ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

2520 Venture Oaks Way, Suite 150 • Sacramento, CA 95833
(800) 564-6791 • (916) 239-4082 • (916) 924-7323 – Fax
ascdc@camgmt.com • www.ascdc.org

October 7, 2019

Rehearing order: 10/18/2019
Opinion filed: 9/18/2019
Opinion panel: ECM KOL RMA

Presiding Justice Kathleen E. O'Leary
Associate Justice Eileen C. Moore
Associate Justice Richard M. Aronson
Fourth Appellate District, Division Three
California Court of Appeal
601 West Santa Ana Boulevard
Santa Ana, California 92701

Re: *Sharon v. Porter*
Court of Appeal No. G056706
Request for Publication of September 18, 2019 Opinion

Honorable Justices:

The Association of Southern California Defense Counsel (the Association) respectfully requests that the court publish its recent opinion in this case ("Opinion"). The Opinion's analysis of the legal malpractice statute of limitations readily meets the publication standard.

The Association's interest

The Association is the nation's largest and most preeminent regional organization of lawyers who specialize in defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. Its members routinely represent other attorneys in legal malpractice actions. The Association has a Lawyers Defense Committee, which has flagged the Opinion as important.

The Association frequently has appeared as amicus curiae in important legal malpractice cases (e.g., *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503; *Viner v. Sweet* (2003) 30 Cal.4th 1232) and obtained publication of important decisions addressing the legal malpractice statute of limitations (e.g., *Foxen v. Carpenter* (2016) 6 Cal.App.5th 284; *Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031.)

Because Association members frequently represent attorneys in malpractice actions, the Association has a direct interest that the law regarding the legal malpractice statute of limitations be certain. *Published* precedent furthers that goal.

Why publication is warranted

The Opinion meets the standard for publication in multiple respects. For each of the following reasons, the Opinion "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions," "explains . . . an existing rule of law," "[a]dvances a new . . . clarification . . . of a provision of a . . . statute," and "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(2), (3), (4), (6).)

- The Opinion addresses an important statutory issue: the proper application of the "actual injury" requirement in Code of Civil Procedure section 340.6 ("section 340.6") and whether a legal malpractice action is tolled when the plaintiff has yet to incur attorney fees from contesting the malpractice. The defendant attorney had represented the plaintiff in a lawsuit that resulted in a default judgment that was later vacated as void because the attorney never pled a damage amount in the complaint. (Opinion, p. 2.) The trial court found that "the judgment had been valid until it was vacated" and that the plaintiff did not incur "actual injury" from the alleged malpractice until she began incurring hourly fees to oppose the judgment debtor's motion to vacate the default judgment, making her lawsuit timely. (*Ibid.*) This Court disagreed with the trial court's analysis and reversed, finding plaintiff's lawsuit was time-barred under section 340.6. (*Ibid.*) The Opinion holds that "the default judgment was void independent of it being vacated" and that "[d]iscovery of the void judgment and whatever injury resulted therefrom occurred at least by" the time the "judgment debtor wrote to [plaintiff] and her new attorney claiming the judgment was void," which means section 340.6's statute of limitations ran one year from then. (*Ibid.*) "In other words, [plaintiff's] lawsuit in this case was time-barred independent of when she began to incur [her new attorney's] hourly fees to address the consequences of [the defendant attorney's] admitted malpractice." (Opinion, p. 11.)

- No prior published appellate decision has addressed this default-judgment context. Moreover, the fact that the trial and appellate courts reached contrary conclusions after reviewing the same record and same existing case law demonstrates the need to clarify the existing case law *through publication*.

- Publishing the Opinion will give important notice to trial courts and plaintiffs in future malpractice cases involving void judgments that the plaintiff may need to sue before the trial court confirms the judgment is void: "It is true our legal conclusion, in effect, put [plaintiff] in the awkward position of having to file a malpractice lawsuit based upon a void judgment prior to the superior court confirming the judgment was indeed void. However, such a situation did not justify tolling based upon any of the exclusive grounds under section 340.6." (Opinion, pp. 11-12.) Absent publication, the same erroneous decisions that the plaintiff and the trial court made here may recur in future cases, burdening parties and wasting judicial resources.

- The Opinion addresses an important line-drawing question: How to determine when "actual injury" occurred for section 340.6 purposes given that "[i]n some circumstances, the incurring of attorney fees necessary to address the underlying malpractice marks the 'actual injury,'" but "[i]n other circumstances, '[t]he loss or diminution of a right or remedy constitutes injury or damage'"? (Opinion, p. 7, citations omitted.)

- The Opinion clarifies the correct construction and application of *Worton v. Worton* (1991) 234 Cal.App.3d 1638 (*Worton*). *Both sides* claimed *Worton* supported their positions, with plaintiff "characteriz[ing] the case as standing for a proposition that actual injury requires an 'overt act' to end tolling under section 340.6, subdivision (a)(1)." (Opinion, p. 8.) The Opinion finds plaintiff's "argument is unpersuasive" and that *Worton* "support[s] [defendant's] position in this case." (*Ibid.*) It holds that "*Worton* and other relevant case law support a finding that the void nature of the [underlying] judgment sufficiently diminished [the plaintiff's] remedy against [her attorney] and the other judgment debtors by no later than November 2015," the time when the judgment debtor told plaintiff and her new attorney that the judgment was void. (Opinion, p. 9.) The Opinion confirms that *Worton* remains good law, noting that the Supreme Court "did not criticize any

aspect of *Worton* in discussing it in *Laird v. Blacker* (1992) 2 Cal.4th 606, 614-617 [*Laird*], where the high court rejected an argument that the statute of limitations should have been tolled while an adverse judgment was potentially remediable through an appeal." (Opinion, p. 10.)

- The Opinion includes an important public policy holding: It holds that "[o]ur findings under the particular circumstances of this case comport with the well-recognized policy interest of section 340.6 'to require diligent prosecution of known claims so that legal affairs can have their necessary finality and predictability and so that claims can be resolved while evidence remains reasonably available and fresh.'" (Opinion, p. 12, quoting *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 755-756, citing *Laird*, *supra*, 2 Cal.4th at pp. 614, 618.) It further holds that plaintiff's argument that her malpractice claim should have been tolled until she actually "agreed to incur attorney fees for [her former attorney's] negligence would be at odds with another policy interest to avoid granting a malpractice plaintiff 'unilateral control over the limitations period.'" (Opinion, pp. 12-13, quoting *Jordache*, at p. 755, citing *Laird*, at p. 618.) The Opinion recognizes that "[n]o authority supports" letting plaintiffs delay malpractice lawsuits for decades and claim timeliness as long as the plaintiff has yet to incur any specific attorney fees. (Opinion, p. 13.)

For each of these independent reasons, the Association respectfully urges the Court to publish its September 18, 2019 opinion.

Respectfully submitted,
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

By: /s/ Edward L. Xanders
Edward L. Xanders

EDWARD L. XANDERS (SBN 145779)
Greines, Martin, Stein & Richland LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On October 7, 2019, I served the foregoing document described as: **CORRESPONDENCE TO THE COURT** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

(X) By Mail: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on October 7, 2019, at Los Angeles, California.

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

/s/ Monique N. Aguirre

Monique N. Aguirre

SERVICE LIST

Via Truefilng:

Martin F. Goldman
Law Offices of Martin F. Goldman
16830 Ventura Boulevard, Suite 620
Encino, California 91436
T: (310) 470-8487
E: marty@martylaw.com
Attorneys for Plaintiff and Respondent Elise Sharon

CALIFORNIA SUPREME COURT
[Electronic Service under Rule 8.212(c)(2)]

Peter J. Porter
Law Offices of Peter J. Porter
19700 Fairchild Road, Suite 200
Irvine, California 92612
T: (714) 835-2700
E: pjplawyer@sbcglobal.net
Attorneys for Defendant and Appellant Peter J. Porter

Via U.S. Mail:

Orange County Superior Court
Honorable Walter Schwarm
700 Civic Center Drive West
Santa Ana, CA 92701
[Case No. 30-2017-00907396]