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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JAMES R. AUSTIN, Plaintiff and Appellant, v. PETER CARL SWARTH and LAW OFFICES OF PETER CARL SWARTH, Defendants and Respondents.	B270071 Los Angeles County Super. Ct. No. BC546155

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

James R. Austin, in pro. per., for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer, and David B. Owen, for Defendants and Respondents.

INTRODUCTION

In 2011, plaintiff and appellant James Austin was convicted of 14 counts of wrongful sexual conduct with a minor and sentenced to state prison. In 2014, he filed this action against defendants and respondents Peter Carl Swarth and the Law Office of Peter Carl Swarth (collectively, Swarth), retained counsel who represented him before trial in his criminal case. Austin, who represented himself below and does so in this appeal, asserted legal malpractice and related claims concerning Swarth's acts and omissions during and after the criminal representation. Austin appeals from the judgment of dismissal entered after the trial court sustained Swarth's demurrer without leave to amend. We conclude all of Austin's causes of action were time-barred and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

On June 25, 2009, Austin was arrested for molesting his stepdaughter. On July 10, 2009, after a preliminary hearing at which he was represented by retained attorney J. Michael Medicis, Austin was charged by information with four counts of oral copulation with a child under 16 (Pen. Code, § 288a, subd. (b)(2)); four counts of oral copulation with a 14-year-old child (Pen. Code, § 288a, subd. (c)(2)); five counts of lewd act on a 14- or 15-year-old child (Pen. Code, § 288, subd. (c)(1)); and one count of attempted unlawful sexual intercourse with a child under 16 (Pen. Code, § 664/261.5, subd. (d)).

On September 18, 2009, Austin retained Swarth to represent him through trial, and on September 22, 2009, Swarth replaced Medicis as attorney of record. On May 7, 2010, after filing several pretrial motions, but before trial, Swarth declared a

conflict of interest, and on May 10, 2010, the court relieved him as trial counsel. Austin was represented by a public defender from May 12, 2010, until July 20, 2010, when she was relieved by retained attorney Winston McKesson. McKesson represented Austin through trial.[1]

On January 27, 2011, a jury convicted Austin of all counts. McKesson filed several post-trial motions, but on March 24, 2011, he too declared a conflict of interest, and the public defender was reappointed to represent Austin through sentencing. On December 16, 2011, Austin was sentenced to 30 years in state prison. Austin appealed, and this court affirmed on September 12, 2013.

On May 19, 2014, Austin filed the complaint in the present case. His complaint identifies six causes of action: breach of express contract, breach of implied contract, legal malpractice, fraud, overbilling and refusal to return unearned legal fees, and intentional infliction of emotional distress. In substance, Austin's causes of action rest on the claim that Swarth did not provide the full range of professional services for which he was paid.

Swarth demurred to all causes of action on three grounds. First, he argued Austin's claims were all barred because he could not prove his actual innocence of the underlying criminal convictions. Second, Austin's claims were all subject to the one-

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[1] Austin's request for judicial notice, filed October 21, 2016, and Swarth's request for judicial notice, filed December 9, 2016, are denied because they ask us to take notice of matters that were not before the trial court. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 ["Reviewing courts generally do not take judicial notice of evidence not presented to the trial court" absent exceptional circumstances].)

year statute of limitations for legal malpractice (Code Civ. Proc.,[2] § 340.6) and were time-barred. Third, Austin failed to plead one or more elements of each cause of action.

The court sustained the demurrer without leave to amend on each ground. The court concluded that the one-year statute of limitations for claims of attorney malpractice (§ 340.6) applied to all causes of action and that Austin's claims accrued on May 7, 2010, the date the criminal court granted Swarth's motion to be relieved as counsel. Because none of the section 340.6 tolling provisions applied, the limitations period expired on May 7, 2011, and the complaint filed May 19, 2014, was untimely.

The court also sustained the demurrer without leave to amend on the ground that Austin failed to plead actual innocence or post-conviction exoneration for all counts, and that he failed to state facts sufficient to support each individual cause of action as follows:

- Austin failed to plead the existence of a written contract (first cause of action);
- Austin failed to plead the terms of the contract (first and second causes of action);
- Austin failed to plead with particularity the required elements of fraud (fourth cause of action);
- Overbilling is not a cause of action and, in any event, the overbilling allegations were duplicative (fifth cause of action); and

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[2] All undesignated statutory references are to the Code of Civil Procedure.

- Austin did not allege sufficient facts to establish extreme, outrageous conduct exceeding the bounds tolerated in a civilized community or that he suffered severe emotional distress (sixth cause of action).

The court subsequently entered a judgment of dismissal, and Austin filed a timely notice of appeal.

DISCUSSION

Austin contends the trial court erred in sustaining the demurrer without leave to amend as to all of his causes of action—except overbilling—because his claims are not time-barred and he was not required to plead actual innocence. We conclude the court properly sustained the demurrer without leave to amend based on each cause of action's statute of limitations. As we must affirm the judgment if it is correct on any ground stated in the demurrer, we do not reach Austin's additional claims of error. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

1. Standard of Review

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Courts must also consider judicially noticed matters. (*Ibid.*) In addition, we give the complaint a reasonable interpretation and read it in context. (*Ibid.*) If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the

demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Ibid.*) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid.*) The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid.*)" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

In light of these principles, the difficulties in bringing a demurrer on statute of limitations grounds are clear: "(1) trial and appellate courts treat the demurrer as admitting all material facts properly pleaded and (2) resolution of the statute of limitations issue can involve questions of fact. Furthermore, when the relevant facts are not clear such that the cause of action might be, but is not necessarily, time-barred, the demurrer will be overruled. [Citation.] Thus, for a demurrer based on the statute of limitations to be sustained, the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint and matters judicially noticed. [Citation.]" (*Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408, 420, fns. omitted; § 430.30, subd. (a).)

2. Applicable Statutes of Limitations

To determine which statute of limitations governs a given cause of action, we must first " 'identify the nature of the cause of action, i.e., the "gravamen" of the cause of action.' [Citation.] The nature of the cause of action and the primary right involved, not the form or label of the cause of action or the relief demanded, determine which statute of limitations applies. [Citations.]" (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 412.) The parties agree that the one-year

limitations period in section 340.6 applies to the third cause of action, for attorney malpractice, and that the three-year period in section 338 applies to the fourth cause of action, for fraud.[3] They disagree, however, about which limitations period applies to the first and second causes of action, for breach of contract, and the sixth cause of action, for intentional infliction of emotional distress.[4]

Swarth argues that all non-fraud causes of action stem from the malpractice allegations and are thus subject to the one-year limitations period of section 340.6. On that basis, he asserts that Austin's causes of action accrued in May 2010, when Swarth withdrew from the criminal case, and as Austin did not file the complaint until May 2014, they are time barred. Austin contends section 340.6 applies only to the malpractice cause of action. He argues that the contract claims were governed by the four-year limitations period in section 337; the emotional distress claim was governed by the two-year period in section 335.1; none of his claims accrued until judgment was entered in his criminal case in December 2011; and in any event, the limitations periods were tolled.

To resolve these interlocking issues, we first determine which statute of limitations applies to Austin's contract and emotional distress causes of action. We conclude section 340.6 applies to those claims. Next, we address accrual dates. We

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[3] Section 340.6, subdivision (a), expressly excludes causes of action based on "actual fraud" by an attorney.

[4] Austin does not challenge the court's conclusion below that the fifth cause of action, for overbilling, duplicated the fourth cause of action for fraud.

conclude the emotional distress claim accrued on July 7, 2011, and the remaining causes of action accrued on or before July 20, 2010. (See § 3, *post*.) Then, we consider Austin's tolling arguments. We conclude that the fraud cause of action was not tolled, but the non-fraud causes of action were tolled until July 7, 2011, and again between March 7, 2012, and September 12, 2012. (See § 4, *post*.) Accordingly, Austin was required to assert his fraud claim on or before July 20, 2013, and was required to assert his remaining claims on or before January 11, 2013. As Austin did not file his complaint until May 19, 2014, the court properly concluded all of the causes of action were time-barred.

2.1. Section 340.6

Section 340.6, subdivision (a), governs any "action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services … ." While the statute plainly applies to malpractice claims, it also governs "claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a 'professional obligation' is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1236–1237 (*Lee*).) Put another way, since the "attorney-client relationship often requires attorneys to provide nonlegal professional services such as accounting, bookkeeping, and holding property in trust," the statute's reach extends beyond

legal malpractice to the performance of services that do not require a law license. (*Id.* at p. 1237.)

On the other hand, "[m]isconduct does not 'aris[e] in' the performance of professional services for purposes of section 340.6(a) merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct." (*Lee*, *supra*, 61 Cal.4th at p. 1238.) Thus, the statute "does not bar a claim arising from an attorney's performance of services that are not 'professional services,' meaning 'services performed by an attorney which can be judged against the skill, prudence and diligence commonly possessed by other attorneys.' [Citation.]" (*Id.* at p. 1237.) The ultimate "question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." (*Id.* at p. 1238.)

2.2. Section 340.6 applies to the contract and emotional distress causes of action.

Austin's causes of action for breach of contract and intentional infliction of emotional distress plainly encompass more than attorney negligence. Nevertheless, we conclude they "depend on proof that an attorney violated a professional obligation in the course of providing professional services." (*Lee*, *supra*, 61 Cal.4th at pp. 1236–1237.)

The gravamen of the first and second causes of action, for breach of express and implied contract, is that Swarth did not provide the full range of professional services for which he was

paid. Because this amounts to a fee dispute concerning Swarth's obligations *as an attorney*, these causes of action are governed by section 340.6, subdivision (a). (*Lee*, *supra*, 61 Cal.4th at pp. 1236–1237.)

The sixth cause of action, for intentional infliction of emotional distress, appears to be based on allegations that, after failing to perform the contracted-for legal services, Swarth responded to Austin's refund request by threatening to reveal privileged client communications at trial. As this cause of action directly concerns the contract claims and arises from alleged violations of the Rules of Professional Conduct, it is also governed by section 340.6. (See Bus. & Prof. Code, § 6068, subd. (e)(1) [a basic obligation of every attorney is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."].)

3. Accrual Dates

"The applicable statute of limitations does not begin to run until the cause of action accrues, that is, ' "until the party owning it is entitled to begin and prosecute an action thereon." ' [Citation.]" (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487.) Thus, to determine when the statutes of limitation ended, we must first address when they began. We conclude the cause of action for intentional infliction of emotional distress accrued on July 7, 2011, and the other causes of action accrued no later than July 20, 2010.

3.1. Fourth cause of action for fraud

" 'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without

such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.] [¶] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a [written] contract. [Citations.] In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; Civ. Code, § 1572, subd. (4) [one form of actual fraud is a "promise made without any intention of performing it."].) A cause of action for fraud accrues when the aggrieved party discovers the facts constituting the fraud. (*Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921.) At that point, the plaintiff has three years to bring an action. (§ 338, subd. (d).)

The gravamen of Austin's fraud claim is that, to induce Austin to enter into a legal services contract, Swarth presented himself as a highly skilled "Level IV" attorney and promised to provide legal services such as pre-trial investigation and trial defense that he did not intend to perform.[5] Swarth contends "Austin knew by May 2010, when Swarth was relieved as his counsel, that Swarth had supposedly not performed as promised. Thus, Austin had three years, until May 2013, to sue Swarth for fraud." On appeal, Austin argues for the first time that the representation continued until December 11, 2011—and he appears to claim that his fraud cause of action accrued on that date. Austin explains:

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[5] For example, Austin alleged that the " 'agreement' … should only be viewed as defendant Swarth's attempt from the very inception of acquiring a grandiose-fee case for purpose of financial gain and just wing the case on off-the-cuff little services … ."

> Appellant filed his suit against respondent on 5/19/14. … [Swarth] was appellant's attorney of record until appellant was sentenced on 12/11/11, even though [Swarth] withdrew as trial counsel on or about May 12, 2009. Hence, appellant filed his original complaint … well within the … 3-year [limitation] of C.C.P. § 338 for fraud claims … .

Whatever this means, it is not an allegation that Austin *discovered* the fraud on December 11, 2011—and the date the representation ended only matters if it is also, coincidentally, the date of discovery. (*Lee v. Escrow Consultants, Inc.*, *supra*, 210 Cal.App.3d at p. 921.) Indeed, Austin has *never* alleged a discovery date, though the complaint provides some clues.

The complaint alleges that shortly after the public defender was appointed to represent Austin, they discussed "what all had just occurred with [Austin's] former paid-attorney. [The new attorney] advised [Austin] that former counsel owed him a return of funds because [Swarth] was paid for a 'trial that he failed to conduct.' … According to the advice of [the new attorney], defendant Swarth 'was a done deal,' and 'he's not going to help' " leaving the "entire case … in her 'lap.' " The Public Defender's Office was appointed on May 10, 2010; on July 20, 2010, the public defender was relieved and replaced with newly retained counsel. Since Austin appears to allege that he discovered the fraud sometime during the two-month period during which he was represented by the public defender, Austin's fraud cause of action necessarily accrued on or before July 20, 2010, the date that representation ended. Accordingly, unless a tolling

provision applied, Austin had until July 20, 2013, to assert his fraud claim.[6]

3.2. First, second, third, and sixth causes of action for breach of express and implied contract, malpractice, and infliction of emotional distress

An "action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services" is timely only if filed "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." (§ 340.6, subd. (a); see *Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 ["discovery of the negligent act or omission initiates the [one-year] statutory period"].)

Austin's malpractice and contract claims allege Swarth failed to perform the full scope of contracted-for services with the skill of a "level IV" attorney. The parties appear to agree that Austin discovered these facts when Swarth ended the attorney-client relationship, but disagree about when that occurred.

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[6] As we will discuss, this claim was not tolled; thus, Austin's May 2014 complaint was untimely. (See §§ 4.3 & 5, *post*.) While Austin has repeatedly requested the opportunity to amend his complaint, he has never explained how he could allege a timely cause of action for fraud. We see no reasonable possibility that an amendment could produce a timely cause of action. (See *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1501, disapproved on another point by *Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, 939–941.)

Swarth contends the representation ended on May 7, 2010.[7] Austin has alleged, at various times, that the representation ended on May 7, 2010, July 10, 2010, and July 20, 2010.[8] In both the complaint and the opposition to the demurrer, Austin alleged that the representation ended on May 7, 2010. In his opposition to the court's tentative order, Austin alleged that Swarth "continued to represent plaintiff after 5/7/10 until on or about 7/10/10" *and* that Swarth represented him until July 20, 2010, when the public defender was relieved and a new private attorney took over. Thus, Austin asserted, "the defendant withdrew over a year before plaintiff's criminal trial and was in no way associated with it or its outcome. Any purported nexus between defendant's derelictions and the verdict is completely attenuated." That assertion is consistent with the argument Austin has made throughout these proceedings that Swarth's malpractice occurred before trial. Thus, Austin alleges the malpractice and contract claims accrued on or before July 20,

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[7] Swarth argued in his demurrer that Austin's claims accrued sometime between May 7, 2010, when Swarth was relieved as counsel in the criminal case, and January 27, 2011, when the jury returned a verdict. On appeal, he argues all claims accrued by May 7, 2010, but it appears from the judicially-noticed minute orders that Swarth was not actually relieved until May 10 or 12, 2010.

[8] Although on demurrer courts ordinarily look only at the complaint and matters judicially noticed, when a party opposing a demurrer admits facts extrinsic to the complaint, courts may properly treat these facts as judicial admissions for the purpose of testing the sufficiency of the complaint. (See *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1368, fn. 10.) We also review the assertions in Austin's briefs to determine if an amendment to the complaint can cure a defect or change the legal effect of the pleading. (*People ex rel. Brown v. Powerex Corp.* (2007) 153 Cal.App.4th 93, 112.)

2010, when he hired a new attorney to appear at trial and sentencing.[9]

Austin's emotional distress cause of action appears to be based on allegations that Swarth responded to Austin's refund request by threatening to reveal privileged client communications at trial. Austin alleges that conversation occurred on or before July 7, 2011.

Accordingly, for purposes of evaluating whether the demurrer was properly sustained without leave to amend on statute of limitations grounds, we assume the first and second causes of action, for breach of contract, and the third cause of action, for malpractice, accrued no later than July 20, 2010. We assume the sixth cause of action, for intentional infliction of emotional distress, accrued on July 7, 2011.

4. Tolling of the Limitations Period

The section 340.6 limitations period is tolled if, among other reasons, the "plaintiff has not sustained actual injury" (§ 340.6, subd. (a)(1)); the "attorney continues to represent the plaintiff regarding the specific subject matter in which the

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[9] As noted, Austin also argues on appeal that the representation did not end until December 2011. As with the fraud claim, however, he does not explain if or how that date affected either "the date of the wrongful act or omission" or the date he discovered or should have discovered the facts underlying the non-fraud causes of action. (§ 340.6, subd. (a).) Nor does he attempt to resolve the conflicts and inconsistencies a December 2011 accrual date would create with his other arguments. We therefore treat his assertion as a claim that the limitations period should have been tolled under section 340.6, subdivision (a)(2) (period tolled during representation), rather than as a claim about the initial accrual date of the cause of action. We address tolling below.

alleged wrongful act or omission occurred" (*id.*, subd. (a)(2)); or the "plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action" (*id.*, subd. (a)(4)). As relevant here, subdivision (a)(4) incorporates section 352.1, subdivision (a), which tolls the statutory period for up to two years if, "at the time the cause of action accrued, [the plaintiff is] imprisoned on a criminal charge … ." Section 352.1 also applies to section 338, subdivision (d), the limitations period for fraud.

Austin argues that the court erred in sustaining the demurrer without leave to amend on statute of limitations grounds because (1) Swarth continued to represent him until judgment was entered in December 2011 (§ 340.6, subd. (a)(2)); (2) he did not sustain actual injury from Swarth's wrongful acts or omissions until July 7, 2011—the date Swarth ultimately announced that he would not return any of Austin's money (*id.*, subd. (a)(1)); (3) the statute was tolled for six months because of physical disability (*id.*, subd. (a)(4)); and (4) the statute was tolled under section 352.1 because Austin was incarcerated (§ 340.6, subd. (a)(4)).

We conclude that the section 340.6 limitations period for the non-fraud claims was tolled until July 7, 2011, under subdivisions (a)(1) and (a)(2), and from March 7, 2012, through September 12, 2012, under subdivision (a)(4). We also conclude that section 352.1, subdivision (a), did not toll either the section 340.6 limitations period for the non-fraud claims or the section 338 limitations period for the fraud claim because Austin was not "imprisoned on a criminal charge" when his causes of action accrued.

4.1. Continuing Representation

Under section 340.6, subdivision (a)(2), a "plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same 'specific subject matter.' [Citations.] In deciding whether an attorney continues to represent a client, we do not focus ' "on the client's subjective beliefs" '; instead, we objectively examine ' "evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship." ' [Citations.]

"Where an attorney unilaterally withdraws or abandons his client, 'the representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.' [Citation.] But where, as here, the attorney has been formally substituted out as counsel, that act of substitution ordinarily ends the relationship [citations], although the relationship can continue—notwithstanding the withdrawal and substitution—if the objective evidence shows that the attorney continues to provide legal advice or services [citation]." (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1038–1039 (*Shaoxing City*).) On appeal, Austin contends that Swarth represented him until December 16, 2011, when judgment was entered in his criminal case. Both the record and Austin's own assertions belie this claim.

In the complaint, Austin alleged Swarth was "attorney of record" until May 7, 2010, and they "maintained a confidential attorney-client relationship" until that date, when Swarth "advised plaintiff that he could no longer represent plaintiff because of [a] conflict of interest." Though Austin viewed the

conflict as a pretextual "way to exit the case," the court allowed "Swarth to remove himself from further obligation to plaintiff, just taking his pretend ethics and of course plaintiff's grandiose legal fee payments and run out on plaintiff right there and on the spot."

On May 12, 2010, a public defender was appointed to represent Austin. She advised him that "Swarth 'was a done deal,' and 'he's not going to help,' " leaving the "entire case … in her 'lap.' " The judicially noticed minute orders establish that on July 20, 2010, the public defender was relieved and newly retained counsel appeared for Austin. That retained attorney, who, Austin alleges, had no contact with Swarth, represented Austin through trial. The minute orders are consistent with Austin's assertions before the court below that Swarth "withdrew over a year before … trial and was in no way associated with it or its outcome" and that Austin's last contact with Swarth occurred on July 7, 2011. Those minute orders also support Austin's appellate argument that Swarth "was relieved more than a year prior to trial."

To be sure, on appeal, Austin also argues that Swarth was officially relieved " 'for purposes of trial only' " and continued to represent him until December 2011. We reject this argument because it is inconsistent with the factual allegations in his complaint. In any event, Austin was plainly represented by other lawyers as of May 12, 2010, and "no authority supports the appointment of 'simultaneous and independent, but potentially rival, attorneys to represent defendant.' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 347.) Nor is there any basis to conclude that Swarth "continue[d] to provide legal advice or services" after declaring a conflict. (*Shaoxing City*, *supra*, 238

Cal.App.4th at p. 1039.) To the contrary, even on appeal, Austin argued that Swarth "represented appellant only in pre-trial proceedings before withdrawing over a year before trial." In addition, other than the inconsistent assertions in his briefs, Austin does not point to anything in the record suggesting that the legal relationship continued after Swarth's alleged July 7, 2011, threat to unilaterally waive the attorney-client privilege and testify against Austin in his criminal case. Accordingly, at best, the malpractice claim was tolled under section 340.6, subdivision (a)(2), until July 7, 2011.

4.2. Actual Injury

"Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751.) "For purposes of section 340.6, '[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.' [Citation.] What matters is 'discovery of the fact of damage, not the amount.' [Citations.] As long as that amount is more than nominal [citations], actual injury exists even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by his attorney's negligence' [citation]; even if the client will encounter 'difficulty in proving damages' [citation]; and even if that damage might be mitigated or entirely eliminated in the future [citations].

"However, 'actual injury' does not include 'speculative and contingent injuries … that do not yet exist.' [Citations.] [¶] We are consequently tasked with 'distinguish[ing] between an actual,

existing injury that might be remedied or reduced in the future, and a speculative or contingent injury that might or might not arise in the future.' [Citation.]" (*Shaoxing City*, *supra*, 238 Cal.App.4th at pp. 1036–1037, italics omitted.)

Austin contends that the court erred in sustaining the demurrer to the contract causes of action without leave to amend because he was not actually injured until July 7, 2011, when Swarth informed him that he would not return any portion of the flat fee notwithstanding his failure to try the case. Until that point, Swarth had assured Austin that "he was going to return some of the money."

In turn, Swarth argues any fee dispute is irrelevant because "the parties' legal services agreement … provides that '[a]ll fees are deemed fully earned upon receipt and are non-refundable.' Thus, Austin's contention that Swarth did not earn all of the fees and should return some money is meritless." Swarth also argues that as a matter of law, billing disputes cannot arise from flat fee cases. Accordingly, he contends, any injuries Austin suffered necessarily stemmed from legal malpractice, not a breach of contract.

"An attorney owes the client a fiduciary duty ' "of the very highest character." … ' This fiduciary duty requires fee agreements and billings ' "must be fair, reasonable and fully explained to the client." ' No fee agreement 'is valid and enforceable without regard to considerations of good conscience, fair dealing, and … the eventual effect on the cost to the client.' " (*Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 430–431, footnotes omitted.) "The fiduciary duty to charge only fair, reasonable and conscionable fees applies to all members of the bar; criminal defense attorneys are not

exempted." (*Id.* at p. 431.) Although we see no reason to categorically exempt flat fee contracts from these rules, we have already determined that Austin's contract claims are subject to the same one-year statute of limitations for attorney malpractice claims. Since Austin alleges that he was not actually injured until July 7, 2011, when Swarth refused to reimburse Austin for unearned fees, we will also assume that the section 340.6 limitations period was tolled for the contract claims until that date. (§ 340.6, subd. (a)(1).)

4.3. Physical Disability and Imprisonment

Next, Austin argues that the statute of limitations was tolled under section 340.6, subdivision (a)(4), while he was physically disabled, and under section 352.1, subdivision (a), while he was incarcerated. We address each claim in turn.

Section 340.6, subdivision (a)(4), tolls the limitations period when the "plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action." While *physical disability* has not been judicially construed in this context, we accept that Austin's alleged injuries—a prison beating that left him with a broken jaw and internal injuries, followed by intestinal complications that led to major surgery and an ileostomy bag—qualify under any definition of that term. Austin alleged that the beating took place on March 7, 2012, and that he was released from the prison infirmary on September 12, 2012. Based on these allegations, we conclude that during that 189-day period, Austin was disabled within the meaning of section 340.6.[10]

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[10] Neither party has pointed us to an analogous provision that would apply to the fraud claim. We note, however, that tolling the

Austin also contends that due to his incarceration, he was legally disabled for two years within the meaning of section 340.6, subdivision (a)(4), and section 352.1, subdivision (a). The courts have construed the reference to legal disability in section 340.6, subdivision (a)(4), as importing the generally-applicable tolling rules in former section 352; as it relates to imprisonment, former section 352 has since been amended and reenacted as section 352.1. (See *Bledstein v. Superior Court* (1984) 162 Cal.App.3d 152, 163–166; *Brooks v. Mercy Hospital* (2016) 1 Cal.App.5th 1 [applying judicial constructions of former section 352 to section 352.1].) Thus, section 352.1 applies to section 340.6 via subdivision (a)(4); section 352.1 also applies to section 338 because a fraud claim is an "action" mentioned in Chapter 3 of the Code of Civil Procedure. Accordingly, our analysis of section 352.1 applies to all of Austin's causes of action.

Section 352.1, subdivision (a) provides, "If a person entitled to bring an action … is, *at the time the cause of action accrued*, imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of that disability is not a part of the time limited for the commencement of the action, not to exceed two years." (Italics added.) In his opposition to Swarth's demurrer, Austin alleged that he was incarcerated in Los Angeles County Jail between June 2, 2009, and January 10, 2012, and in state prison from January 10, 2012, through November 6, 2012, a period of approximately three years, five months.

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fraud cause of action for 189 days would not change the result in this case.

Thus, under section 352.1, the limitations period applicable to each of Austin's causes of action would have been extended by two years if—*but only if*—the cause of action accrued while he was "imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life … ." (§ 352.1, subd. (a); see § 357 [tolling for legal disabilities limited to disabilities existing when the cause of action accrues].) As discussed, Austin's causes of action accrued on July 20, 2010, and July 7, 2011, while he was in pretrial custody in the county jail. Thus, section 352.1 tolling only applies if pretrial incarceration constitutes "imprison[ment] on a criminal charge" within the meaning of the statute. (§ 352.1, subd. (a).)

The Code of Civil Procedure does not define *imprisoned on a criminal charge*, however, and our research has not revealed any published decision defining that term. The term's meaning, therefore, is a "question[] of statutory interpretation that we must consider de novo." (*People v. Prunty* (2015) 62 Cal.4th 59, 71.)

4.3.1. Principles of Statutory Interpretation

As with any case involving statutory interpretation, our primary goal is to ascertain and effectuate the lawmakers' intent. (*People v. Park* (2013) 56 Cal.4th 782, 796.) To determine intent, we first examine the statutory language and give the words their ordinary meaning. (*Ibid.*) "Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition." (Civ. Code, § 13; see *People v. Gonzales* (2017) 2 Cal.5th 858, 871 & fn. 12

[because term of art "must be understood as it is defined, not in its colloquial sense," courts must assume the Legislature knew the ramifications of its word choices].) If statutory language is unambiguous, its plain meaning controls; if the statutory language is ambiguous, " ' "we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history." [Citation.] Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute. [Citations.]' " (*Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321.)

While on its face, *imprisoned* appears to refer to people incarcerated in state prison, Austin has advanced a different interpretation. *Imprisoned*, he argues, should be construed in its broader, colloquial sense to include people held in pretrial custody in the county jail. As the meaning of the term is apparently ambiguous, we turn to legislative history. Section 352.1 was enacted in 1994, but its precursor, section 352, was enacted in 1872 alongside California's civil death statutes. As we will explain, the current provision must be understood in that context.

4.3.2. Civil Death

Civil death is a legal status with roots in ancient Greece and English common law. "In ancient Greece, those criminals 'pronounced infamous' were unable to appear in court or vote in the assembly, to make public speeches, or serve in the army. … European lawmakers later developed the concept of 'civil death, which put an end to the person by destroying the basis of legal capacity, as did natural death by destroying physical existence.' " (Ewald, *"Civil Death": The Ideological Paradox of Criminal*

Disenfranchisement Law in the United States (2002) 2002 Wis. L.Rev. 1045, 1059–1060 (Ewald, *Civil Death*).) A civil death sentence extinguished the civil, legal, and political rights of people convicted of certain offenses. Without those rights, convicts could not bring civil actions or perform any legal function. (Saunders, *Civil Death—A New Look at an Ancient Doctrine* (1970) 11 Wm. & Mary L.Rev. 988, 989, 992–994.)

Because civil death revoked the full spectrum of rights of people convicted of certain offenses, it was historically "limited to very serious crimes" and imposed "only upon judicial pronouncement in individual cases." (Ewald, *Civil Death*, *supra*, 2002 Wis. L.Rev. at p. 1061; see 4 Blackstone, Commentaries 373 [civil death applied only "when it is … clear beyond all dispute that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society."].) In the United States, however, this distinction eroded in the years following the Civil War as federal constitutional rights began to constrain the activities of individual states. (Grady, *Civil Death is Different* (2013) 102 J. Crim. L. & Criminology 441, 447; see U.S. Const., 14th Amend. [equal citizenship rights regardless of race]; U.S. Const., 15th Amend. [universal male suffrage]; compare *Barron v. The Mayor and City Council of Baltimore* (1833) 32 U.S. 243, 247 [5th Amend. takings clause limited only federal power and did not apply to the states] with *Chicago, Burlington & R'D v. Chicago* (1897) 166 U.S. 226 [takings clause applied to states via 14th Amend.].) Many states, including California, began to impose forms of civil death broadly and automatically.

As codified in 1872, the California Penal Code provided that a "person sentenced to imprisonment in the State prison for

life is thereafter deemed civilly dead." (Pen. Code, § 674, as enacted by Pen. Code of 1872.) Those sentenced to terms shorter than life received temporary, more limited forms of civil death. (Pen. Code, § 673, as enacted by Pen. Code of 1872 [a "sentence of imprisonment in a State prison for any term less than life suspends all the civil rights of the person so sentenced … during such imprisonment."].) That distinction was important. As the California Supreme Court explained, if "the convict be sentenced for life, he becomes *civiliter mortuus*, or dead in law, in respect to his estate, as if he was dead in fact. If, however, he be sentenced for a term less than life, his civil rights are only suspended during the term" of imprisonment. (*Matter of Estate of Nerac* (1868) 35 Cal. 392, 396.)

While civil death had expanded beyond those criminals "no longer fit to live upon the earth" (4 Blackstone, Commentaries 373), given its serious consequences, even this modified version was reserved for felons sentenced to state prison. As the Attorney General explained in 1951: "Mere conviction of a crime and imprisonment alone do not result in a loss of civil rights, e.g., civil rights are not lost upon imprisonment in the county jail following the conviction of a misdemeanor. … [¶] … [¶] There must be a 'sentence of imprisonment in a State prison,' and the civil rights of the person so sentenced are suspended only 'during such imprisonment.' [¶] ... [¶] Thus, unless there is actual imprisonment in the State prison pursuant to the sentence there is no suspension of civil rights." (17 Ops.Cal.Atty.Gen. 34, 35 (1951) [construing Pen. Code, § 2600, which replaced the original civil death statute (Stats. 1941, ch. 106, § 15, p. 1091)]; see *Hayashi v. Lorenz* (1954) 42 Cal.2d 848, 852 ["California's civil death statutes are intended to apply only to persons convicted in

the courts of this state and imprisoned in the prisons of this state."]; *People v. Banks* (1959) 53 Cal.2d 370 [civil death does not apply to probationers].)

4.3.3. Former Section 352

Even as the new Penal Code stripped the rights of imprisoned felons, however, the new Code of Civil Procedure ameliorated its impact by tolling statutes of limitations for prison inmates. (§ 352, as enacted by Code Civ. Proc. of 1872.) As enacted, the statute provided that "[i]f a person entitled to bring an action … be at the time the cause of action accrued, either:" a minor, insane, a married woman, or "[i]mprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life … [t]he time of such disability is not a part of the time limited for the commencement of the action." (*Ibid.*; see § 328, as enacted by Code Civ. Proc. of 1872 [property actions].)

After 1872, therefore, although prisoners were stripped of all civil rights during their incarceration—a legal disability that prevented them from bringing civil actions or appearing in court—they would get those rights back when they were released. (*Matter of Estate of Nerac*, *supra*, 35 Cal. at p. 396.) Statutes of limitation are based on the assumption that a claimant will not delay his claim for an unreasonable time; that assumption does not apply where a person is denied access to courts. (*Estate of Caravas* (1952) 40 Cal.2d 33, 40.) Thus, as with minors, the insane, and married women, statutes of limitations were tolled for convicts barred from the civil courts. (*Grasso v. McDonough Power Equipment, Inc.* (1968) 264 Cal.App.2d 597, 600 [tolling raised "the possibility" that upon his release from custody, a convict could "realiz[e] redress for wrongs done to him."]; see

Brooks v. Mercy Hospital, *supra*, 1 Cal.App.5th at p. 7 [applying *Grasso* to successor statute, section 352.1].)

Since statutory tolling existed to ameliorate statutorily imposed disabilities, it only applied to prisoners who *actually suffered* legal disabilities—felons sentenced to state prison. Thus, the tolling statute did not apply to county jail inmates. (See 15 Ops.Cal.Atty.Gen. 38, 39 (1950) ["The Legislature has not suspended the civil rights of a person convicted of a felony but sentenced to the county jail as a misdemeanant. Therefore, … there are no civil rights to be restored."].) Nor did it apply to parolees. (See *Deutch v. Hoffman* (1985) 165 Cal.App.3d 152, 153–155 [tolling statute does not apply to parolees because the right to initiate civil actions was not among the pre-1976 restrictions to which they were subjected].)

4.3.4. Section 352.1

Over the years, the civil death statutes were occasionally relaxed to allow for restoration of some rights on a case-by-case basis, but in general, automatic deprivation of prisoners' civil rights continued in California for more than 100 years. (See Stats. 1919, ch. 28, § 1, p. 34; Stats. 1941, ch. 489, §§ 1–2, pp. 1797–1798; Pen. Code, § 2600, added by Stats. 1941, ch. 106, § 15, p. 1091 ["A sentence of imprisonment in a State prison for any term less than life suspends all the civil rights of the person so sentenced … during such imprisonment."]; Stats. 1968, ch. 1402, § 1, p. 2763.) In 1968, however, the Legislature loosened restrictions on prisoners' civil rights and abolished civil death for prisoners serving life sentences. (Stats. 1968, ch. 1402, pp. 2763–2764.) Then, in 1975, the Legislature repealed the rest of the "ancient 'civil death' provision" and enacted the Inmates' Bill of Rights, which provided "that inmates may be deprived of

civil rights only if necessary for the reasonable protection of the public and the reasonable security of the institution." (Assemblyman Alan Sieroty, Assem. Bill No. 1506 declaration of intent (1975–1976 Reg. Sess.) Sept. 20, 1978, author's chaptered bill file, ch. 1175; Stats. 1975, ch. 1175, § 3, pp. 2897–2898 [repealing and reenacting Pen. Code, §§ 2600, 2601].)

In so doing, the Legislature fundamentally changed this area of the law by reversing the state's default treatment of State prisoners' civil rights. Whereas in 1968, a "sentence of imprisonment in a state prison for any term suspend[ed] all of the civil rights of the person so sentenced," *except* those explicitly exempted (Stats. 1968, ch. 1402, § 1, p. 2763), by 1975, a "person sentenced to imprisonment in a state prison [could], during any such period of confinement, be deprived of such rights, and *only such rights*, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public." (Stats. 1975, ch. 1175, § 3, p. 2897, emphasis added [enacting Pen. Code, § 2600].) Lawmakers also specifically enumerated eight civil rights that could not be abridged—including the right to correspond confidentially with counsel and the right to initiate civil actions. (*Id.* at pp. 2897–2898 [enacting Pen. Code, § 2601].)

Though the new Penal Code provisions granted state prisoners the right to bring civil actions, lawmakers did not amend section 352, the tolling statute, until 20 years later when they removed prisoners from the list of the legally disabled in section 352 and enacted a new, less generous tolling provision in section 352.1. Why not amend the statute in 1975? Because as it applied to prisoners, former section 352 existed to solve the very specific problem of how to apply statutes of limitations to the

civilly dead—and the Legislature had just abolished civil death. That is, to the extent lawmakers considered section 352, they apparently assumed that it would no longer apply. (See, e.g., Cal. Dep. Corrections, Enrolled Bill Rep. on Assem. Bill No. 1506 (1975–1976 Reg. Sess.) Sep. 19, 1975, p. 4 ["The right to initiate civil actions is double edged. On one hand the inmate may use them to harass the state, other governmental entities and private individuals. On the other hand, now the statute of limitations does not run since the inmate cannot sue. If he has the right [to sue] presumably the statute would run."].)

There was precedent for such a belief. Married women, for example, were listed in section 352 for decades after California abolished coverture—the common-law rule that a wife's legal personality was merged with her husband. (See, e.g., *Follansbee v. Benzenberg* (1954) 122 Cal.App.2d 466, 476 [noting that "hollow, debasing, and degrading philosophy, which has pervaded judicial thinking for years, has spent its course."].) Yet as late as 1968, the California Law Revision Commission found wives' continued presence in a list of the legally disabled so uncontroversial that it noted, "This vestigial remnant is of no significance since the abolition of coverture. [Citation.]" (Recommendation Relating to Sovereign Immunity, 9 Cal. Law Revision Com. Rep. (1968) p. 54, fn. 7.) That is, according to the Commission, there was no need to amend section 352 because it clearly no longer applied to married women. It appears the Legislature expected that tolling for prisoners would become obsolete the same way[11]—but the federal courts continued to toll

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[11] Likewise, the analogous tolling provision for public entity lawsuits last amended in 1970, *still* provides, "When a person is unable to commence the suit within the time prescribed in subdivision (b)

limitations periods for state prisoners. (See, e.g., *May v. Enomoto* (9th Cir. 1980) 633 F.2d 164, 166–167.)

The history of section 352.1, which was enacted to fix the problem of indefinite tolling, supports this view. Senate Bill No. 1445 was drafted "to require prisoners to bring their actions against the state in a timely manner." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1445 (1993–1994 Reg. Sess.) Apr. 6, 1994.) The legislative reports explained that when the tolling "provisions were first enacted in 1872, inmates were barred from filing civil suits during their incarceration," but though there was "no longer any legal impediment for an inmate to file a civil action during his imprisonment, neither Section 328 nor 352 has been changed to reflect the change." (*Ibid.*) As discussed, civil death statutes and their related tolling provisions only applied to defendants convicted of felonies and sentenced to state prison. Accordingly, the legislative history materials mention only those inmates. (See Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1445 (1993–1994 Reg. Sess.) Mar. 15, 1994 [identifying key issue as: "Should a state prison inmate be required to file a civil cause of action within the applicable statutory limitations period without any tolling of the statute during the person's term of imprisonment?"].)

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because he has been sentenced to imprisonment in a state prison, the time limited for the commencement of such suit is extended to six months *after the date that the civil right to commence such action is restored to such person … .*" (Gov. Code, § 950.6, subd. (c), emphasis added.)

The law's legislative findings make this focus explicit. It provides, "The Legislature finds and declares …

> (a) Since 1988, the number of civil lawsuits filed against the state *by inmates incarcerated with the Department of Corrections* has outpaced the increase in California's prison population.
>
> (b) Civil lawsuits make up approximately 55 percent of all lawsuits brought against the state *by inmates incarcerated in California prisons*.
>
> …
>
> (f) It is in the best interest of the state to curtail the number of frivolous lawsuits filed by persons *incarcerated with the Department of Corrections*.

(Stats. 1994, ch. 1083, § 1, pp. 6465–6466, emphasis added.)

In short, the Legislature plainly intended to limit the statutory tolling formerly granted to state prison inmates. There is no indication the Legislature, in so doing, intended to *expand* tolling to local inmates in pretrial custody. We therefore hold that a would-be plaintiff is "imprisoned on a criminal charge" within the meaning of section 352.1 if he or she is serving a term of imprisonment in the state prison.

As discussed at length above, Austin's causes of action all accrued on either July 20, 2010, or July 7, 2011. Austin alleged that he was in pretrial custody in Los Angeles County Jail during this period, and the record reveals that judgment was not entered in his criminal case until December 16, 2011. Accordingly, Austin was not "imprisoned on a criminal charge" when his causes of action accrued, and section 352.1 does not apply.

5. Austin did not file his complaint within the statutory period.

To summarize, Austin's contract, malpractice, and fraud causes of action accrued no later than July 20, 2010, and his emotional distress cause of action accrued no later than July 7, 2011.

Giving Austin every benefit of the doubt, under section 340.6, which governs the first, second, third, and sixth causes of action, the one-year statute of limitations for those claims did not begin to run or was tolled until Swarth refused to reimburse Austin for unearned fees on July 7, 2011. The statute of limitations was then tolled for 189 days, or between March 7, 2012, and September 12, 2012, because of Austin's physical disability. Since Austin was in county jail, not state prison, when all of his causes of action accrued, the statute of limitations was not tolled due to his imprisonment. Therefore, Austin had until January 11, 2013, to file a lawsuit for all of his non-fraud claims. As to the fourth cause of action, since no tolling provision applied, the three-year statute of limitations period for the fraud claim expired on July 20, 2013.

Austin's complaint was filed on May 19, 2014. Because all of his causes of action were time-barred and there is no reasonable possibility amendment would cure the problem, the court properly sustained Swarth's demurrer without leave to amend.

DISPOSITION

The judgment is affirmed. Each party to bear his own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P.J.

JOHNSON (MICHAEL), J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.