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January 8, 2014

Hon. Joan Dempsey Klein, Presiding Justice
California Court of Appeal
Second Appellate District, Division Three
300 S. Spring Street
Second Floor, North Tower
Los Angeles, California 90013

Re: *Roger Cleveland Golf Co. Inc. v. Krane & Smith*
Second Appellate District Case No. B237424
Los Angeles County Super. Ct. Case No. LC093721
(Hon. James A. Kaddo, Judge)

Application to File Letter Brief and Amicus Curiae Letter Brief of Association of Southern California Defense Counsel in Support of Respondents

Your Honor:

Pursuant to Rule 8.200(c) of the California Rules of Court, the Association of Southern California Defense Counsel (hereafter ASCDC or Association) submits this application for leave to file a letter brief, and its accompanying letter brief as amicus curiae in support of Respondents Krane & Smith, APC, Marc Smith and Ralph C. Loeb (collectively "Krane & Smith" or "respondents") in the above captioned appeal, *Roger Cleveland Golf Co. Inc. v. Krane & Smith,* Case No. B237424.

APPLICATION OF ASCDC FOR LEAVE TO FILE LETTER BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

On December 5, 2013, after briefing and oral argument, this court sent a letter to counsel for the parties requesting supplemental letter briefs be filed by January 9, 2014 to further address the following question of statutory interpretation:

> In the briefs and during oral argument to the court, the parties appear to be in agreement that *Yee v. Cheung* (2013) 220 Cal.App.4th 184, and *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, correctly held that Code of Civil Procedure section 340.6, subdivision (a), is the applicable statute of limitations for a malicious prosecution action against an attorney. This court has concerns as to whether *Yee* and *Vafi* are contrary to the plain language and legislative history of that Code of Civil Procedure section 340.6, subdivision (a).

IDENTITY AND INTEREST OF ASCDC

ASCDC is a voluntary membership association consisting of approximately 1,100 attorneys, among whom are some of the leading trial lawyers of California's civil defense bar. ASCDC's members routinely represent and defend professionals, businesses, civic and religious institutions who provide the goods, services, jobs and investments vital to the country's economic health and prosperity. The Association is dedicated to promoting the administration of justice, providing education to the public about the legal system, and enhancing the standards of civil litigation and trial practice in this State.

ASCDC and its member-attorneys have been called upon many times to address similar questions of public concern regarding the exercise of protected First Amendment speech and petition rights of parties, witnesses and attorneys who participate in proceedings before judicial, quasi-judicial, administrative and other "official" bodies, including *Rubin v. Green* (1993) 4 Cal.4th 1187, and more recently cases addressing the broad application of California's anti-SLAPP law to derivative lawsuits (including malicious prosecution actions) against lawyers and other professionals, such as *Kibler v. Northern Inyo County Hosp. Dist.* (2006) 39 Cal.4th 192 and *Jarrow Formulas, Inc. v. La Marche* (2003) 31 Cal.4th 728 (*Jarrow*).

Because ASCDC members often represent attorneys in litigation, the Association is also interested in the proper interpretation of the statute of limitations applying to claims against members of the legal profession; for example, having participated before the California Supreme Court as amicus curiae in *Beal Bank v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503 (*Beal Bank*) to address whether judicially-created "tolling" rules may properly be engrafted upon the legislated time periods set forth in section 340.6.

REQUEST FOR LEAVE TO FILE LETTER BRIEF AS AMICUS CURIAE

ASCDC and its members therefore have substantial interests in the important question of legislative intent and statutory construction posed by this court's December 5 request for supplemental briefing and in the proper application of the statute of limitations governing malicious prosecution claims.

ASCDC understands that both sides to this appeal, in their original briefing and arguments to this court, agreed that Section 340.6 applies—as Division 8 of this court concluded in *Vafi* and as the Fourth Appellate District more recently followed that reasoning in *Yee*. In ASCDC's view, *Vafi* and *Yee* were correctly decided. Section 340.6 remains the most specific (and, indeed, the exclusive) statute of limitations governing claims asserted against attorneys for wrongful acts or omissions, other than actual fraud, arising in the performance of professional services on behalf of their clients in an underlying lawsuit for reasons that *Vafi* and *Yee* cogently articulated. Section 340.6, by the plain language of the statute and consistent with established rules of statutory construction applied by our Supreme Court, is the statute of limitations that applies to the present malicious prosecution action against Krane & Smith.

Accordingly, ASCDC respectfully requests leave to file the letter brief that follows below as amicus curiae in support of respondents pursuant to Rule 8.200(c).

ASCDC LETTER BRIEF IN SUPPORT OF RESPONDENTS

A. Background of the Legislature's Enactment of Section 340.6 and the Historically Consistent Judicial Application of That Specific Statute of Limitation to Claims of Attorney Misconduct Arising From the Representation of Clients

Roger Cleveland Golf does not challenge the trial court's conclusion that its malicious prosecution claim falls within the purview of the anti-SLAPP statute. (See *Jarrow*, 31 Cal.4th at p. 735 [a malicious prosecution action alleges that the defendant committed a tort by filing a lawsuit, and therefore, California courts routinely conclude that malicious prosecution causes of action fall within the purview of the anti-SLAPP statute].) Addressing the second prong of the anti-SLAPP analysis, the trial court concluded that appellant failed to present evidence sufficient to "[establish] that there is a probability that [he] will prevail on the claim" (§ 425.16, subd. (b)(1)), ostensibly because the one-year statute of limitation to pursue that claim against the lawyers had already run out under section 340.6 before the lawsuit was commenced. (AOB at pp. 15-16; 11 CT 2585-2586.)

ASCDC addresses only the question of whether section 340.6 is the proper limitation period applicable to the suit against the lawyers. In recent years, first *Vafi* and

later while this appeal was pending, *Yee*, examined the competing arguments that the one-year statute of limitation set forth in section 340.6, as opposed to the more general two-year statute of limitation governing personal injury claims, controls the time to file a cause of action for malicious prosecution against opposing counsel in the position of Krane & Smith. (See generally *Yee*, *supra*, 200 Cal.App.4th at pp. 193-194.)[1]

More than two decades ago, in *Laird v. Blacker* (1992) 2 Cal. 4th 606, 611-612 (*Laird*), the California Supreme Court digested and tracked the development of section 340.6 which was originally enacted by the Legislature in 1977. Before 1977, the statute of limitations for legal malpractice actions was governed by section 339, subdivision 1, which provides a two-year limitations period for any action based on "a contract, obligation or liability not founded upon an instrument in writing ...." Although section 339, subdivision 1, did not establish an accrual date for legal malpractice actions, courts generally adopted, as the date of accrual, the date on which the malpractice *occurred*. (*Id.* at pp. *Hays v. Ewing* (1886) 70 Cal. 127 [cause of action for attorney malpractice barred at expiration of two years after neglect occurred].) Recognizing the harshness of a strict occurrence rule, later cases held that a cause of action for legal malpractice accrued when a plaintiff suffered "irremediable damage." (See, e.g., *Heyer v. Flaig* (1969) 70 Cal.2d 223, 230 [statute of limitations for legal malpractice begins to run on date attorney performs last negligent act].)

Ultimately, when the Legislature adopted section 340.6 in 1977, it implicitly rejected the term "irremediable damage" and codified the discovery rule of *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176 (*Neel*), and *Budd v. Nixen* (1971) 6 Cal.3d 195, 198 (*Budd*). (See generally *Laird*, *supra*, 2 Cal.4th at p. 611.) These prior cases held that a cause of action for legal malpractice accrues when the client discovers or should discover the facts essential to the malpractice claim, and suffers appreciable and actual harm from the malpractice. Discovery of any appreciable and actual harm from the attorney's negligent conduct establishes a cause of action and begins the running of the limitations period. (*Id.*, citing *Budd, supra*, 6 Cal.3d at p. 201.)

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[1] Section 340.6, subdivision (a) provides in relevant part: "*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." (Italics added.) Before *Vafi*, section 335.1, which applies to claims for "injury to ... an individual caused by the wrongful act or neglect of another," had been held to govern claims for malicious prosecution generally, but not specifically to such claims against lawyers. (See *Yee*, *supra*, 200 Cal.App.4th at pp. 193, fn. 8; *Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 197.)

Section 340.6 codified the general rule of "accrual" of a cause of action in favor of a "plaintiff" (the statute of limitation for claims of attorney misconduct explicitly uses the word "plaintiff" and does not restrict its application to a lawsuit brought by a "client") embodied in *Budd, supra*, 6 Cal.3d 195, and *Neel, supra*, 6 Cal.3d 176. Those cases addressed the former two-year legal malpractice statute of limitations (§ 339), but did not specifically determine whether actual injury occurs when the client suffers an adverse judgment or after an appeal of right is concluded and the judgment is final. Rather, *Neel* and *Budd* suggested the time of discovery is often a question of fact for the jury. *Neel*, however, explained the holding in *Hays v. Ewing, supra*, 70 Cal. 127, which interpreted the limitations period of section 339 when the malpractice occurred in the course of litigation. *Neel* stated that the *Hays* court "accepted the date of dismissal of the suit—that is, the date upon which the client suffered damage—as the crucial point from which the statute of limitations should run. Indeed, the court refused to adopt as the critical time the date of the affirmance of the dismissal on appeal." (*Laird, supra*, 2 Cal.4th at p. 611, citing *Neel, supra*, 6 Cal.3d at p. 183.)

After reviewing this background, *Laird* determined that "actual injury" for purposes of accrual of the one-year statute occurred when the *underlying judgment was entered* against the plaintiff—regardless of whether an appeal was filed after that judgment. (*Laird, supra*, 2 Cal.4th at p. 618; see also *id.* at p. 621 (dis. opn. by Mosk, J.) [majority opinion rejecting the dissent's view that statutory tolling exceptions were "intended to toll the limitations period for filing legal malpractice actions when, as here, a client takes an appeal of right from the underlying judgment and is awaiting its outcome"]; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 755-756 (*Jordache*) [following *Laird*].) That same rule is applied to the accrual of a cause action for malicious prosecution—accrual occurs on entry of the trial court judgment in the underlying action, without "tolling" even if an appeal is taken from that judgment. (Resp. Br. at p. 23, citing *Feld v. Western Land & Dev. Co.* (1992) 2 Cal.App.4th 1328, 1334 among other cases.)

Section 340.6 by its plain language thus applies to an "action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services..." The tolling provisions explicitly stated in section 340.6 are *exclusive*. (*Laird, supra*, 2 Cal.4th at p. 618 ["the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute"]; accord *Jordache, supra*, 18 Cal.4th at p. 755; *Beal Bank, supra*, 42 Cal.4th at pp. 510-511 [digesting prior cases interpreting the legislative history of section 340.6].)

Over the years, the principles embodied in section 340.6 have been consistently applied by the California courts to claims brought against attorneys; i.e., claims arising out of "wrongful acts or omissions" in the performance of professional services on behalf

of actual clients, whether or not sounding in tort. (See *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1363; *Levin v. Graham & James* (1995) 37 Cal.App.4th 798, 805; *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 68; *Vafi*, *supra*, 193 Cal.App.4th at pp. 882-883; *Yee*, *supra*, 200 Cal.App.4th at pp. 193-194.) *Vafi* and *Yee* are simply among the most recent cases to do so—in deciding which statute applies to malicious prosecution claims against attorneys representing *adverse parties* in a prior lawsuit.

B. *Vafi* and *Yee* Correctly Applied the One-Year Time Limit of Section 340.6 to Actions for Malicious Prosecution Against Opposing Lawyers

Logically, and consistently with the plain meaning and the sound legislative purposes of section 340.6, the one-year time limit was correctly applied by *Vafi* and *Yee* to third party claims against opposing lawyers for malicious prosecution. Since long before the enactment of section 340.6, our Supreme Court has consistently recognized that statutes of limitation and repose are not simply "procedural" means of avoiding potentially meritorious claims, but in themselves encompass the defendant's substantive legal rights:

> The fundamental purpose served by statutes of limitations—even the stringent limitations of valid actions—is to prevent stale claims. They thus provide repose to individuals subject to legal actions or criminal prosecution. Statutes of limitations are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. *Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost.*
>
> *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 777 (italics added, internal citations and quotation omitted); accord *Jordache*, *supra*, 18 Cal.4th at pp. 755-756 (stating, in the specific context of section 340.6: "Limitations statutes are intended to enable defendants to marshal evidence while memories and facts are fresh and to provide defendants with repose for past acts.").

In *Yee*, the Court of Appeal observed that *either* the one-year statute of limitation under section 340.6 *or* the more the "general" statute of limitations of two years under section 335.1 might arguably apply to malicious prosecution claims against attorneys. Although the Fourth Appellate District did not feel it was constrained by Division 8's earlier decision in *Vafi*, which had applied the one-year statute to malicious prosecution claims against attorneys, *Yee* nonetheless independently agreed with *Vafi's* conclusion—

but only after thoroughly analyzing the language of section 340.6, the stated legislative purposes and controlling precedents as *Vafi* had previously done. (*Yee*, *supra*, 200 Cal.App.4th at pp. 193-195; cf. *Vafi*, *supra*, 193 Cal.App.4th at pp. 880-883.)

Questions of statutory interpretation begin with the words of the statute. If the statutory language is clear and unambiguous, the inquiry ends there. Words are given their plain and commonsense meaning, and courts should avoid a construction that would produce absurd consequences. When a general and a particular provision are inconsistent, the latter is paramount to the former. Particular intent prevails over general, inconsistent intent. Thus, a specific statute of limitations applicable to professional services performed by a lawyer takes precedence over a general one, even though the latter *might* be broad enough to include the subject covered by the more particular provision. (*Yee*, *supra*, 200 Cal.App.4th at p. 194; *Vafi, supra*, 193 Cal.App.4th at p. 880.)

As in *Vafi*, the Fourth Appellate District disagreed with Yee's argument that section 340.6 applied only to disputes between attorneys and clients, a position which is contrary to the plain language of the statute. (*Yee*, *supra*, 200 Cal.App.4th at p. 194.) The *Yee* court also did not agree that the statute's term "wrongful act or omission" could only refer to attorney malpractice, as that word does not appear in the statute. (*Id.* at pp. 195-196.) Applying section 340.6 to malicious prosecution actions would not produce an absurd result. Malicious prosecution is a disfavored tort, a policy that arguably applies with additional force to attorneys who are likely to be involved in more litigation than the average citizen. At least one legitimate legislative purpose in enacting section 340.6 was to reduce the costs of legal malpractice insurance, including the costs of defense which are significantly impacted by malicious prosecution claims. (*Id.* at pp. 196-197.)[2]

Thus, the Legislature could have articulated many valid policy reasons for shortening the statute of limitations for malicious prosecution actions brought by a third party "plaintiff" against opposing attorneys arising from professional services performed for that plaintiff's adversary in the underlying litigation. (*Yee*, *supra*, 200 Cal.App.4th at pp. 194-197.) Discussing these purposes, and agreeing with *Vafi's* interpretation of section 340.6's plain language dealing with the specific subject matter of a lawyer's "wrongful acts or omissions," *Yee* explained:

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[2] As this court aptly observed in *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 506-509, many forms of liability insurance, including professional liability policies, customarily promise to pay for a "full defense" of malicious prosecution claims, despite the statutory prohibition on indemnification of claims involving "willful" injury or malicious torts.

> Yee's complaint alleges that Jensen acted wrongfully in "pursu[ing] a meritless lawsuit against [Yee] for fraud and conversion" and in "fil[ing] and continu[ing] litigation of the Underlying Action on behalf of [the nonattorney defendants] despite the fact no reasonable attorney would have done so." Thus, the gravamen of Yee's complaint against Jensen is the allegation that Jensen engaged in wrongful acts in his performance of professional legal services in his representation of the nonattorney defendants. This claim clearly falls within the plain language of the statute. (See *Vafi, supra*, 193 Cal.App.4th at p. 880.) Yee's claim against Jensen also falls within the plain language of the alternative statute of limitations set forth in section 335.1 that has been held generally applicable to malicious prosecution actions (see *Stavropoulos, supra*, 141 Cal.App.4th at p. 197).
>
> As noted, where more than one statute might apply to a particular claim, "'a specific limitations provision prevails over a more general provision.' [Citation.]" (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316-1317[.]) Given that section 340.6 is a more specific statute of limitations, applicable only to actions against attorneys for their wrongful acts or omissions, its provisions prevail over the more general "catchall" statute of limitations for claims against any defendant based on his or her alleged "wrongful act or neglect" of another.
>
> We are not persuaded by Yee's argument that the language of section 340.6 "contemplates situations where the wrongful act is related to the duties of an attorney to the *client*." (Italics added.) We are bound by the plain language of the statute, which clearly applies when "the plaintiff" discovers the wrongful act on the part of the attorney. There is no requirement in the statute that the plaintiff has been a client of the attorney. (§ 340.6.) Rather, the Legislature chose to use the term "plaintiff" and not "client," in framing the entire provision.

Yee, supra, 200 Cal.App.4th at p. 195 (some internal citations omitted).

As in the context of accrual of claims for malpractice brought by an actual client, commencing the statute of limitation upon entry of judgment in the underlying action works no particular hardship on the third party plaintiff who desires to bring a timely lawsuit for malicious prosecution. The Supreme Court notes that "case management tools available to trial courts, including the inherent authority to stay an action when appropriate and the ability to issue protective orders when necessary, can overcome

problems of simultaneous litigation if they do occur." (*Jordache*, *supra*, 18 Cal.4th at p. 758.)

Conversely, extending the statute of limitations to two years, or applying a more liberal "tolling" rule in favor of *non-clients* who bring malicious prosecution actions against opposing lawyers, likely *would* produce "absurd" results that are contrary to the commonsense purposes of section 340.6. For public policy reasons justifying the characterization of malicious prosecution as a "disfavored tort," the circumstances giving rise to a civil cause of action that might be brought by adversaries in litigation against another party's counsel are few and far between. (*Vafi*, *supra*, 193 Cal.App.4th at p. 883; cf. *Thayer v. Kabateck, Brown & Kellner, LLP* (2012) 207 Cal.App.4th 141, 161 [anti-SLAPP statute applied to dismiss claims pursued by a non-client who challenged class action counsel's advice and strategic settlement decisions made on behalf of the firm's actual clients in the underlying action].)

The courts thus have often observed: "We are wary about extending an attorney's duty to persons who have not come to the attorney seeking legal advice" or adversaries with whom the attorney deals at arms-length, as in virtually every litigation context. (*Hall v. Superior Court* (2003) 108 Cal.App.4th 706, 714; see also *Chang v. Lederman* (2009) 172 Cal.App.4th 67, 82-83 [describing the limited nature of duties owed by attorneys to third parties and rejecting the necessity for expansion of "third party beneficiary" claims]; *Thayer*, *supra*, 207 Cal.App.4th at 157-161 [digesting cases that compelled dismissal of "fraud," "unfair business practices" and "breach of fiduciary duty" claims asserted by a non-client against litigation attorneys for their conduct in representing "actual clients"].)

There is no sound public policy reason or legislative purpose justifying departure from the result correctly reached by *Vafi* and *Yee* in applying section 340.6 to malicious prosecution claims against opposing counsel.

CONCLUSION

Vafi and *Yee* are soundly reasoned decisions that were rightly decided in light of the plain meaning of section 340.6—the most specific statute of limitation applicable to malicious prosecution claims brought by a "plaintiff" against attorneys for "wrongful acts or omissions" arising in their performance of professional services. *Vafi* did so in the identical procedural context presented by this record; namely, an anti-SLAPP motion requiring the plaintiff to demonstrate the probable merits of its claims. Given that the statute of limitation has expired, there is no such reasonable probability on this record.

The trial court after applying controlling California Supreme Court precedents under the anti-SLAPP statute and section 340.6 properly dismissed the malicious prosecution claim against respondents. That judgment should be affirmed.

Respectfully submitted,

MANATT, PHELPS & PHILLIPS LLP

By 
Harry W.R. Chamberlain II

MICHAEL A. COLTON
Attorney and Counselor at Law

By 
Michael A. Colton

Attorneys for Amicus Curiae Association of Southern California Defense Counsel

cc: See attached Service List

[PROPOSED] ORDER

No. B237424

In the Court of Appeal

OF THE

State of California

SECOND APPELLATE DISTRICT

DIVISION THREE

ROGER CLEVELAND GOLF CO. INC.

Plaintiff and Appellant,

v.

KRANE & SMITH LLC, et al.

Defendants and Respondents.

[PROPOSED] ORDER GRANTING LEAVE TO FILE AMICUS CURIAE LETTER BRIEF IN SUPPORT OF RESPONDENTS

The court has considered the application of the Association of Southern California Defense Counsel (ASCDC) under Rule 8.200(c), California Rules of Court, for leave to file an amicus curiae letter brief in support of respondents, and good cause appearing, the application is hereby **GRANTED**.

The ASCDC amicus curiae letter brief which accompanied the application, having been served on all parties, shall be filed upon entry of this Order. **IT IS SO ORDERED**.

Dated:_____

_____

PRESIDING JUSTICE

PROOF OF SERVICE

Roger Cleveland Golf Co. Inc. v. Krane & Smith
No. B237424

I, Harry W.R. Chamberlain II, declare: I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My employer's business address is Manatt, Phelps & Phillips, LLP, 11355 W. Olympic Boulevard, Los Angeles, CA 90064.

On **January 8, 2014**, I served a copy of the within document:

Application to File Letter Brief and Amicus Curiae Letter Brief of Association of Southern California Defense Counsel in Support of Respondents

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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

Executed on **January 8, 2014**, at Los Angeles, California.

HARRY W.R. CHAMBERLAIN II

SERVICE LIST

Roger Cleveland Golf Co. Inc. v. Krane & Smith
No. B237424

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Trial Court Super. Court Case No. LC093721	Los Angeles County Superior Court Clerk/Executive Officer 111 N. Hill Street Los Angeles, CA 90012 For: Hon. James A. Kaddo, Judge
Court of Appeal No. B237424 **(Original + 4 copies by NORCO Overnight Delivery)**	Clerk of the California Court of Appeal Second Appellate District, Division 3 300 S. Spring Street Second Floor, North Tower Los Angeles, CA 90013
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