CONCLUSION
A good rule of thumb to use in evaluating a medical malpractice case is to assume that the statute has not run. Suspicion is always a question of fact for a jury. It is rare that defendants disclose appropriate information for the plaintiff to have knowledgeably evaluated whether there was a case or not. Health care practitioners are fiduciaries with a duty of disclosure. Depositions of treating doctors and nurses will almost never reveal that they gave the plaintiffs enough information for the plaintiffs to have acted more promptly. In opposing summary judgments on the statute issue, take some of these depositions beforehand and use this lack of disclosure to your advantage. A medically unsophisticated patient and/or his/her family should not be turned away on statute grounds absent a very clear showing by the defendant, who has the burden on this issue, that the plaintiffs really suspected negligence and did nothing about it. Preparation for this defense is the key.

CLAIMS AGAINST GOVERNMENTAL AGENCIES
A claim for medical negligence against a governmental entity has a much shorter statute of limitations than Section 340.5; that is, when did the plaintiff know or suspect that the injury was caused by negligence? In the case of a minor, it is the knowledge of the parents that determines when the cause of action accrues. Whitfield v. Roth, 10 Cal.3d 874, 112 Cal.Rptr. 556 (1974). Delayed discovery is always a jury question.

WHEN DID PLAINTIFF SUSPECT NEGLIGENCE?
In trying to determine the statute of limitations dates, it is always important to know the state of mind of the plaintiff and his family. The statute does not begin to run until plaintiff knew or should have known of the cause of action. Injury plus negligence should always be a factual issue for a jury as to when the plaintiffs had actual or constructive knowledge of a cause of action. In evaluating the case and especially prior to the deposition of the plaintiff, be quite certain about the answer to the key questions - "Why did plaintiff see an attorney?" "Did plaintiff suspect that something was done wrong?"

If the plaintiff saw another lawyer before you, then the presumption is at that point the plaintiff had some suspicion of negligence even if the first lawyer turned down the case. The statute would be deemed to have started to run when that first lawyer evaluated the case. If the plaintiff suspected or reasonably should have suspected the cause of action, then bad advice by the first attorney will not toll the statute. Gutierrez v. Mofid, 39 Cal.3d 892, 898-900 (1985). However, the mere fact that a plaintiff saw an attorney does not necessarily mean that they suspected malpractice. It is very common for people to see an attorney simply because they have no explanation for what has happened; doctors and hospitals don't always explain in an understandable fashion why a particular injury has occurred. Question plaintiff closely on this issue - the answer is seldom cut-and-dry.

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The statute of limitation cannot start to run until an injury has occurred. An injury has been variously defined as "the damaging effect of the alleged wrongful act becoming apparent," Hills v. Aronsohn, 152 Cal.App.3d 753, 762, 199 Cal.Rptr. 816, 822 (1984), or "appreciable harm." Brown v. Bleiberg, 32 Cal.2d 426, 437 n.8, 186 Cal.Rptr. 228, 234 n.8 (1982). For example, in Steingart v. Oliver, 198 Cal.App.3d 406, 243 Cal.Rptr. 678 (1988), four years after misdiagnosis, plaintiff discovered her cancer. The statute of limitations started to run when the injury (the cancer) was diagnosed. In Photias v. Doerfler, 45 Cal.App.4th 1014, 1020, 53 Cal.Rptr.2d 202, 206 (1996), a complaint filed 20 years after the negligent act (failing to diagnose undescended testicle) was held to be timely.

The statute of limitations in medical malpractice cases, Civil Code section 340.5, is a maze of uncertainty, full of tricks and traps for the unwary. The cut-off date for filing is rarely set in stone and there are many opportunities to have your case decided on the merits. This article has some suggestions of ways to avoid the pitfalls of the statute and use it affirmatively for your client's benefit.

Strategies for Dealing with The Statute of Limitations in Medical Malpractice Cases

By Philip Michels
Law Offices of Michels & Watkins

The Law Offices of Michels & Watkins, represents victims of medical negligence and their families. Founding partner, Philip Michels, has been a prominent speaker and prolific writer, authoring over 25 published articles on a variety of topics pertaining to the medical malpractice field. His credentials include being AV rated by Martindale-Hubbell and being named Consumer Attorneys Association of Los Angeles Trial Lawyer of the Year, 2003. Phil is certified in Professional Negligence through the American Board of Professional Liability Attorneys and is a State Bar of California Legal Specialist in Medical Professional Liability. He has been named by The American Trial Lawyers Association Top 100 Trial Lawyers in California and Best Lawyers/US News Tier 1 in Medical Malpractice Law - Plaintiffs, Best Lawyers in America (2006-present) and Southern California Super Lawyer (2006-present).

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On the trial of this issue, put the defendant on the defensive - did they ever disclose to plaintiff any grounds for suit? Didn't they have an obligation to do so? Didn't plaintiff trust and rely on them for an explanation? Who had the education, skill and training to understand what happened? Clearly not the plaintiff.

There are also some ways to get around the need to file a claim against a public entity at all at least as to district hospitals. It has been held that a letter to a district hospital under C.C.P. § 364 is considered to be a defective claim Phillips v. Desert Hospital, 49 Cal.3d 699, 263 Cal.Rptr. 119, 128 (1989), which then triggers the entity obligation to inform you of the defectiveness of the claim. In addition, if a district hospital does not file the appropriate documents with the Roster of Public Agencies in the Secretary of State's office and the county clerk where they are doing business under Government Code section § 3505, there is no need to file a claim against that entity before proceeding with a lawsuit. Gov. C. § 9464; Wilson v. San Francisco Redevelopment Agency, 19 Cal.3d 555, 138 Cal.Rptr. 720, 724 (1977). That does not apply to cities or counties but it does apply to district hospitals whose identity as a public entity is the least likely to be known. If you avail yourself of that exception you are back within the confines of Section 340.5 and not the Government Code. Banfield v. Sierra View Local District Hospital, 124 Cal.App.3d 389, 177 Cal.Rptr. 290, 303 (1983).

A lawsuit against a public entity must be filed within six months of the notice of rejection of the claim; that six month time period can be extended 90 days by letter under C.C.P. § 364 against a public entity. Anson v. County of Merced, 202 Cal.App.3d 115, 249 Cal. Rptr. 457, 462 (1988).

**NINTY DAYS LETTERS**

Ninety-day letters pursuant to Section 364 toll the one year statute of limitations by 90 days. This is true only if a Section 364 letter is properly sent in the last 90 days prior to the expiration of the statute. Woods v. Young, 53 Cal.3d 315, 279 Cal.Rptr. 613, 624 (1991). Section 364 letters have been held not to extend the three year statute. Rewald v. San Pedro Peninsula Hosp., 27 Cal.App.4th 480; 32 Cal.Rptr. 2d 411, 415 (1994).

Be sure the Section 364 letter is sent to the doctor at his correct address and not, for example, to the hospital where the incident occurred. Hanooha v. Pivko, 22 Cal.App.4th 1553, 28 Cal.Rptr.2d 70, 77 (1994). The letter does not need to be hand served or certified mail. You simply have to have a copy of the letter in your file with the date of mailing.

**BIRTH INJURIES: EIGHT NOT SIX YEARS**

Birth injuries caused by medical negligence have an eight year statute. The legislature created some confusion on this issue in 1992 when they added Section 340.4. That statute provides that "an action by or on behalf of a minor for personal injuries sustained before or in the course of his or her birth must be commenced within six years after the date of birth." This code section conflicts directly with Section 340.5 which states that "... actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period." It is clear, however, that the eight year provision under Section 340.5 applies to birth injuries and not the six year provision under Section 340.4.

The legislative history of Section 340.4 reveals that it is merely a new designation for the old Civil Code section 29. Civil Code section 29 provided a six year statute of limitations for birth injuries. It was repealed in 1983. Its content was resurrected by Assembly Bill 2641 in February 1992, however, when the Family Code was created by Assembly Bill 2650, the companion to 2641. The Senate Committee on the Judiciary stated "the California legislature, in 1983, with the section conforming changes into a separate bill in order to limit the amount of reprinting that would have to be done each time there was a change to the already lengthy Family Code bill (AB 2650)." The Law Revision specifically went on to state that Section 340.4 was simply a continuation of the former C.C.P. § 29 "without substantive change."

The Supreme Court already has considered the interaction between C.C.P. § 29 and C.C.P. § 340.5 in Young v. Haines, 41 Cal.3d 883, 891-894, 226 Cal.Rptr. 547, 550-552 (1986). Young found that C.C.P. § 340.5 was the more specific statute and controlled over C.C.P. § 29.

**THE DEATH OF A PATIENT CREATES A NEW CAUSE OF ACTION AND A NEW STATUTE OF LIMITATIONS**

Whenever negligence leads to the death of a patient a new cause of action arises. Larcher v. Wells, 18 Cal.App.3d 646, 135 Cal.Rptr. 75 (1976). This is true even if the decedent had already filed an action prior to his or her death. Larcher at 109. See also Kleefeld v. Superior Court, 25 Cal.App.4th 1680, 1685, 31 Cal.Rptr.2d 12, 14 (1994), "Until that death [of the patient], the heirs have suffered no injury under Section 377 [the wrongful death statute] and hence have no basis for filing suit." Larcher, 18 Cal.App.3d at 657, 135 Cal.Rptr. at 81. In any medical malpractice case on behalf of a living patient there is potentially a second case for wrongful death which can either be filed after death or negotiated before suit. If both cases are negotiated during the patient’s life-time, it is commonplace to negotiate the wrongful death case as well for a separate consideration. If the wrongful death case involves minors, a minor’s compromise is required under C.C.P. § 372.

The statute of limitations for wrongful death when brought by an adult is “one year ... measured from the date on which [the heir] discovers or should have discovered their injury in the form of the death of their decedent and its negligent cause.” Larcher 18 Cal.App.3d at 657-658, 135 Cal.Rptr. at 81. The important point in wrongful death cases is that the death itself is simply the earliest point at which the statute could start to run. The defense may cite Gomez v. Valley View Sanatorium, 87 Cal.App.3d 507, 151 Cal.Rptr. 97 (1978), and Braham v. Sorensen, 119 Cal.App.3d 367, 370, 174 Cal.Rptr. 39-40 (1981), in which it is said that the death starts the statute running. In neither case, however, was the issue of delayed discovery of the negligent cause of the death discussed. A close reading of Larcher, a Supreme Court decision, shows that Gomez and Braham are limited. Larcher establishes that death is the injury but there still must be “discovery” of the cause of action.

In the case of a child as the heir, the child clearly has a minimum of three years under Section 340.5. Ferguson v. Uragul, 187 Cal.App.3d 702, 707, 232 Cal.Rptr. 79, 82 (1987). In Ferguson the decedent, while she was alive, had filed a medical malpractice case. Upon her death a new cause of action arose on behalf of her family including her child. That child had a minimum of three years under Section 340.5 and, depending on the child's age at the time of the death, should have until age eight if that provides a longer period of time.

**THE USE OF DOE AMENDMENTS**

Doe amendments allow you to bring in a new defendant to an existing case after the statute of limitations may have run. The amendment under C.C.P. § 474 allows you to substitute a newly identified defendant for a previously named Doe defendant and have that substitution relate back to the date of filing of the original complaint to avoid the bar of the statute of limitations.

Ignorance of the identity of a Doe defendant under Section 474 has been construed to mean ignorance of both the identity and the cause of action against that defendant. Mishalow v. Horwald, 231 Cal.App.2d 517, 41 Cal.Rptr. 895 (1964).

Defendants occasionally attack the legitimacy of a Section 474 amendment by motion. The important point in opposing a Section 474 motion is to convince the court of the plaintiff's veracity. It is not enough simply to say that plaintiff didn't know of the facts giving rise to the cause of action before the date of filing. You must convince the court that your statement is true. That means showing the court why plaintiff didn't know before but does know now.

In particular, make the following points:


3. The issue is when the plaintiff’s knowledge of on or before filing the complaint and not at any time later. Johnson v. Goodyear Tire and Rubber Co., 216 Cal.App.2d 133, 137, 30 Cal.Rptr. 650, 652-653 (1963).

4. There is no duty of inquiry by plaintiff. The issue is when did plaintiff know the facts giving rise to a cause of action against the Doe defendant, not when he should have known. Plaintiff does not need to have exercised reasonable diligence to discover those facts. Mishalow, 231 Cal.App.2d at 523-524, 41 Cal.Rptr. at 899; Balon v. Drost, 20 Cal.App.4th 483, 488, 25 Cal.Rptr.2d 12, 19 (1993).
On the trial of this issue, put the defendant on the defensive - did they ever disclose to plaintiff any grounds for suit? Didn't they have any obligation to do so? Didn't plaintiff trust and rely on them for an explanation? Who had the education, skill and training to understand what happened? Clearly not the plaintiff.

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Phil Michels is the founding partner at Michels & Watkins, a personal injury law firm in Los Angeles California. The firm is known for the quality of their cases, the thoroughness of their work and the excellence of their results. In practice over 30 years, Phil Michels has been a prominent speaker and prolific writer, authoring over 25 published articles on a variety of topics pertaining to the medical malpractice field.

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