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5-21-10 - Opposition Due
5-27-10 - Reply Due

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CHRISTOPHER ELLIS, BRADLEY D. ELOW, ROBERT FINCH and HOWARD LaBORE, individually, and on behalf of all others similarly situated, Plaintiffs, v. JACKSON, DeMARCO, TIDUS & PECKENPAUGH, A LAW CORPORATION, GREGORY GLENN PETERSEN, an individual, CHRISTOPHER D. NISSEN, an individual, BRADLEY MATHEWS, an individual, STEPHENEY R. WINDSOR, an individual, MICHAEL ANTHONY JENKINS, an individual, and DOES 1-50, Defendants.	**CASE NO. 37-2010-00086284-CU-PN-CTL** **DEFENDANT GREGORY GLENN PETERSEN'S NOTICE OF HEARING ON DEMURRER TO PLAINTIFFS' COMPLAINT; DEMURRER TO COMPLAINT; AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES** **DATE:** **June 4, 2010** **TIME:** **10:00 a.m.** **DEPT.:** **71**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 4, 2010, at 10:00 a.m., or as soon thereafter as the matter may be heard in Department 71 of the above-entitled Court, located at 220 West Broadway, San Diego, California, Defendant Gregory Glenn Petersen will and hereby does demur to the Complaint filed by Plaintiffs Christopher Ellis, Bradley D. Elow, Robert Finch and Howard LaBore ("Plaintiffs").

This Demurrer is made pursuant to Code of Civil Procedure section 430.10 et seq., and is made on the grounds that Plaintiffs' Complaint against defendant Petersen is barred by the statute of limitations, Code of Civil Procedure section 340.6.

This Demurrer will be based upon this Notice, the accompanying Demurrer, the attached Memorandum of Points and Authorities, the Request for Judicial Notice and exhibits, the papers and pleadings on file with the court in this action, additional matters which may be judicially noticed, and upon such further oral or documentary evidence or argument as may be properly presented to the court at or before the time of the hearing on this motion.

DATED: April 19, 2010

SEDGWICK, DETERT, MORAN & ARNOLD LLP

By: _____

Gregory H. Halliday
Frederick B. Hayes
Attorneys for Defendant,
GREGORY GLENN PETERSEN

SEDGWICK
DETERT, MORAN & ARNOLD LLP

DEMURRER TO COMPLAINT

Defendant Gregory Glenn Petersen demurs to the complaint filed by Plaintiffs Christopher Ellis, Bradley D. Elow, Robert Finch and Howard LaBore ("Plaintiffs") and its sole cause of action labeled "Attorney Malpractice" on the grounds that the complaint fails to state facts sufficient to a cause of action.

WHEREFORE, defendant Gregory Glenn Petersen prays that his Demurrer to Plaintiffs' Complaint be sustained without leave to amend, and that the court grant such other and further relief as it deems just and appropriate.

DATED: April 19, 2010

SEDGWICK, DETERT, MORAN & ARNOLD LLP

By: _____
Gregory H. Halliday
Frederick B. Hayes
Attorneys for Defendant,
GREGORY GLENN PETERSEN

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

The present action for "Attorney Malpractice" against defendant Gregory Glenn Petersen is barred by Code of Civil Procedure section, 340.6, the one year statute of limitations applicable to legal malpractice causes.

Court records and orders in the underlying action, *Aaron, et al. v. Aguirre, et al* (*"Aaron"*), establish that any cause of action for legal malpractice that Plaintiffs Christopher Ellis, Bradley D. Elow, Robert Finch and Howard LaBore ("Plaintiffs") had against defendant Petersen accrued no later than September 3, 2008 when summary judgment was granted in that action. When summary judgment was granted, Petersen no longer represented Plaintiffs, and had not represented them since May 2008. Plaintiffs did not file their legal malpractice action until February 2010, by which time their claims for legal malpractice against Petersen were barred by the one year statute of limitations, Code of Civil Procedure section 340.6.

Further, even though Petersen has not represented these Plaintiffs since May 2008, he continues to represent approximately 190 individuals who were plaintiffs in the underlying *Aaron* action. Petersen cannot effectively defend against the allegations in the present case that he rendered negligent advice to Plaintiffs without revealing confidential attorney-client communications he had with his own clients subsequent to May 2008 (when Plaintiffs substituted the law firm Jackson, DeMarco, Tidus & Peckenpaugh in as their attorneys of record). Because Petersen cannot mount a complete defense to Plaintiffs' allegations due to the limitation imposed on him by the attorney-client privilege with his own clients, this is another reason why Plaintiffs' claims against Petersen should be dismissed by the sustaining of this demurrer without leave to amend

Put simply, Plaintiffs have not alleged sufficient facts to state a cause of action against Petersen because the statute of limitations bars their claims. Additionally, Petersen cannot fully defend himself without disclosing his privileged communications with persons (his clients) other

than these Plaintiffs. For these reasons, Petersen's demurrer should be sustained, and because no amendment will change this result, this demurrer should be sustained without leave to amend.

II.

DEMURRER IS PROPER WHERE ACTION IS BARRED BY STATUTE OF LIMITATIONS

"The party against whom a complaint . . . has been filed may object, by demurrer . . .as provided in Section 430.30, to the pleading on ... the grounds that . . . [t]he pleading does not state facts sufficient to constitute a cause of action . . ." (Code Civ. Proc. § 430.10, subd. (e).)

When the plaintiff's action is barred by the statute of limitations, a general demurrer (i.e., the pleading does not state facts sufficient to constitute a cause of action) is proper. (*Saliter v. Pierce Bros. Mortuaries* (1978) 81 Cal.App.3d 292, 300, fn. 2; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.)

Under Section 430.30, a demurrer is properly based on "any matter of which the court is required to or may take judicial notice."[1] (Code Civ. Proc. § 430.30, subd. (a).) Under Evidence Code section 452(d), the court can take judicial notice of the court records of any court of record of the United States. (Evid. Code § 452(d).)[2] When court records subject to judicial notice disclose an absolute defense to the action or a deficiency in the complaint, the matter can be adjudicated at by way of demurrer. (*Bistawros v. Greenberg* (1987) 189 Cal.App.3d 189, 192 [court took judicial notice of its own files in sustaining demurrer on ground of another action pending between same parties on same cause]; see also *Frommhagen v. Board of Supervisors of Santa Cruz County* (1987) 197 Cal.App.3d 1292, 1299 [court took judicial notice of complaint in prior action]; *Britz, Inc. v. Dow Chem. Co.* (1999) 73 Cal.App.4th 177, 180 [in ruling on demurrer, court could take judicial notice of prior order approving good faith settlement under Code of Civil Procedure § 877.6].)

Here, defendant Petersen requests that this court take judicial notice pursuant to Evidence Code section 452(d) of the court records, including court orders, in the underlying action on

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[1] All further statutory references are to the Code of Civil Procedure unless stated otherwise.
[2] Evidence Code section 452 provides as follows: "Judicial notice may be taken of the following matters ... [¶¶] (d) Records of ... (2) any court of record of the United States ..."

which these Plaintiffs' present legal malpractice claims are based, namely *Aaron, et al. v. Aguirre, et al.*, Case No. 06-CV-1451-MLH, filed in the United States District Court, Southern District of California.

These court records establish that Plaintiffs' cause of action for legal malpractice against Defendants accrued no later than September 3, 2008 when the District Court granted summary judgment on Plaintiffs' federal law claims and dismissed their state law claims without prejudice. (Request for Judicial Notice ["RJN"], Exh. 7.) These court records also show that when the District Court granted the summary judgment, Petersen was no longer representing Plaintiffs. (RJN, Exhs. 2-6.) Accordingly, the one year statute of limitations for any claim Plaintiffs had against Petersen for legal malpractice commenced to run on September 3, 2008. Because Plaintiffs did not file this action until more than one year later in February 2010, their action against Petersen is time barred.

III.

STATEMENT OF FACTS

Plaintiffs Christopher Ellis, Bradley D. Elow, Robert Finch and Howard LaBore ("Plaintiffs") were 4 of the approximately 1,800 individuals who were plaintiffs in an underlying action filed in July 2006 in the United States District Court, Southern District of California, *Aaron, et al. v. Aguirre, et al.*, Case No. 06-CV-1451-MLH. (Complaint ¶¶ 13, 14.)[3]

In April 2008, the District Court entered an order requiring each of the plaintiffs in the *Aaron* action to sign a substitution of attorney stating whether he or she was represented by Petersen, the law firm Jackson, DeMarco, Tidus, & Peckenpaugh ("JDTP"), or someone else. (Request for Judicial Notice ("RJN"), Exh. 1.)

In May 2008, consistent with the District Court's April 2008 order, Plaintiffs Ellis, Elow, Finch and LaBore (and hundreds of others) submitted substitutions of attorneys identifying the JDTP law firm as their attorneys in the *Aaron* action. (RJN, Exh. 2 at 2:11 (LaBore), Exh. 3 at 2:21(Elow) and 3:9 (Finch), Exh. 4 at 2:15 (Ellis).)

[3] Plaintiffs' complaint is not a picture of clarity; however, there can be no dispute that the underlying litigation is *Erica Aaron, et al. v. City of San Diego, et al.*, Case No. 06-CV-1451-MLH-POR.

On June 25, 2008, the District Court entered its order approving JDTP's representation of, among others, Ellis, Elow, Finch and LaBore in the *Aaron* action. (RJN, Exh. 5 at 7:3 (Elow), 7:19 (Finch), 12:7 (LaBore) and 31:26 (Ellis).) On September 25, 2008, the District Court also entered its order identifying the approximately 190 plaintiffs that Petersen represented. (RJN, Exh. 6.)

On September 3, 2008, the District Court entered its order granting summary judgment in the *Aaron* action in favor of the defendants on the plaintiffs' federal law claims and dismissing the plaintiffs' state law claims. (RJN, Exh. 7.) On October 3, 2008, Plaintiffs appealed from the September 3, 2008 summary judgment. (RJN, Exh. 8.)

In the present action, Plaintiffs contend Defendants, including Petersen, were negligent in handling the underlying lawsuit. (Complaint ¶ 20.)[4] However, the claim lacks merit because Plaintiffs suffered actual injury no later than September 3, 2008 when the District Court granted summary judgment against them. (RJN, Exhs. 7, 8.) Because Petersen was no longer representing Plaintiffs, the statute of limitations was not tolled and commenced to run as to Petersen on September 3, 2008. (Code Civ. Proc. § 340.6; Exhs. 2-6.) Plaintiffs did not file their action against Petersen until February 2010, long after the one year statute had run, and therefore, their claim for legal malpractice against Petersen is time barred.

IV.

THE ENTIRE ACTION AGAINST PETERSEN IS BARRED BY CODE OF CIVIL PROCEDURE SECTION 340.6

A. The One Year Statute of Limitations Set Forth In Section 340.6 Applies To Plaintiffs' Claims.

Plaintiffs' claims against Petersen are barred by the one year statute of limitations set forth in Section 340.6, which is the statute of limitations for all actions against attorneys for

[4] Plaintiffs allege this action is brought on behalf of a "class," but there is no class. The only plaintiffs are the four individuals. Although Petersen continues to represent approximately 190 individuals, these individuals are not similarly situated to Plaintiffs and the other approximately 1,600 individuals who chose to have the JDTP law firm represent them in May 2008. Further, the legal malpractice claims against Petersen by Plaintiffs and all persons similarly situated to them are time barred.

alleged wrongful acts or omissions arising out of the rendition of professional services. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682.). Section 340.6 states:

> "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. (Code Civ. Proc. § 340.6(a).)

Where an attorney has been accused of wrongful conduct, the courts recognize that regardless of the labels attached to the pleading's allegations, the gravamen of the complaint is legal malpractice. (*Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1022-1023 (*Kracht*) [complaint for breach of statutory duty, constructive fraud and ordinary negligence treated as malpractice claim for purposes of upholding order sustaining demurrer without leave to amend]; *Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 346, 349 [fraud and breach of contract theories, where alleged misfeasance were acts requiring professional "judgment calls," treated as malpractice claims for assignability purposes].) California case law treats all actions arising out of the wrongful acts or omissions of attorneys as falling under the umbrella of legal malpractice. (*Pompilio v. Kosmo, Cho & Brown* (1995) 39 Cal.App.4th 1324, 1329 [plaintiff's breach of fiduciary duty cause of action for attorney's errors and omissions "sounds in legal malpractice"]; see also, *Levin v. Graham & James* (1995) 37 Cal.App.4th 798; *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 664; *Jacoby v. Schenkel* (1995) 36 Cal.App.4th 1701; *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, 966; *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1368.)

Put simply, when the claim concerns an alleged injury arising by reason of an attorney's professional negligence, the claim is one for legal malpractice subject to the statute of limitations set forth in Section 340.6. (*Kracht*, 219 Cal.App.3d at pp. 1022-1023.)

Here, the thrust of Plaintiffs' claim is that the Defendants, including Petersen, negligently handled the underlying litigation. (Complaint ¶20.) The complaint's allegations plainly establish that Plaintiffs are suing Defendants for alleged errors and omissions arising from the

provision of legal services with respect to the underlying litigation. Thus, the applicable statute of limitations is Section 340.6. (*Kracht*, 219 Cal.App.3d at pp. 1022-1023.)

B. Plaintiffs Suffered "Actual Injury" No Later Than September 3, 2008 When The District Court Granted Summary Judgment Against Plaintiffs.

The California Supreme Court has made it clear that "[a]ctual injury occurs when the client suffers any loss or injury legally cognizable as damages in a legal malpractice action based on the asserted errors or omissions." (*Jordache Enterprises, Inc. v. Brobeck, Phleger and Harrison* (1998) 18 Cal.4th 739, 743 (*Jordache*).) The *Jordache* court determined that the "loss or diminution of a right or remedy constitutes injury or damage. Neither uncertainty of amount nor difficulty of proof renders that injury speculative or inchoate." (*Id.* at p. 744.) As explained by the Supreme Court, in determining actual injury, the "inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Id.* at p. 752.)

In *Jordache*, the plaintiff alleged that the defendant committed malpractice by failing to advise the plaintiff to tender a complaint filed against it to its insurance carrier. (*Id.* at p. 746.) As a result of the defendant's omission, significant time passed before the plaintiff tendered the complaint to the insurer. (*Id.* at p. 745.) The insurance carrier argued that the plaintiff's late tender relieved its obligation to provide benefits. (*Ibid.*) The plaintiff initiated litigation against the insurer regarding the coverage issue and the viability of the insurer's late tender defense. (*Ibid.*) The plaintiff did not file its professional malpractice claim against the defendant until after resolution of the coverage litigation. (*Id.* at p. 746.)

In evaluating when the actual injury occurred under Section 340.6, the California Supreme Court concluded that in addition to incurring legal fees to prosecute the coverage dispute, the defendant's alleged omissions also gave the insurers an objectively viable defense which consequently "reduced those [insurance] claims' settlement value." (*Id.* at p. 743.) Because the insurer's objection rendered the plaintiff's claims immediately less valuable than they were prior to the assertion of such defense and because the defense arose as a result of the plaintiff's counsel's omission, the plaintiff was actually injured within the meaning of Section

340.6 at the time the insurer's defense was asserted. (*Id.* at pp. 743-744.) It does not matter whether a plaintiff is able to quantify the amount by which its claims were devalued at the time such a defense accrued and was asserted because "actual injury ... may well precede quantifiable financial costs." (*Adams v. Paul* (1995) 11 Cal.4th 583, 591, fn. 5.)

Thus, under *Jordache*, the "test for actual injury under section 340.6, therefore, is whether the plaintiff has sustained any damages compensable in an action . . . against an attorney for a wrongful act or omission arising in the performance of professional services." (*Jordache*, 18 Cal.4th at p. 751.)

In the present case, Plaintiffs suffered actual injury no later than September 3, 2008 when the District Court granted summary judgment against Plaintiffs on their federal law claims and dismissed their state law claims without prejudice. (RJN, Exhs. 7, 8.) When Plaintiffs suffered actual injury, Petersen was no longer representing them. (RJN, Exhs. 2-6.)

C. Plaintiffs Discovered The Alleged Injury No Later Than September 3, 2008 When Petersen No Longer Represented Them

To constitute discovery, as that term is used in Section 340.6, a plaintiff need only be apprised of the fact that someone has done a wrong – plaintiff need not have a legal theory or knowledge that he has a cause of action against an attorney at that point. (*McGee v. Weinberg* (1979) 97 Cal.App.3d 798 (*McGee*); *Worton v. Worton* (1991) 234 Cal.App.3d 1368.) Discovery for purposes of triggering the commencement of the limitations period under Section 340.6 occurs when the client discovered or should have discovered the facts giving rise to a cause of action for legal malpractice.

As noted by the *McGee* court: "The test is whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation." (*McGee*, 97 Cal.App.3d at p. 798.)

Here, Plaintiffs knew they had lost their case in the District Court on September 3, 2008 because their attorneys (the JDTP law firm) were representing them and were present in court, and the information is therefore imputed to Plaintiffs. (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d

868, 875.) Thus, as of September 3, 2008, Plaintiffs knew they had lost their case in the District Court and that Petersen had not been their attorney since May 2008.

As of September 3, 2008, Plaintiffs had information "sufficient to put a reasonable person on inquiry." The possibility that the Plaintiffs may not have understood, or that their then-attorney may not have told them of all of the significance of the September 3, 2008 decision (e.g., the commencement of the statute as to any claims against Petersen) does not alter the fact that Plaintiffs discovered (or should have discovered) the facts which gave rise to their legal malpractice claims against Petersen no later than September 3, 2008.

D. Plaintiffs Suffered Actual Injury More Than One Year Before Filing Their Complaint And The Statute of Limitations Has Not Been Tolled.

Under Code of Civil Procedure section 340.6, an action must be commenced one year from discovery unless tolled because, among other things, the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged act or omission occurred. (Code Civ. Proc. § 340.6.) In this case, there is no dispute that Petersen's representation of Plaintiffs ceased in May 2008 (when they filed substitution of attorney forms naming the JDTP law firm as their attorneys). As such, there is no tolling of the statute for continuous representation. The present situation is somewhat analogous to *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503 (*"Beal Bank"*).

Beal Bank acquired loans that contained default provisions and retained the A&H law firm to handle the collection efforts. The attorney handling the matter left the A&H law firm and the attorney's new firm took over Beal Bank's representation. When the collections efforts were unsuccessful, Beal Bank sued the A&H law firm and the new law firm. The A&H law firm demurred to the malpractice complaint on the theory that when the lawyer left and took the client with him, there was no need to continue to toll the statute of limitations against the A&H law firm due to continued representation. The Supreme Court agreed, and held that once the case leaves the firm, the representation of the prior firm ceases and the statute of limitations clock begins to tick against the prior firm. (*Beal Bank*, 42 Cal.4th at pp. 512-514.)

The Supreme Court recognized that this situation may require malpractice plaintiffs to move swiftly, and perhaps, act in filing a lawsuit before the underlying action was resolved but the Supreme Court did not let this concern affect its reasoning regarding when continuous representation tolling ceases.

Here, the clock for Plaintiffs' malpractice claims against Petersen commenced to tick in May 2008, when they substituted Petersen out in place of the JDTP law firm. Plaintiffs did not file an action against Petersen within one year of the substitution, and their claims are time barred.

Plaintiffs may argue that because they appealed from the District Court's order granting summary judgment, the statute of limitations did not commence to run until the Ninth Circuit rendered its decision on that appeal. This argument lacks merit and was rejected by the *Jordache* court when it determined that a causal nexus between the injury and the malpractice does not need to be confirmed by settlement or adjudication. (*Jordache*, 18 Cal.4th at p. 744.) The Supreme Court reasoned that "an existing injury is not contingent or speculative simply because future events may effect its permanency or the amount of monetary damages eventually incurred." (*Id.* at p. 754.)

Thus, even if Plaintiffs did not know whether future events (i.e., their appeal) may effect the permanency of their injury (e.g., ruling that retiree benefits were not vested – Complaint at 20), they still had suffered actual injury no later the September 3, 2008. In determining actual injury, the "inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount is the critical factor." (*Id.* at p. 752.) The limitations period is not tolled even if the injury is, in some way, remediable and "appreciable actual injury does not depend on the plaintiff's ability to attribute a quantifiable sum of money to consequential damages." (*Jordache*, 18 Cal.4th at p. 750.)

Here, the underlying court records show Petersen no longer represented these Plaintiffs after May (or June) 2008, and that the District Court granted summary judgment against Plaintiffs on September 3, 2008. (RJN, Exhs. 2-8.) Plaintiffs' complaint offers no facts that would toll Section 340.6 after the one year limitations period commenced on September 3, 2008.

Because Plaintiffs did not file this action until February 24, 2010, more than one year after September 3, 2008, Plaintiffs' claims against Petersen are time barred and this demurrer should be sustained without leave to amend as to Petersen.

V.

DEMURRER SHOULD ALSO BE SUSTAINED BECAUSE PETERSEN CANNOT DEFEND HIMSELF IN THIS LAWSUIT WITHOUT DISCLOSING CONFIDENTIAL COMMUNICATIONS HE HAD WITH HIS CLIENTS

Even though Petersen has not represented these present Plaintiffs since May 2008, he represents approximately 190 of the persons who were plaintiffs in the underlying *Aaron* action. Petersen cannot effectively defend against the allegations in the present lawsuit by Plaintiffs without disclosing confidential communications he had (and continues to have) with his clients. Fortunately, the law protects attorneys such as Petersen under such circumstances.

The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for nearly 400 years, and is afforded absolute protection from compelled disclosure. (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.) The privilege belongs to the client, and may not be waived by others. (Evid. Code §950 *et seq.*) In fact, when an action cannot be proved or disproved because of the attorney-client privilege, "the suit must be dismissed in the interest of preserving the privilege." (*General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1190.) Thus, "an action against an attorney may be dismissed if the attorney cannot mount a defense without breaching the attorney-client privilege." (*Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 702.)

In *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, corporate counsel assisted in the preparation of an affiliation agreement between two health care providers. Disagreements ensued, and the shareholders for one of the providers sued corporate counsel. The defendant moved for judgment on the pleadings, taking the position that the derivative action should be dismissed because counsel had no means of defending himself due to the attorney-client privilege. The trial court denied the motion. On writ review, the Court of Appeal directed the trial court to enter a new order granting the motion for judgment on the pleadings.

The Court held that allowing the action to proceed "effectively place[d] the defendant attorney in the untenable position of having to preserve the attorney client privilege (the client having done nothing to waive the privilege) while trying to show that his representation of the client was not negligent." (*Id.* at 384 (citation omitted).) The Court concluded that the defendant law firm was foreclosed from mounting an adequate defense to the charges, and that dismissal was proper under the circumstances. (*Id.* at 385.)

In *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451, the trial court dismissed a malpractice action because the defendant was unable to adequately defend himself without disclosing attorney-client privileged communications between himself and a third-party. In affirming the trial court order, the appellate court relied on the fundamental inequity of holding an attorney accountable for his actions while at the same time barring his use of exculpatory evidence – a *de facto* gag order. (*Id.* at 463-464.) The Court concluded that "[t]here can be no balancing of the attorney-client privilege against the right to prosecute a lawsuit to redress a legal wrong," and found that "because this lawsuit is incapable of complete resolution without breaching the attorney-client privilege, the suit may not proceed." *Id.* at 457, 467. In accord, *Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537, 1544 [cross-action for indemnity against plaintiff's personal counsel dismissed because cross-defendant "would be unable to defend itself to the extent that its actions depended on client communications"]; *Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1024 [malpractice actions are not assignable in part because such a suit puts the attorney in the unfair position of having to protect attorney-client confidences while at the same time trying to defend against a malpractice claim].

In the present case, Plaintiffs' claims against Petersen are based on a contention that Petersen rendered negligent advice to persons he represented in the underlying *Aaron* action. Under Evidence Code section 953, the individuals whom Petersen represented are the "holder[s] of the privilege." After these Plaintiffs substituted Petersen out, he continued to represent approximately 190 individuals on the appeal from the summary judgment and represents them in state court with respect to their state law claims. Petersen's clients have not waived the privilege with respect to communications between them and Petersen.

Under, among other rules, Evidence Code sections 954 and 955 and Business and Professions Code section 6068(e), Petersen is required to assert the privilege and cannot be compelled to disclose his confidential communications with his clients, the approximately 190 individuals he continues to represent.

Petersen cannot effectively defend against the allegations he rendered negligent advice in the underlying *Aaron* action without revealing confidential attorney-client communications he had (and continues to have) with his clients. Because Petersen cannot mount a complete defense to Plaintiffs' allegations due to the limitation imposed on him by the attorney-client privilege, Plaintiffs' claims against Petersen should be dismissed by the sustaining of this demurrer without leave to amend.

VI.

CONCLUSION

As discussed above, there are at least two reasons why this demurrer should be sustained without leave to amend. First, the allegations of Plaintiffs' complaint and court records from the underlying *Aaron* action firmly establish that Plaintiffs' claims against defendant Petersen are barred by the one year statute of limitations applicable to legal malpractice actions. Second, Plaintiffs' allegations also firmly establish that Petersen cannot defend against Plaintiffs' claims in this lawsuit without disclosing confidential communications with persons who remain his clients in litigation against the City of San Diego regarding police officers' employment and retirement benefits.

For these reasons, defendant Petersen's demurrer to Plaintiffs' complaint should be sustained. Moreover, because no amendment will change this result, this demurrer should be sustained without leave to amend.

DATED: April 19, 2010

SEDGWICK, DETERT, MORAN & ARNOLD LLP

By: _____
Gregory H. Halliday
Frederick B. Hayes
Attorneys for Defendant,
GREGORY GLENN PETERSEN

PROOF OF SERVICE

Ellis v. Jackson, DeMarco, Tidus & Peckenpaugh, et al.
San Diego Superior Court Case No. 37-2010-00086284-CU-PN-CTL

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Sedgwick, Detert, Moran & Arnold LLP, 3 Park Plaza, 17th Floor, Irvine, California 92614-8540. On **April 19, 2010**, I served the within document(s):

DEFENDANT GREGORY GLENN PETERSEN'S NOTICE OF HEARING ON DEMURRER TO PLAINTIFFS' COMPLAINT; DEMURRER TO COMPLAINT; AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

☐ FACSIMILE - by transmitting via facsimile the document(s) listed above to the fax number(s) set forth on the attached Telecommunications Cover Page(s) on this date before 5:00 p.m.

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

☐ PERSONAL SERVICE - by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ OVERNIGHT COURIER - by placing the document(s) listed above in a sealed envelope with shipping prepaid, and depositing in a collection box for next day delivery to the person(s) at the address(es) set forth below via OverNite Express.

SEE ATTACHED 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 affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **April 19, 2010**, at Irvine, California.

Suzanne E. Sheppard
SUZANNE E. SHEPPARD

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