored statute of limitations for legal malpractice." Mallen also titled his proposal for such statute, "LEGAL MALPRACTICE." *Id.*, at p. 24.

not "arises," not "arising out of," not "arises from," not "in connection with," etc.[7]

In *Palmer v. Agee* (1978) 87 Cal. App. 3d 377, 386, the court cited:

> "Webster's Third New International Dictionary, Unabridged, defines 'arise' as 'to originate from a specified source' or to come into being."

This definition, cited in 1978, would have been appropriate in time to section 340.6's 1977 enactment.

Since section 340.6 specifies "arising in," however, it appears the appropriate definition is "come into being" and that the wrongful act or omission must come into being "in" the performance of professional services. The word "arising" conveys an **immediacy** – an instantaneous activity – the wrong **then** (in the "performance") "arising"; the word "in" limits the connector to a single source – ***in the performance,*** **or** ***failure to perform*** **a specific professional task. The combination "arising in" means that the doing of a professional task *is/must be* the wrongful act or omission.**

[7]Evidence Code Section 958 evidences that in 1965 the Legislature knew how to effect the entire Attorney-Client relationship, if it chose. ("There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, ***of a duty arising out of the lawyer–client relationship.***")

For purposes of section 340.6, the Legislature could have used some or all of the phrase, "breach ... of a duty ***arising out of the lawyer–client relationship,***" but it didn't.

In applying this plain "arising in" language, in the case of an **omission**, the statute can only mean that as to a professional task deemed a necessary to the "professional services" – to the attorney "acting as an attorney" – the attorney failed to do such task, and that was the wrong; **The necessary "to an attorney acting as attorney" professional task and the "wrongful omission" must be the same.** In *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 180, 98 Cal. Rptr. 837, 491 P.2d 421, the necessary professional task was service of summons and complaint on defendant, but attorney failed to serve before time expired. ***The statutory language mandates a professional negligence analysis – as intended by the Legislature (and Mallen)***.

In applying this plain "arising in" language, in the case of an **act**, the statute can only mean that in doing a particular professional task deemed necessary to the performance of professional services – to the attorney "acting as an attorney" – the attorney performed the task, but in a lesser or inappropriate manner, or to a lesser standard, and that was the wrong; **the necessary professional task and the wrongful act must be the same**. In *Budd v. Nixen* (1971) 6 Cal.3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433, the attorney filed an answer, but failed to assert client's affirmative defense that client was acting in a corporate capacity only, and was not personally liable. **The statutory language mandates a professional negligence analysis – as intended by the Legislature (and Mallen)**.

There is all manner of attorney wrongs – but only those wherein an attorney "is acting as an attorney," and only those for professional negligence, can be "a wrongful act or omission . . . arising in the performance of professional services."

X. FIDUCIARY LAW: PROTECTS THE VULNERABLE, POLICES THE "ABUSING" ENTRUSTEE.

In Duncan, *Legal Malpractice By Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 Wake Forest L. Rev. 1137, Professor Duncan noted:

> "... A fiduciary is one who has undertaken a responsibility to act primarily on behalf of another, the entrustor,[footnote omitted] for a distinct purpose, whether that purpose be narrow or broad.[footnote omitted] ... It is this transfer of power from the entrustor to the fiduciary that gives rise to the need for the creation of a body of law designed to protect the entrustor – and **society** – from the fiduciary over-reaching or abusing the power with which he has been entrusted....[footnote omitted]" (At p. 1150; bold added.)
>
> "... Fiduciary law serves to deter the fiduciary from abusing his power by prohibiting, supervising, and limiting self-dealing.[footnote omitted]" (at p. 1150.)
>
> **"... Fiduciary law is a fiercely protective body of law that exists for the benefit of the entrustor.**[footnote omitted] As such, it empowers an entrustor with rights that, in the absence of fiduciary law, she would not otherwise have...." (At p. 1151; bold added.)
>
> "However, fiduciary law essentially shifts the property rights to the power delegated back to the entrustor.[footnote omitted] In other words, fiduciary law ensures that the fiduciary merely owns *legal* title to the power which has been entrusted to him; the beneficial ownership – or the entitlement to the benefits of

> that power – remains with the entrustor. [footnote omitted] As a result, the entrustor, as an owner of property, may enforce any prohibition against the fiduciary's use of power directly against the fiduciary." (At p. 1151.)
>
> "Whereas negligence law requires the actor to exercise the appropriate standard of care, fiduciary law requires the fiduciary to exercise the appropriate standard of conduct."

Fiduciary law says, "be good; be decent; be Prince/Princess Valiant."

Impliedly, in every fiduciary transaction, the fiduciary represents, "I will not hurt you. I will not abuse my powers." This is – or should be – an area in which strict liability applies. To transfer funds to an entrustee is such a dangerous, vulnerable activity.

It's noteworthy that the very crux of "fiduciary law" is to protect the weak/vulnerable entrustor from the potential personal misuse by the entrustee. Such "personal misuse" by the entrustee would not be insured (would instead be excluded from insurance coverage as an intentional act, etc.); consequently, the extinguishment of any such claims (via a shortened statute of limitations) would benefit a "wrongdoing/taking" entrustee, to the detriment of the weak, vulnerable entrustor.

In 1977, in a complex society dependent on "trustworthy entrustees," appellant asserts that such a drastic alteration of the fabric of society – the removal of protections for the weak and vulnerable – is so momentous and consequential that the Legislature, and staff, would have evaluated it fully,

and the Legislative History would have been rife with commentary – but no such mention is made. RJN, p. 1-45

XI. ATTORNEYS PERFORM MANY ROLES, BUT SECTION 340.6 ONLY APPLIES WHEN AN ATTORNEY IS "ACTING AS AN ATTORNEY."

Appellant asserts that an attorney acts in numerous roles depending on each client's needs/ability to pay, but that only attorney's "attorney role" is targeted via section 340.6. When attorney acts in any of his various other roles, however, section 340.6 does not apply. Some of those other roles are:

Acting as a "No License to Practice Law Needed" Agent, (acting in any non court setting); anyone, a friend, business acquaintance, or, more formally, an attorney-in-fact, could perform this function (the Von Rott analysis);

Acting as a trustee (attorney may receive money for a specific purpose) or possibly an escrow; again, not acting as an attorney (you don't need an attorney's license to receive, safe keep, account for, or distribute special purpose money;

Acting as an accountant, but not as an attorney (you don't need an attorney's license to perform an accounting function);

Acting as a businessman/businesswoman (as any business person, bringing in business, billing for time/services, accounting for monies

paid/received and justifying billings. None of this is the "practice of law," or the attorney "acting as an attorney," but it is the reality of our complex society and the business of law.

XII. THE ABSURDITY OF A DIFFERENT APPLICATION.

For argument purposes, if the Court were to expand the claims targeted by the Legislature, affording a Legislature-***un*intended** "favoritism" to attorneys, for attorneys "handling" their billings/monies (the "businessman-attorney"), for attorneys handling monies given for an express purpose (the "trustee-attorney"), for attorneys while accounting for funds recovered (the "accounting-attorney"); under this alternative, this Court creates a special class – the attorney-agent, the attorney-trustee, etc., granting them the protections of section 340.6, while "just" businessmen, "just" trustees, or "just" accountants remain governed by the various standard (pre-1977) SOLs (with the lengthier "from discovery" periods, with no "from the occurrence" cap, and with all claims open to all tolling arguments). Appellant argues that all such "non professional services" claims should be governed by the standard (pre-1977) statutes of limitation.

XIII. "ATTORNEY FAVORITISM" BY THE COURTS IS "DOUBLY SUSPICIOUS."

As noted by this Court in *Neel, supra*, at p. 190, discussing the unfairness of the preclusion of a client's legal malpractice claim before the

client ever "discovered" she had such claim, when all other professions had a "from discovery" rule, this Court said:

> "An immunity from the statute of limitations for practitioners at the bar not enjoyed by other professions is itself suspicious, [footnote omitted] but when conferred by **former practitioners who now sit upon the bench,** it is doubly suspicious." (Bold added.)

In the case of **any** "attorney favoritism," this "double suspicion" is warranted – **but this trial court was oblivious to this perception, finding misappropriation – moral turpitude – to be the performance of professional services.**

In this case, where respondent attorney claims the benefit of section 340.6 for "non attorney" work – for taking his client's money, for a taking ***after*** all professional services were completed – the trial court opined that the facts at bar **were** the performance of professional services! (***What?***)

This is not to say that the trial court was bad – it is rather to say that **this Court's stewardship** over section 340.6 cases has been grossly negligent – that *Stoll* and its progeny are a travesty, bearing Supreme Court imprimatur, which prevented "good" courts from analysis/discussion, and begetting: judges who can't judge, judge's employing a Legal Rorschach test, and judges always concluding the statute applies, court of appeal who are simply cheerleaders for the bar, wrongdoing attorneys claiming the protection of a statute unintended for them, and a State Bar which can't

process a "my attorney stole my money" claim (RJN, p. 66-81); the foreseeable result is "Supreme Court licensed," and vouch safed, "predators" eating lambs.

Under the police power, it was appropriate for the Legislature to enact an "insurer favoring" statute, but such legislation should and did benefit only the legal malpractice insurers; the stilted language of section 340.6 intentionally effected **only legal malpractice claimants** – with 100% of any savings benefitting only the insurer, and hopefully reducing costs.

XIV. VIA 340.6, THE 1977 LEGISLATURE INTENDED TO RESTRICT ONLY THE RIGHTS OF "PROFESSIONAL NEGLIGENCE" CLAIMANTS.

(a) Neel (1971). In 1971, in Neel, supra, at 180, the Supreme Court quoted the definition of legal malpractice, with footnotes, as follows:

> "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.) [Footnote omitted] When such failure proximately causes damage, it gives rise to an action in tort. [Footnote omitted] 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 that contract. [Footnote omitted] Thus legal malpractice generally constitutes both a tort and a breach of contract. [Footnote omitted]

In the omitted footnotes, the Supreme Court cited numerous cases, all of which had as their gravamen, a breach of attorney's duty of due care.

Tellingly, however, the footnotes also cited law review articles, but cited the pages within each article, discussing only "professional negligence" and the attorney's duty of special care. Although the articles also discussed other wrongs and breaches (of fiduciary duties, of fraud, etc.) by an attorney, this Court referenced only an attorney's professional negligence – his duty of special care, breach, causation and damages – <u>in relation to its definition and discussion of "legal malpractice</u>." In <u>Neel</u>, footnote 3, the Supreme Court stated "... see generally Leavitt, The Attorney as Defendant (1961) 13 Hastings L.J. 1, **23-32**; Note (1963) Columbia L. Rev. 1292, **1294-1302**." (Bold added.)

By referencing only the sections of the articles dealing with professional negligence, the Court made clear – <u>as stated in its definition</u> – the term "**legal malpractice**" then (**<u>1971</u>**) meant solely and only **an attorney's breach of his duty to use (special) care** in rendering his professional services and so the gravamen of "**legal malpractice**" was **breach of attorney's duty to use due care** (hereafter a "Due Care Gravamen").

Necessarily, this Supreme Court definition of "legal malpractice" informed the Legislature's, and all staff's, analysis, discussion and intent in enacting a "legal malpractice" statute, dealing with a "negligent act."

The Legislative History evidences the Legislature's intent to regulate "Neel defined legal malpractice" only, only legal malpractice claimants. RJN, p. 1-45

From the legislative history, it's also clear the Legislature intended

(c) Legislative History. Filed under Appellant's Motion for Judicial Notice, and to which appellant requests the Court take Judicial Notice under Evidence Code sections 451, 452, 454, 459, is the legislative history of Assembly Bill 298, the enactment of CCP section 340.6.

In all the committee reports, fact sheets and digests relating to Assembly Bill 298 ("AB 298"), the problem to be addressed was "legal malpractice," as above identified (with a Due Care Gravamen).

AB 298 had two distinct formats: (1) As introduced by Assemblyman Brown on January 25, 1977, AB 298 used the format of 340.5, with minor variations ("In any action for damages against an attorney based upon the **attorney's alleged professional negligence**, the time for commencement ..." (AB 298, Introduced January 25, 1977) (Request for Judicial Notice ("RJN") pgs. 48-49) (bold added); (2) As amended by Assemblyman Brown and reintroduced, and amended by the Assembly on May 9, 1977, AB 298 used the format proposed by attorney Mallen in his article, Mallen, *A Statute of Limitations*, *supra*, p. 22, with the proposed statute of limitations at p. 24 (therein using the "targeting" language of the current statute, "... for a wrongful act or omission ... **arising**

in the performance of professional services ...." (AB 298, Amended in Assembly May 9, 1977) (RJN pgs. 50-52) (bold added); Mallen titled his proposed statute "LEGAL MALPRACTICE (Id., p. 24)). Assemblyman Brown, the State Legislature, all consulting staff personnel and the Governor, believed the two versions targeted the exact same wrong – claims against an attorney for "professional negligence," a Due Care Gravamen.

Legislative Counsel's Digest. In every version of the bill – as originally introduced (when it tracked exactly 340.5), as amended to Mallen's proposal (May 9, 1977), and in every subsequent amendment (May 17, 1977, August 17, 1977, and as it was chaptered) (RJN pgs. 48-65) – in each Legislative Counsel's Digest, in identifying the problem to be resolved (the opening such paragraph), the Digest set forth the exact same language for the existing problem: the statutes governing an "attorney's professional negligence" and the delayed accrual (until discovery of the material facts of a legal malpractice action) of such actions (alluding to the holdings of *Neel, supra,* and *Budd, supra* which "imposed a date of discovery," which effected only legal malpractice claims). It's noteworthy that although Assemblyman Brown amended AB 298 to rewrite the bill as Mallen had proposed, the Legislative Counsel's Digest did not change a word of the description of the problem, continuing to reference only an "attorney's professional negligence" and the two year ("based upon a

contract, obligation, or liability not founded upon an instrument in writing") and four year ("based upon an instrument in writing") statutes of limitations. (Accord, *Southland, supra*, p. 427)

Assemblyman Brown's Understanding. Because Assemblyman Brown's amendments to AB 298 used the (nearly) exact format as Mallen's proposal, Assemblyman Brown had clearly seen the article (Mallen, *A Statute of Limitations, supra*), and noted Mallen's assertions that his (Mallen's) proposal was: "a **specifically tailored statute** of limitations for **legal malpractice**," as was enacted in the "**medical malpractice field**" (at p. 22). Appellant suggests Assemblyman Brown adopted Mallen's proposal because it purportedly did exactly the same thing as intended (a statute "tailored" to "legal malpractice"). It's noteworthy that the medical statute, 340.5, since it's 1975 amendment, targeted only "professional negligence" as the cure to the malpractice insurance crisis; It's also noteworthy that the Legislature were concerned at the time with the public criticism of "Legislature attorneys" favoring attorneys over physicians.

Based on Mallen, *A Statute of Limitations*, there is no basis for any reasonable jurist to conclude that Mallen's proposed statute (which was modified and enacted as section 340.6), or Assemblyman Brown's adoption thereof, intended that the statute apply to any cause of action except professional negligence, or a Due Care Gravamen.

On August 31, 1977 (with the bill assured of passage by both houses; RJN p. 46), Assemblyman Brown, the original author of AB 298, wrote to Governor Brown (RJN pgs. 29-30), stating in part:

> "I am writing to request your signature on AB 298. This bill creates a new statute of limitations **for legal malpractice actions** in an effort to close off the present **open-ended time frame** allowed for such actions. ¶ AB 298 provides a limitation period of one year from the date of plaintiff's discovery of the **negligent act** or four years from the date **such negligent act** was committed, whichever comes first. ... ¶ This measure would bring **legal malpractice statutory limits** more in line with current limitations on medical malpractice actions, and would, moreover, codify relevant case law in the area of **legal malpractice**, and provide easier access of attorneys to malpractice insurance."

That is, Assemblyman Brown urged adoption of a "professional negligence" limitations statute, **as had been enacted for medical providers** (which had targeted only professional negligence to alleviate the medical malpractice insurance crisis).

The Legislature, All Staff Advisors, and the Governor's Informed Beliefs. In every transmittal, the parties involved identified the problem as "legal malpractice" or referenced the "legal malpractice statutes," or referred to a "negligent act" as the trigger for such action:

– Assembly California Legislature, Willie L. Brown, Jr., "Fact Sheet," AB 298 (As Introduced), March 25, 1977: First Paragraph ("What the Bill Does"); Second Paragraph ("Background"); Third Paragraph ("Pros

... – provides same treatment for attorneys with reference to statute of limitation as now afforded to physicians....”). (RJN p. 2)

– Assembly Committee on Judiciary, “Bill Digest,” AB 298 (As Amended 5/9/77), 5/12/77 Hearing Date: First Section, “Bill Description” – first paragraph, “legal malpractice,” second paragraph, “negligent act”; Second Section, “Background” – “legal malpractice,” “negligent act,” references to *Neel* and *Budd*; Sixth Section, “Comment” – **Mallen, A Statute of Limitations has “been provided” to each Member of the Assembly Judiciary Committee**; and Sixth Section, “Comment,” subsection (d) – “negligent act,” “when the negligent act results in actual injury.” (RJN pgs. 3-6)

– From the Assembly Office of Research, For Assembly Third Reading, AB 298 (As Amended 17 May 1977): “Digest”: First Paragraph and Second Paragraph (“legal malpractice”); Third Paragraph (deferral until occurrence of the future act or event (purely a duty of due care analysis)); Fourth Paragraph (cost savings on “professional negligence” insurance policies to be passed through to insureds); Fifth Paragraph (“Comments”) (“legal malpractice,” “negligent act is discovered”). (RJN pgs. 7-8)

– Senate Committee on Judiciary, 1977-78 Regular Session, AB 298 (Brown), [undated] “Background Information,” Section 2, “Purpose” (“The bill is intended to provide **same treatment** for attorneys with reference to

the statute of limitations **now afforded physicians**.") (Bold added.) (RJN pg. 9)

– Senate Committee on Judiciary, 1977-78 Regular Session, AB 298 (Brown, As Amended 5-17-77), [Analysis of the Bill]: Under Section 2, "Purpose" ("legal malpractice," "discovery of the negligent act," "such negligent act was committed," deferral to future act or event for "effective date" [due care analysis], "AB 298 would require any resulting decrease in costs to an insurer to be passed on to persons insured against professional negligence," "**the purpose of the bill is to reduce the costs of legal malpractice insurance**"); Under Section 3, "Comments," under subsection (1) ("The **applicable statute of limitations for an action involving professional negligence** ..."; "legal malpractice"); Under subsection (2) (cites *Neel* and *Budd, supra*, and the "'discovery rule' (in malpractice actions)"); Under subsection (3) ("to prevent an attorney to defeat a legal malpractice cause of action by ..."; "AB 298 incorporates this [continuous representation] rule into the **legal malpractice** statute of limitations."); Under subsection (4) ("Where an attorney knows facts which constitute a plaintiff's cause of action for **professional negligence**, AB 298 would ..."; "... who has knowledge of his or her malpractice ..."); Under subsection 6 **("This bill would require insurers to pass on to insured attorneys any decrease in costs to insurers .... [P] HOW IS THIS PROVISION TO BE ENFORCED?")** (RJN pgs. 35-38)

– Senate, AB 298 (Brown et al., Amended Copy 5-17-77, Amended Copy 8-17-77), 8-17-77, Under "Digest," First Paragraph ("This bill provides that in a **legal malpractice action** ..."); Second Paragraph (deferral until the occurrence of the act or event (purely duty of due care analysis)); Under "Comments" ("legal malpractice," "negligent act is discovered"). (RJN pgs. 43-44)

– Assembly Office of Research, Unfinished Business, Concurrence in Senate Amendments, AB 298 (Brown, As Amended 17 August 1977), 8-24-77, Under "Digest," First and Second Paragraphs ("in legal malpractice actions" "in a legal malpractice action"); Third Paragraph (deferral until the occurrence of the act or event (purely duty of due care analysis)); Fourth Paragraph (cost savings on professional liability insurance policies to be passed through to insureds); Under "Comments": ("the **statute of limitations in legal malpractice actions** is open-ended, since the statute does not begin to run **until the negligent act is discovered**. **This bill places** a four-year **limit** on most causes of action."). (RJN pgs. 41-42)

– In the Legislative Secretary's Enrolled Bill Memorandum to Governor, on AB 298 (Brown), 9-15-77, First Paragraph ("...nor does a cause of action based upon an **attorney's professional negligence** accrue, until ..."). (RJN p. 21)

– In Legal Affairs Secretary's Enrolled Bill Report to Governor's Office, AB 298 (Brown), 9-15-77: First Paragraph ("legal malpractice");

Second Paragraph ("This bill would provide a specific statute of limitations for **legal malpractice actions** which basically parallels the limits imposed **on medical malpractice suits by AB 1** of the Second Special Session of 1975 (Keene)."); Fifth Paragraph ("**This bill is opposed by** a number of **individual physicians who do not understand it** and **believe that attorneys are receiving better treatment than doctors**." (Bold added.) (RJN p.27) [It's noteworthy that by this language the **Legal Affairs Secretary** informed the **Governor** of **Legal Affairs' opinion** that attorneys were **not receiving better treatment than doctors** (whose statute (340.5) only protected against "professional negligence" claims]) **and the opposing physicians "do not understand [the bill]."**

– Letter Dated 9-13-77 From Edward Rubin, President, State Bar of California, to Governor, First Paragraph ("The Board, however, recognizes certain problems in the legal malpractice field created by this legislation ...") (RJN p. 28)

Finally, it's noteworthy that nowhere in the legislative history is there any suggestion that AB 298 would apply to any action whose gravamen was <u>other than</u> a breach of attorney's duty of due care – there's no mention of breaches of fiduciary duties, or of malicious prosecution.

XV. PRAKASHPALAN: REGARDING EXPRESS TRUSTS, IF SECTION 340.6 MIGHT HAVE APPLICATION, A "FRAUD

BASED" ACTION UNDER SECTION 16460 PLEADS A MORE PARTICULAR FRAUD EXCEPTION.

It's noteworthy that regarding "express trust,"*Prakashpalan, supra*, p. 1117-1123, held:

- that a client with "fraud based claims" can allege a Probate Code section 16460 ("section 16460") breach of trust ("BOT") action to effect an "actual fraud" exception to section 340.6, and
- that the provisions of section 16460 imposing fiduciary duties to account for the funds held, deposit them in trust, and return them promptly on demand, are "more particular" than the "general" provisions of a fraud cause, and so the section 16460 SOL is to be applied.

Before *Prakashpalan,* appellant's counsel did not (could not) make the "connection" that an attorney's receipt of advances was "holding property for another's benefit," (*Prakashpalan, supra*, p. 1119) creating an express trust. It's somewhat noteworthy that the court did say,

> "Although no other cases have so applied Probate Code section 16460, we do not see this as a reason for not doing so here." (Id., p. 1122)

To see *Prakashpalan's* application of law to facts was eye opening, and appellant asserts that she had, in her SAC, pleaded the elements of a BOT action; if any elements are missing she could/would supply them by amendment.

That is, although appellant did not plead a separate BOT cause, she did plead as facts:

- attorney's receipt of client's advances for an express purpose,
- attorney's accountings which maintained the integrity of client's funds as her money,
- the purpose ended as to attorney's holding,
- client's request for an accounting and return of the unused funds, and

-attorney failed to return funds.[8]

Although appellant wasn't willing to plead a "fraud cause of action" against respondent, she had previously specified the facts of her "fraud based" claims, stating exactly what respondent had done/represented (that respondent asked for advances and represented to her he'd hold all funds in trust and return all unused funds, that he had her sign what she believed were bank papers to open a Lee-specific trust account for her monies, that the representations were intended to induce appellant to advance funds, that she relied on such representations in making her advances (CT, 400-401, Declaration Of Nancy Lee Re Ex Parte Application); that those

[8]Appellant pleaded a "fraud based" BOT in her SAC at paras. R-3, -4, -5, -7, -13, -14, ITA-22, ITC-22, and R-9, -6, -11; Said paras. appear in the Clerk's Transcript at: CT 164:16-22; 165:3-10; CT 165:11 to 166:13; 165:27 to 166:13; 171:2 to 172:4; 166:24-167:11; 172:5-9; 177:12-19; 178:14-22; 131, 132; 168:13-28; 166:14-18. All as set forth in ARB, pg. 29, l.1 – pg. 31, l. 10.

representations, in combination with respondent's limited document production under court order (CT 728-729, Declaration of Walter J. Wilson in Support of Ex Parte Motion, and CT 747-748, emails regarding production), and respondent counsel's later admission that respondent never put appellant's monies in trust (CT 732-734) led to appellant's conclusion that respondent always intended to steal from her and made his representations and promises as part of his scheme to steal from her).

Although the COA "bristled" over an unpleaded theft/conversion cause of action on the facts pleaded, it didn't "bristle" over an unpleaded "fraud based" BOT cause of action, which came up because of newly enunciated law.

Appellant asserts that a fraud based BOT claim is another way of saying: (a) the holding of funds was not "professional services" (it was not measured by attorney's duty of due care – **as consistently alleged in every appellant writing**), (b) of asserting a newly discovered "fraud based" manner of effecting the "other than actual fraud" exception, and/or (c) of asserting that section 16460 is a SOL more specific ***than section 340.6***.

XVI. ON THE FACTS, PROBATE CODE SECTION 16460 IS A MORE SPECIFIC STATUTE OF LIMITATIONS THAN SECTION 340.6; ITS ABSURD TO APPLY "TERMINATION OF THE ATTORNEY-CLIENT RELATIONSHIP," TO RESPONDENT'S "POSSESSION" OF APPELLANT'S MONEY.

Appellant reasserts that an express trust does not require an attorney's license to practice law, and that section 340.6 has no arguable application to the facts at bar (no "professional services," the section does not apply). For argument, however, if section 340.6 is somehow found to apply, appellant asserts that Probate section 16460 is the more specific (than section 340.6) statute of limitations for wrongdoing in an express trust.

Appellant also asserts that if somehow the creation/administration/execution of a trust is "professional services," then those same professional services (whatever the Court identifies them as) must be used to evaluate the continued representation tolling provision.

If the holding of funds is somehow the "professional services," attorney acted in the role of such "money holder" in two regards. On the one hand, as a "self payer" for the ($15,000 retainer, and the $30,000 and $65,000 advances =) $110,000 (which reduced to the unreturned $46,321), and for the $10,000 advanced for expert fees (which reduced to $9,725). In this regard, attorney continuously, from mid-February through December 28, 2010 (when attorney did return to appellant $9,725, via his trust account check (CT 734)), but he failed to disclose his receipt of said unused expert fees, and failed to return said funds until the above date.

Specifically noteworthy to the "professional services" analysis, however, is the absurdity of trying to apply section 340.6 to a trust: the termination of the attorney-client relationship – while it stops attorney from continuing to represent his client – doesn't affect any trustee's status as trustee, or his duties, and it doesn't transfer ownership of her monies to him, under any circumstances; the trial court, COA, rulings are grossly, and equitably off point and ill-considered insofar as they try to apply section 340.6 to a trust or other holding of money.

XVII. STOLL IS "DELUSIONALLY BAD" LAW, WITH A "FAUX HOLDING," A KNOWING MISREPRESENTATION, AND UNSUPPORTED/WRONG CONCLUSIONS.

The problems raised (but not justified or logically addressed) in *Stoll's* proclamation to the effect that "all" fiduciary breaches are governed by section 340.6, are generally the following:

1. Dicta versus Holding. In the first paragraph of *Stoll, supra*, at p. 1366, under "DISCUSSION," the court "held":

> "... although styled as a breach of fiduciary duty, the misconduct alleged in this case is nothing more than **professional malpractice** subject to the one-year statute." (Bold added.)

Stated otherwise, the gravamen of the Stoll action was **held to be** breach of attorney's duty of due care (the court impliedly finding Stoll failed to disclose to his employer sufficient information so employer could

make an informed decision in the purchase of a ski resort); the claimed wrong was therefore a "wrongful ... omission ... arising in the performance of professional services ...." ***Although the action was styled as a fiduciary breach, it was simply legal malpractice.***

In this regard, there was nothing unusual about the holding, and the case was consistent with prior holdings. This "**actual** holding," however, reduced to *dicta* the statement in the opening paragraph of the Stoll decision, at p. 1363-1364:

> "... we hold that the statute of limitations within which a client must commence an action against an attorney on a claim for legal malpractice **or breach of fiduciary duty is identical.** Unless tolled, **a claim based on either theory falls within the statutory term "wrongful act or omission"** and must be commenced within one year after the client discovers, or with reasonable diligence should have discovered, the facts constituting the act or omission, or four years from the date of the act or omission, whichever occurs first." (Bold added.)

Insofar as the wrongful omission was nothing more than (*Neel* defined) legal malpractice, then the "holding" of the case would only have application to a fiduciary breach which was also a due care breach (as that was all that was before the court).

2. *Stoll* Created a Straw Man. Stoll ignored (without discussion) the concept of a pleading's gravamen, and instead created a "straw man" – that all claims pleaded as fiduciary breach are exempt from section 340.6

(this is simply untrue). That is, court's regularly evaluate and act upon **every claim's gravamen**. In this manner, regulating many, but-not-all fiduciary wrongs.

Insofar as the words of a statute are to be given such meaning as intended by the Legislature, the Legislature's 1977 statement of the problem being addressed was legal malpractice, and there is no reference in the legislative records to fiduciary breaches. The legislative records (RJN, p. 1-65) do not support any intent by the Legislature to address the "problem" of fiduciary breaches" (and in 1977 fiduciary breaches were not a problem) (see RJN, p. 1-65).

In the above section VII, the thrust of Professor Duncan's article was that fiduciary law protects the weak and vulnerable from the dominant. To **remove such needed protections**, such a foundational requirement to a "representational" society, would require in depth evaluation by the Legislature. The Legislative history reflect no such consideration.

3. Stoll's claim it was using the "*Southland* reasoning" was a gross mischaracterization. That is, *Southland* interpreted the words of the statute, giving the words a meaning to save the statute, preventing an interpretation by which the statute would have no effectiveness whatever.[9]

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[9]*Southland's* holding that "wrongful act or omission" included wrongs styled as contract breaches was grounded on three tracks, chief among them was supply, by

Stoll's truncation of the statutory language had the effect of extinguishing more claims – that is, 15 years after enactment, the *Stoll* court, "re targeted" the statute to extinguish more claims than the Legislature had targeted. The extinguishment of these "non Legislature targeted" claims, made the statute do more – but did not "save" the statute from total ineffectiveness. (This re targeting was also "judicial legislation" in violation of *Samuels v. Mix*, *supra*, at p. 7.)

4. ***Stoll's* truncation** of the targeting phrase ("a wrongful act or omission other than actual fraud …") **in effect told the courts to ignore the full statutory phrase written by the Legislature**, and apply only a truncated such phrase – now targeting all attorney wrongdoing, transforming section 340.6 into a status statute.

This is grossly unconstitutional. *Samuels, supra*, at p. 7

5. The *Stoll* court either didn't read the legislative records, or **specifically, knowingly continued a misrepresentation** about the records (and from the phrasing (next) it appears the latter). That is, at p. 1367, the Stoll court stated:

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definition "legal malpractice" was both a tort and contract claim and so you would believe the Legislature was addressing both phases of the wrong.

The *Southland* court's choice was to give to the words a meaning as apparently intended by the Legislature, or the statute would have **no effectiveness whatever**.

> *Southland* found it of "some significance" that the Bill Digest of the Assembly Committee on the Judiciary indicated that the members had **reviewed and considered** a leading article on statutes of limitations for legal malpractice: Mallen, *Panacea or Pandora's Box? A Statute of Limitations for Lawyers* (1977) 52 State Bar Journal 22.... (Bold added.)

The Stoll court purported to have the Legislative history in front of it, should have noticed Southland's apparent misstatement – but chose to **emphasize it**; the *Stoll* phrasing implies Stoll specifically knew the bolded language was "unsupported." A knowing misrepresentation by the Court of Appeal.

As set forth in the legislative materials, at RJN pgs. 3-6, is the identified, "Bill Digest," which states under COMMENTS (RJN p. 5), "Members of the Assembly Judiciary Committee **have been provided** the detailed analysis of recommended legal malpractice statutes of limitations recently published in the State Bar Journal ...."

Although the mischaracterization that members had "**reviewed and considered**" a certain article, when the source documents showed clearly only that members **(of that committee, only)** were "**provided**" the certain article, might be a mild transgression in some circumstances, but here, *Stoll* relied on a sentence and a footnote buried within the "provided article" as grounds for the conclusion the Legislature **intended** to target more claims for extinguishment.

Stoll also ignored or missed Mallen's specific application of the statute to an attorney "acting as an attorney," see Sections I, B, and IX, A, 1 (a), *supra.*

6. The "Context of Malpractice" and a "Precise Definition of Malpractice" – Huh? In addition, although the Supreme Court in *Neel* defined "legal malpractice," and although all legislative records indicate the Legislature intended to address the "legal malpractice" problem, *Stoll* "created," without explaining, a "context of malpractice," and claimed that in Mallen, *A Statute of Limitations*, Mallen "precisely defined malpractice" - apparently something other than the *Neel* definition; a reading of Mallen, *A Statute of Limitations* will convince this Court that, in context, the article attempts no such thing.[10]

These "creative-but-inaccurate" concepts, **from a COA** – and passed on **with Supreme Court approval** are an issue because: *Neel* set forth the definition of legal malpractice (adopted and used in *Southland* and *Quintilliani*, among numerous others), from which the "gravamen" approach arose, and, by such definition determines whether a matter is or it isn't (like pregnancy) legal malpractice. Additionally, from the identical sentence structures, and the use of "in the performance of" in the targeting

[10] Mallen's conclusion is that the attorney must be "acting as an attorney," and the only time that happens is when he is in the rendition of professional services.

phrase of section 340.6 is based upon the definition of legal malpractice, and the definition of legal malpractice informs the interpretation of the targeting phrase, the "professional services" of section 340.6 are "the legal tasks they undertake."

Also in addition, all the legislative records identified the problem as (*Neel*) legal malpractice, and none of the records ever mentioned or discussed a "context of malpractice" or spoke of altering the definition of legal malpractice, or spoke of targeting any claims other than legal malpractice (e.g., fiduciary breaches).

7. In *David Welch Welch Co. v. Erskine & Tully* (1988) 203 Cal. App. 3rd 884, the gravamen of the action was not "legal malpractice." It was solely a fiduciary breach of loyalty, and the breach occurred years after the professional services (from which the legal malpractice must come into being) were completed. The case doesn't provide any facts to even argue that the gravamen was breach of the due care duty, or that plaintiff's claim was for a "wrongful act ... arising in the performance of professional services."

Stoll ***mis***characterized the *David Welch* holding.

Since there was no legal malpractice to discuss in *David Welch*, there was no distinction to be made!

It's noteworthy that no courts have previously criticized *Stoll*, while so many (with the Supreme Court's approval) criticized *David Welch.*

XVIII. THERE WAS NO AMBIGUITY IN APPELLANT'S FACTS IN HER SAC; THE FOURTH DISTRICT SIMPLY SAW A REMEDY/CONCLUSION OF LAW.

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 ..."

CONCLUSION

For the foregoing reasons, appellant Nancy F. Lee asks this Court to affirm reversal, and hold section 340.6 has no application to the facts at bar.

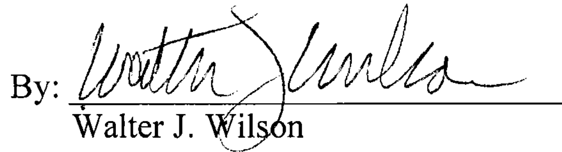
Respectfully submitted,

Dated: December 3, 2014 By: [signature]

Walter J. Wilson,
Attorney for Appellant 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 **12,572** 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 December 3, 2014, I served the following document(s):
APPELLANT'S ANSWER BRIEF ON THE MERITS

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

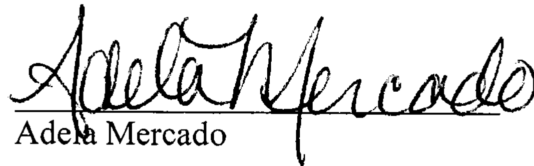
CLERK FOR THE COURT OF APPEAL
4TH DISTRICT COURT OF APPEAL, DIVISION 3
601 W. SANTA ANA BOULEVARD
SANTA ANA, CA 92701

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 this 3rd day of December 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.

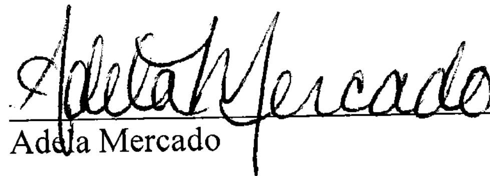


Adela Mercado

PROOF OF SERVICE BY ELECTRONIC DELIVERY

On December 3, 2014, I, Adela Mercado, submitted to the **Supreme Court** an electronic copy in .PDF format of Appellant Nancy F. Lee's, **APPELLANT'S ANSWER BRIEF ON THE MERITS** 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 this 3rd day of December 2014, in Long Beach, California.



Adela Mercado