

1                                    IN THE UNITED STATES DISTRICT COURT  
2                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4 JOHN PARLANTE,  
5                                    Plaintiff,

No. C 09-03336 CW

ORDER DISMISSING  
COMPLAINT

6                                    v.

7 DAN NEAR,  
8                                    Defendant.

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10                    On July 21, 2009, Plaintiff filed an application to proceed in  
11 forma pauperis and a complaint asserting a claim of legal  
12 malpractice on the ground that Defendant had failed to file a  
13 notice of appeal on Plaintiff's behalf. On October 19, 2009, the  
14 Court issued an Order Granting Plaintiff's Application to Proceed  
15 In Forma Pauperis and Dismissing Complaint With Leave to Amend in  
16 which it held that Plaintiff's sparse allegations failed to state a  
17 malpractice claim and that, in an amended complaint, Plaintiff must  
18 describe "the case in which he alleges a notice of appeal should  
19 have been filed, the ruling he wished to appeal, to whom should the  
20 appeal have been made, and that, but for Defendants' error,  
21 Plaintiff would have obtained a more favorable result." The Court  
22 also instructed Plaintiff to address the statute of limitations for  
23 a legal malpractice claim, and if the complaint was filed outside  
24 the limitations period, to address the application of equitable  
25 tolling.

26                    On November 9, 2009, Plaintiff filed a First Amended Complaint  
27 (FAC) and a motion for reinstatement, asking the Court to accept  
28 the filing of the FAC and to seal confidential documents. In his

1 FAC, Plaintiff addresses all the issues raised in the October 19,  
2 2009 Order. Plaintiff alleges that in 2003, Defendant represented  
3 him in a criminal case for a misdemeanor violation of California  
4 Penal Code § 273A(B), causing willful harm or injury to a child.  
5 As a result of his conviction, Plaintiff was incarcerated for sixty  
6 days. Plaintiff filed a notice of appeal himself when he was  
7 released from jail, but it was untimely. Plaintiff alleges that,  
8 but for Defendant's breach of his duty to file a notice of appeal,  
9 Plaintiff would have received favorable post judgment relief in his  
10 underlying case in the form of an overturned conviction.

11 Plaintiff alleges that equitable tolling applies because he was  
12 representing himself in a child dependency case that occurred as a  
13 direct result of Defendant's malpractice. The dependency case is  
14 currently pending before the California Supreme Court and is  
15 expected to be final by December 20, 2009. Plaintiff alleges that  
16 he "suffers a legal disability that would not permit him to file a  
17 complaint any earlier than after responses to Respondents brief  
18 were taken care of."

19 California Code of Civil Procedure § 340.6(a) governs the  
20 statute of limitations for legal malpractice actions, rendering two  
21 distinct and alternative limitation periods: one year after actual  
22 or constructive discovery of the facts constituting the wrongful  
23 act or omission, or four years after the date of the wrongful act  
24 or omission, whichever occurs first. Samuels v. Mix, 22 Cal. 4th  
25 1, 5 (1999).

26 Plaintiff does not dispute that his legal malpractice claim  
27 was filed outside the statutory time period. Therefore, for his  
28 claim to be viable, tolling must apply.

1 Under § 340.6(a), "[i]n no event shall the time for  
2 commencement of legal action exceed four years except that the  
3 period shall be tolled during the time that any of the following  
4 exist": 1) the plaintiff has not sustained actual injury; 2) the  
5 attorney continues to represent the plaintiff regarding the  
6 specific subject matter in which the alleged wrongful act occurred;  
7 (3) the attorney willfully conceals the facts constituting the  
8 wrongful act or omission when such facts are known to the attorney;  
9 or (4) the plaintiff is under a legal or physical disability that  
10 prevents the plaintiff from commencing legal action. Cal. Code of  
11 Civ. Pro. § 340.6(a).

12 The California Supreme Court has held that "the Legislature  
13 expressly intended to disallow tolling under any circumstances not  
14 enumerated in [§ 340.6(a)]." Laird v. Blacker, 2 Cal. 4th 606, 618  
15 (1992). Following the Laird decision, many California appellate  
16 courts have also held that the tolling provisions contained in  
17 § 340.6(a) are exclusive because the statutory language, "in no  
18 event shall the time for legal action exceed four years" except  
19 under those circumstances enumerated therein, expresses the  
20 Legislature's intent to disallow tolling under any other  
21 circumstances. Jordache Enters., Inc. v. Brobek, Phleger &  
22 Harrison, 18 Cal. 4th 739, 758 (1998); People ex rel. Dep't of  
23 Corporations v. Speedee Oil Change Systems, Inc., 95 Cal. App. 4th  
24 709, 725 (2002).

25 Plaintiff alleges that tolling under § 340.6(a)(4) applies  
26 because he was under a legal disability due to his self-  
27 representation in a child dependency case which required his  
28 "continuous court involvement." In Coscia v. McKenna & Cuneo, 25

1 Cal. 4th 1194, 1209 (2001), the court indicated that tolling for  
2 legal disability required that the plaintiff be prevented from  
3 filing suit by circumstances beyond his control, such as minority,  
4 mental illness or incarceration. Plaintiff's allegation that he  
5 was prevented from filing suit due to his involvement in another  
6 lawsuit does not rise to these levels of incapacitation.  
7 Furthermore, even if a plaintiff is incarcerated, the tolling  
8 period is only two years. See Cal. Code Civ. Pro.  
9 § 352.1. Here, Plaintiff was immediately aware of Defendant's  
10 failure to file the notice of appeal because he filed a notice of  
11 appeal himself as soon as he was released from jail. Thus,  
12 Plaintiff's claim accrued sometime in 2003 and, to be timely, his  
13 malpractice complaint should have been filed sometime in 2004.  
14 Plaintiff filed this complaint in 2009, five years beyond the  
15 limitations period.

16 The Court concludes that the tolling provisions of  
17 § 340.6(a)(4) do not apply to this case. Thus, Plaintiff's  
18 complaint must be dismissed because it is untimely. This dismissal  
19 is without leave to amend because amendment would be futile.  
20 However, dismissal under the in forma pauperis statute does not  
21 foreclose the filing of a paid complaint.

22 IT IS SO ORDERED.

23 Dated: February 10, 2010



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CLAUDIA WILKEN  
United States District Judge

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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 JOHN PARLANTE,  
5 Plaintiff,

Case Number: CV09-03336 CW

**CERTIFICATE OF SERVICE**

6 v.

7 DAN NEAR et al,  
8 Defendant.

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,  
10 Northern District of California.

11 That on February 10, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located  
14 in the Clerk's office.

15 John Parlante  
16 1920 Windview Ct  
17 Reno, NV 89523

Dated: February 10, 2010

Richard W. Wieking, Clerk  
By: Ronnie Hersler, Deputy Clerk