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Legal Malpractice Statutes of Limitations: A Critical Analysis of a Burgeoning Crisis

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LEGAL MALPRACTICE STATUTES OF LIMITATIONS: A CRITICAL ANALYSIS OF A BURGEONING CRISIS

by

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Speaking for the Supreme Court of California, Justice Tobriner states:

> *An immunity from the statute of limitations for practitioners at the bar not enjoyed by other professions is itself suspicious, but when conferred by former practitioners who now sit upon the bench, it is doubly suspicious.*[1] (emphasis added)

The legal profession confronts a challenge to develop rules of law that are fair and complete in providing its clients with their day in court. To do less is to default in its trust.

The rise in legal malpractice litigation has not to this point engulfed the legal profession and threatened grave societal consequences, as is the case with the medical profession and medical malpractice litigation. But there has been a sharp and threatening rise in legal malpractice claims and litigation, so as to pose serious problems for the profession and the communities it serves, and these threaten to become markedly more serious.[2] Whether the rise is due to less care in professional practice or a growing awareness in the community of the profits in litigation, it behooves the legal profession to generate a sense of urgency to put its house in order. This, of course, involves maximizing the care

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[1]Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 98 Cal. Rptr. 837, 491 P.2d 421 (1971).

[2]Mossner, *Legal Malpractice Insurance Trends — The National and Michigan Experience*, 65 MICH. B.J. 550, 550-551 (1986). While this article focuses upon the insurance aspect of legal malpractice claims, it also indicates the rapidly escalating rate of these claims:

> Thirty years ago lawsuits against lawyers were rare — so rare, in fact, that only about 10 percent of all practicing attorneys bothered to purchase malpractice insurance.
>
> During the 1960's there was a gradual increase in the number of claims brought against lawyers but still, compared to today, the figures were modest. By the end of 1969 only 25 of every 1,000 attorneys were subjected to a claim, and the average cost per claim was only about $5,300.
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> The real explosion in legal malpractice claims came in the late 1970's. By then one of every 14 lawyers in the country was reporting a claim to his/her carrier.
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> [In] [t]he early 1980's . . . legal malpractice claims against lawyers were still escalating at a rapid rate . . .

See also ABA Standing Comm. on Lawyers' Professional Liability, *Profile of Legal Malpractice: A Statistical Study of Determinative Characteristics of Claims Asserted Against Attorneys* (1986), which contains an analysis of 29,227 claims asserted against attorneys reported in the National Legal Malpractice Data Center of the American Bar Association from January, 1983, through September 30, 1985; Mallen, *Legal Malpractice: Controlling the Odds*, TRIAL 24 (September 1984), reports on earlier statistics from the American Bar Association's National Legal Malpractice Data Center.

and safeguards used for the protection of clients, but it also has an additional dimension. It involves establishing rational and just rules for litigating legal malpractice claims.

Surprisingly little has been written on the law of legal malpractice. Even more disturbing is the fact that there is little analytical writing to help guide the courts and bar in this area. The analysis and recommendations contained in this article are intended as a basis in developing rules for statutes of limitations in legal malpractice actions that meet the needs of the parties, the test of fundamental fairness, and evoke a genuine sense of confidence in society.

I. THE LATITUDE PROVIDED BY THE COMMON LAW SYSTEM

A. *Historical Perspective.*

The willingness of the sovereign, or his consent unwillingly exacted, to repose in courts the ability to develop and modify rules of law by judicial decision provides a flexibility which distinguishes the common law system of justice from others. As common law actions developed, procedural devices were developed for the enforcement and limitation of the rights created.[3] The actions became self-limiting, or confining, by the rigidity of the requirements for each of the forms of action.[4] A degree of flexibility was provided by the enactment of the Statute of Westminster II in 1285.[5] This resulted in the expansion of the action of trespass on the case so that it could be used as a residual remedy to overcome the inflexibility and constrictive nature of the developed common law actions.[6]

With development of procedural devices such as the general and special demurrer, the litigant was faced with the danger that an error in pleading would result in the loss of substantive rights.[7] Here, some relief was granted by allowing amendments to pleadings.[8] Throughout this development of substantive and procedural law there runs the thread of the granting of a right, its formalization, its restriction, and then an effort to overcome restrictions by providing new rights and procedures. In this context, statutes of limitations developed. As early as 1236, statutes were enacted in England that prohibited

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[3] J. KOFFLER, COMMON LAW PLEADING, 32-43 (1969).

[4] *Id.*

[5] The statute, 13 Edw. 1, c. 24, 1 Pickering's Statutes at Large, 196, provided:

> And whensoever from henceforth it shall fortune in the Chancery, that in one Case a Writ is found, and in like Case [in consimili casu], falling under like Law, and requiring like Remedy, is found none, the Clerks of the Chancery shall agree in making the Writ; or the Plaintiffs may adjourn it until the next Parliament, and let the cases written in which they cannot agree, and let them refer themselves until the next Parliament, by Consent of Men learned in the Law, a Writ shall be made, lest it might happen after that the Court should long time fail to minister Justice unto complainants. (Translation of Cambridge Edition, 1762).

[6] J. KOFFLER, *supra* note 3, at 44-45, 175.

[7] *Id.* at 405.

[8] *Id.* at 405, 558-564.

real property actions if based on seisin prior to a given date.[9] By 1540 an English statute had enacted fixed time limitation periods.[10] The modern legislative prescriptions are said to have their origin in the English Limitations Act of 1623.[11]

Statutes of limitations may generally be considered to be among the most severely restrictive procedural devices, as they can truncate substantive rights. However, the statutes also perform very positive functions. They allow individuals to function without unending concern or fear that actions will be instituted against them. This lends fairness to the system of justice, as time dims memories, records may be lost, and testimony and evidence may become unavailable.[12] Even beyond this, statutes of limitations provide an end to a threat that may in various ways prevent individuals from functioning as productively and efficiently as they might otherwise function, since the statutes remove potential liability, as well as psychological stress. They thus provide benefits for individuals and entities and allow for a more productive society.

B. *Development of Statutes of Limitations in Legal Malpractice*

Are statutes of limitations creatures of the legislative process, and not the judicial? In answering this question, one must note that legislative enactments prescribe periods of limitation for various actions. To this extent statutes of limitations are creatures of the legislature. But the wisdom of this conclusion terminates at this point. Legislative enactments may be specific in providing the limitation period in terms of years, for various actions, but at this juncture many questions may arise. This is particularly true in legal malpractice actions.

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[9] *See* Note, *Developments-Statutes of Limitations,* 63 HARV. L. REV. 1177 (1950).

[10] *See* 32 Hen. 8, c.2 (1540). This statute provided in part:

> Be it therefore enacted by the King our Sovereign Lord, the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the Authority of the same, That no manner of Person or Persons shall from henceforth sue, have or maintain any Writ of Right, or make any Prescription, Title or Claim of, to or for any Manors, Lands, Tenements, Rents, Annuities, Commons, Pensions, Portions, Corrodies or other Hereditaments, of the Possession of his or their Ancestor or Predecessor, and declare and allege any further Seisin or Possession of his or their Ancestor or Predecessor, but only of the Seisin or Possession of his Ancestor or Predecessor, which hath been, or now is, or shall be seized of the Said Manors, Lands, Tenements, Rents, Annuities, Commons, Pensions, Portions, Corrodies or other Hereditaments, within threescore Years next before the *Teste* of the same Writ, or next before the said Perscription, Title or Claim so hereafter to be sued, commenced, brought, made or had.

[11] *See* Note, *supra* note 9 at 1177-78.

This statute, 21 Jac. I, c.16. (1623), provided in part:

> For quieting of Mens Estates, and avoiding of Suits, be it enacted by the King's most Excellent Majesty, the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, That all Writs of *Formedon in Descender, Formedon in Remainder,* and *Formedon in Reverter,* at any Time hereafter to be sued or brought, of or for any Manors, Lands, Tenements, or Hereditaments, whereunto any Person or Persons now hath or have any Title, or Cause to have or pursue any such Writ, shall be sued and taken within Twenty Years next after the End of this present Session of Parliament; And after the said Twenty Years expired, no such Person or Persons, or any of their Heirs, shall have or maintain any such Writ, of or for any of the said Manors, Lands, Tenements, or Hereditaments; . . .

[12] *See* Order of the R.R. Telegraphs v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944).

Some of the questions that may be raised in legal malpractice actions are:

First: If there is no specific period of limitation fixed for legal malpractice, in what category of action is it to be placed?

Second: In making this determination, should analogy be drawn to other malpractice actions, such as medical malpractice, for which a specific limitation period has been provided by statute?

Third: In making this determination, should analogy be drawn to some other category, as, for example, negligence, for which a specific limitation period is also provided by statute?

Fourth: If the period is established by analogy to that fixed for some other category, how do we determine what this category is? For example, is it negligence or contract, for which the periods of limitation differ? The answer to this question may be critical to the success or failure of an action.

Fifth: Are the *common law forms of action,* although abolished by the legislature, to be critical in determining questions relating to statutes of limitations, and thus determine in certain cases whether the client will succeed or fail in an action? In this regard, is present vitality given to the observation of Maitland that, "The forms of action we have buried, but they still rule us from their graves"?[13]

Sixth: Do courts make determinations concerning statutes of limitations in legal malpractice actions that appear to be in direct conflict with legislative enactments?

Seventh: Do courts "favor" attorneys in certain instances by accepting or rejecting the analogy with medical malpractice, where the statute of limitations is at issue in a legal malpractice action?

In addition to considering problems that arise in dealing with questions such as these, this article proceeds into an area of decisional law that is frequently divorced from legislative enactment. This involves a consideration of decisional principles in various jurisdictions, grounded in differing perceptions of public policy, as to *when* the statute of limitations *begins* to run in legal malpractice actions.[14] This includes a consideration of continuous representation doctrines and discovery rules,[15] as they have been formulated and applied in legal malpractice actions. These doctrines and rules may or may not find their basis in legislative enactment.

Questions which should be considered are: What competing considerations should be taken into account and how should they be treated in developing rules for time limitations in legal malpractice actions? What is good that

[13]The Forms of Action at Common Law, Lecture I, 2 (Cambridge, 1948).

[14]*See* discussion in Section III through VII and IX through X.

[15]*See* Section X for a discussion of the Continuous Representation Doctrine, and Section IX for a discussion of Discovery Rules.

has developed in jurisdiction X and what is good that has developed in jurisdiction Y? Conversely, what is unfair, inadequate, or incomplete in the resolutions found in the various jurisdictions? Finally, what is an ideal solution? This article is intended to provide a basis for answering many of these questions. Proposals that may be used in approaching an ideal solution are suggested at the conclusion of this article.

II. SERIOUS PROBLEMS AND CONSEQUENCES RESULTING FROM THE PRESENT USE AND APPLICATION OF STATUTES OF LIMITATIONS IN LEGAL MALPRACTICE ACTIONS

As the law of each state governs the rules and principles applied in legal malpractice litigation, it is not surprising to find basic differences among the various jurisdictions. This is the price inevitably exacted by the common law, and it is often a good one, as diversity in cultural, economic and industrial climates in various jurisdictions are frequently best served by the development of different rules and principles of law. Both decisional law and legislative enactment may generate these differences. Such is the case in legal malpractice. However, it is difficult to conclude that these differences in the cultural, economic and industrial climate in various jurisdictions justify differences in the rules relating to statutes of limitations in legal malpractice actions.

The following results can occur in some or most jurisdictions as the body of law presently exists:

1. A client's rights can be extinguished before the client can maintain an action for violation of these rights.
2. A client may be limited to the recovery of nominal damages, although substantial actual damage thereafter results from the attorney's negligence.
3. A client's rights can be extinguished before the client is aware of facts on the basis of which the client can maintain an action to vindicate these rights.
4. A client's rights can be extinguished before the client is removed from an environment of dependence upon the attorney.
5. A client's rights can be extinguished while the attorney fails to disclose information which would permit the client to obtain relief for violation of these rights.

All of these results are unacceptable. Further consideration of statutes of limitations in legal malpractice actions illustrates the need for significant modifications in legislative and judicial approaches in this area.

III. A GENERAL VIEW OF THE DAMAGE RULE AND THE OCCURRENCE RULE

Traditionally the statute of limitations begins to run in an action at law at

the time a cause of action comes into existence or accrues.[16] Applying this concept to legal malpractice actions, this would generally mean that when the action is in tort, grounded in negligence, the statute of limitations would begin to run from the time that duty, breach of duty, causation and damage all come into existence.[17] This is described as the damage rule, in that it requires that there be actual damage before the statute of limitations begins to run.[18] There is authority for application of the damage rule in legal malpractice actions.[19] Application of this rule in legal malpractice is, however, not without its problems, as indicated in the subsequent discussion in this article.[20]

There is also authority in legal malpractice actions for the application of the occurrence rule, which provides that the statute of limitations begins to run from the time of the wrongful act or omission, even if actual damage has not as yet occurred.[21] This is most disturbing, because application of the occurrence rule will, in some circumstances, prevent the client from recovering in tort for actual damages caused by an attorney's negligence.[22] Similarly disturbing is the fact that application of the occurrence rule can result in a client's action in contract against an attorney being lost by the running of the statute of limitations, because the action might have been, but wasn't, brought, although under the circumstances only nominal damages could have been recovered.[23] Here the client forfeits his right to recover for actual damages, which may later occur.

A caveat is observed with respect to the discussion of the occurrence rule and the damage rule that follows in sections IV, V, VI and VII. In some jurisdictions, a discovery rule may be superimposed upon these rules. Furthermore, a continuous representation rule, or a similar rule differently named, may supplement these rules in some jurisdictions. Discovery rules, continuous representation rules, and similar rules differently named, are discussed in later sections of this article.[24] The discussion in those sections must therefore be considered in conjunction with the analysis presented in sections IV, V, VI and VII.

IV. A CLOSER EXAMINATION OF THE OCCURRENCE RULE – THE DOCTRINE OF *WILCOX V. PLUMMER*

With the occurrence rule, the proposition is that the statute of limitations

[16]Note, supra note 9, at 1200.

[17]Note, *supra* note 9, at 1201; PROSSER ON TORTS § 30 (5th ed. 1984).

[18]PROSSER ON TORTS § 30 (5th ed. 1984); Note, *supra* note 9, at 1200-1201.

[19]*See,* Sections VI and VII for discussion of Damage Rule.

[20]*Id.*

[21]*See* Sections IV and V for discussion of Occurrence Rule.

[22]*Id.*

[23]*Id.*

[24]*See* Section IX for discussion of Discovery Rules, and Section X for discussion of Continuous Representation and Comparable Rules.

begins to run in a legal malpractice action from the time of the wrongful act or omission, even if actual damage has not as yet occurred.[25] This principle was adopted by the United States Supreme Court in *Wilcox v. Plummer,*[26] which was an action in *assumpsit,* and shall presently be considered at length.

Where the legal malpractice action is brought in tort, there is also support for this proposition that the statute of limitations begins to run from the time of the wrongful act or omission, even if this is before actual damage is sustained.[27] This proposition was accepted by the Supreme Court of Nebraska in a legal malpractice action which principally involved a question of statutory interpretation.[28] The court observed that in formulating the statute of limitations for actions based on professional negligence, Nebraska's legislature had expressly stated that such actions "shall be commenced within two years next after the alleged act or omission."[29] It concluded that in selecting this language the legislature rejected actual damage as the index for the inception of the time limit for an action based on malpractice, and that "tortious invasion of another's legal right is the triggering device for the statute of limitations."[30] This is, however, not in accord with the traditional requirements for tort actions grounded in negligence, which necessitate actual loss or damage for an action to come into existence, with the result that generally the statute of limitations does not begin to run in a negligence action until actual damage has been sustained.[31]

Where a legal malpractice action was brought in *assumpsit,* the United States Supreme Court, in 1830, in *Wilcox v. Plummer,*[32] adopted the view that the statute of limitations begins to run at the time of the breach, even though

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[25] *See, e.g.,* McClain v. Johnson, 160 Ga. App. 548, 288 S.E.2d 9 (1981), *aff'd* 248 Ga. 877, 289 S.E.2d 247 (1982), a legal malpractice action in which the alleged unskillful act was the drafting of a property settlement agreement. The court states:

> It is not the special damage or injury resulting from the unskillfulness of an attorney at law in the representation of his client's interests, but the breach of the duty imposed by the contract of employment, which gives a right of action for damages sustained. The statute of limitations [sic] in such a case runs, therefore, from the date of the breach of duty, and not from the time when the extent of the resulting injury is ascertained. Gould v. Palmer & Read, 96 Ga. 798, 22 S.E. 583 (1895); Riser v. Livsey, 138 Ga. App. 615, 227 S.E.2d 88 (1976).

Sorenson v. Pavlikowski, 581 P.2d 851, 854 (Nev. 1978), where the court observes:

> If the theory of recovery rests upon breach of a written contract, the six-year statute of limitations provided in NRS 11.190(1)(b) would begin to run at the moment of breach, and the limitation period has elapsed.

Martin v. Clements, 98 Idaho 906, 575 P.2d 885 (1978), where the court states:

> Whether we apply appellants' suggestion that I.C. § 5-224 should apply, or respondent's suggestion that I.C. § 5-217 is applicable, under either statute the action is barred within four years of the date of the occurrence.

[26] 29 U.S. (4 Pet.) 172 (1830).

[27] Rosnick v. Marks, 218 Neb. 499, 357 N.W. 2d 186 (1984).

[28] *Id.*

[29] *Id.* at 505, 357 N.W. 2d at 190.

[30] *Id.* at 505-06, 357 N.W.2d at 191.

[31] PROSSER ON TORTS § 30 (5th ed. 1984); Note, *supra* note 9, at 1201.

[32] 29 U.S. (4 Pet.) 172 (1830).

no actual damage has as yet been sustained. As a basis for justifying this conclusion, the court indicated that nominal damages would, in such a case, be awardable.[33] In *Wilcox* it was alleged and proven that an attorney, the testator of the defendant, received a note from plaintiff for collection. The defendant pled the statute of limitations. On one count, the court held that the statute began to run at the time the attorney ought to have sued an endorser, and on another count, at the time the attorney committed a misnomer of plaintiffs. This was so, the court held, even though at these times the plaintiff had suffered *no* actual damage.[34]

It has been said that viewed as a contract action, the *Wilcox* holding has intrinsic merit because the attorney impliedly agreed to act diligently. He breached this agreement, and a cause of action for breach of contract is generally held to accrue at the time of breach.[35] Even if this reasoning has merit, it can result in a client being without *any* remedy for actual damage he sustains as a result of the attorney's negligence. If, measuring from the time the attorney's negligence occurred, the period of limitation expires before the client suffers actual damage, the client is without a remedy for actual damage, however serious, which he thereafter incurs as a result of the attorney's negligence. Such a result is unconscionable. It seems clear that the United States Supreme Court, in deciding *Wilcox,* consciously recognized that such a result could flow from its decision. The court cited *Battley v. Faulkner*[36] as "exactly this case,"[37] pointing out that the damage in *Battley* depended upon an issue in another suit, and could not be assessed by the jury until the final result in that suit was definitely known. Yet it was held that plaintiff should have instituted his action and was barred for not doing so.

V. AVOIDING UNCONSCIONABLE RESULTS FLOWING FROM THE *WILCOX V. PLUMMER* DOCTRINE

Unconscionable results that can flow from *Wilcox,* in whole or in part, may be avoided, by formulating additional theories, or by novel applications of existing theories.

First: Even where a court insists on adhering to the *Wilcox* doctrine, its effect can be isolated by making it applicable to only *a very small segment* of legal malpractice cases. This can be accomplished by applying concepts that have been developed in legal malpractice actions, although in another context,

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[33] *Id.* at 182.

[34] *Id.*

[35] Ellis, *Malpractice Accural: Adherence to the Common Law in Professional Negligence Actions,* 19 IDAHO L. REV. 63, 69 (1983).

[36] 3 B. & Ald. 288, 22 Rev. Reptr. 390 (1820).

[37] 29 U.S. (4 Pet.) 172, 182 (1830).

in cases in New York,[38] Illinois,[39] Alaska[40] and the Virgin Islands.[41] These cases involve a problem *different* from that under consideration. A crucial issue in these cases is whether the tort or contract statute of limitations should be applied, with the client seeking application of the longer contract statute by alleging the action as one for breach of contract. Application of the shorter tort statute of limitations would result, in these factual situations, in the actions being time-barred. In most instances, the court concludes that irrespective of the form in which the action is pled, the tort statute of limitations applies. It does this by *narrowing the area,* or type of factual situation, in which a wrong committed by an attorney can be considered a breach of contract, rather than a tort.

The principles in these cases also provide a compelling basis for greatly limiting the types of cases in which the *Wilcox* doctrine can be applied. In *Wilcox* the court concludes that the occurrence rule applies in contract actions, and anchors its holding on the fact that the legal malpractice action in *Wilcox* is in *assumpsit.* If, however, a legal malpractice action *must,* in a particular instance, irrespective of the nature of the pleadings, be treated as one in tort for negligence, there is in such a case no sound basis for application of the *Wilcox* doctrine, and the damage rule should be applied. Some jurisdictions already apply the damage rule in legal malpractice actions in tort for negligence,[42] and where they have not already done so, they should be persuaded to follow the general rule in actions in tort for negligence, which provides for application of the damage rule.[43] To make an exception for legal malpractice actions, to the serious detriment of clients, cuts sharply against fundamental fairness, and should find no support in sound public policy.

Cases which have considered whether the tort or contract statute of limitations should be applied have not spoken in identical terms, but there is a clear thread, or similarity, in the principles enunciated. In *DiPietro v. Hecker,*[44] the court states that "in the absence of *an agreement to obtain a specific result,* carelessness resulting in professional miscarriage would be governed by the

[38] *See* DiPietro v. Hecker, 43 Misc. 2d 630, 251 N.Y.S. 2d 704 (1964); Glens Falls Insurance Co. v. Reynolds, 3 A.D.2d 686, 159 N.Y.S. 2d 95 (1957); Albany Sav. Bank v. Caffry, Pontiff, Stewart, Rhodes & Judge, 95 A.D.2d 918, 463 N.Y.S. 2d 896 (1983); Brainard v. Brown, 91 A.D.2d 287, 458 N.Y.S.2d 735 (1983). *Contra:* Sinopoli v. Cocozza, 105 A.D. 2d 743, 481 N.Y.S. 2d 177 (1984); Kramer v. Belfi, 106 A.D. 2d 615, 482 N.Y.S. 2d 898 (1984).

[39] *See* Bonanno v. Potthoff, 527 F. Supp. 561 (N.D. Ill. 1981).

[40] *See* Van Horn Lodge, Inc. v. White, 627 P.2d 641 (Alaska 1981).

[41] *See* Moorehead v. Miller, 102 F.R.D. 834 (V.I. 1984).

[42] *See,* e.g., where the damage rule is applied, frequently in conjunction with the discovery rule: Fort Meyers, Seafood Packers, Inc. v. Steptoe and Johnson, 381 F.2d 261 (D.C. 1967), *cert denied,* 390 U.S. 946 (1968); Byers v. Burleson, 713 F.2d 856 (D.C. 1983); Levin v. Berley, 728 F.2d 551 (1st Cir. 1984); Jaramillo v. Hood, 93 N.M. 433, 601 P.2d 66 (1979); Luick v. Rademacher, 129 Mich. App. 803, 342 N.W. 2d 617 (1983); Pancake House, Inc. v. Redmond, 239 Kan. 83, 716 P.2d 575 (1986); Arizona Management Corp. v. Kollof, 142 Ariz. 64, 688 P.2d 710 (1984).

[43] *See generally* PROSSER ON TORTS § 30; F. POLLOCK, LAW OF TORTS 244 (3rd Ed. 1894).

[44] 251 N.Y.S. 2d 704, 43 Misc. 2d 630 (1964).

three-year [negligence] statute, otherwise the six-year [contract] statute would apply."[45] In *Glens Falls Insurance Company v. Reynolds,*[46] the opinion states that "[c]arelessness resulting in professional miscarriage, in the absence of agreement to obtain a specific result *or to assure against miscarriage,*"[47] would usually be governed by the three year statute of limitations for negligence (emphasis added). The court adds: "But if there was an agreement to obtain a specific result or to assure the effect of the legal services rendered, the six-year Statute of Limitations in contract may apply."[48]

In *Bonanno v. Potthoff,*[49] an attorney entered into a retainer agreement to represent a client in the prosecution or settlement of all claims against a particular party. The complaint alleged that the attorney, due to negligence, failed to represent the client in certain litigation. The court states that this is not a situation in which the client's claim "asserts only a general failure to provide reasonably competent professional services or some other broad noncontractual claim."[50] It rather charges the attorney "with failure to perform precisely what he had contracted to do."[51] On this basis, the court found that the ten-year contract limitation period applied, which made the plaintiff's complaint timely.

In *Van Horn Lodge v. White,*[52] the court observed that the duty allegedly breached "was a duty of reasonable care imposed by law . . ."[53] The court added: "There is no evidence of an agreement to obtain a particular result . . ."[54] It concluded that the essence of the complaint was in negligence, "the gravamen thereof lies in tort,"[55] and therefore the applicable statute of limitations was one for tort and not for contract. In *Moorehead v. Miller,*[56] the court indicated

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[45] *Id.* at 706, 43 Misc. 2d at 630-31. *See also* Albany Sav. Bank v. Caffry, Pontiff, Stewart, Rhodes & Judge, 95 A.D. 2d 918, 463 N.Y.S. 2d 896 (1983); Brainard v. Brown, 91 A.D. 2d 287, 458 N.Y.S. 2d 735 (1983). *Contra:* Sinopoli v. Cocozza, 105 A.D. 2d 743, 481 N.Y.S. 2d 177 (1984); Kramer v. Belfi, 106 A.D. 2d 615, 482 N.Y.S. 2d 898 (1984). For a discussion of the differing views in New York and their bases, see Section VIII, *infra,* at the point where Video Corporation v. Frederick Flatto Associates, Inc., 58 N.Y.S. 2d 1026, 462 N.Y.S. 2d 439 (1983), is discussed.

[46] 3 A.D. 2d 686, 159 N.Y.S. 2d 95 (1957).

[47] *Id.* at 686, 159 N.Y.S.2d at 97 (emphasis added). *See, also,* Albany Sav. Bank v. Caffry, Pontiff, Stewart, Rhodes & Judge, 95 A.D.2d 918, 463 N.Y.S. 2d 896 (1983); Brainard v. Brown, 91 A.D.2d 287, 458 N.Y.S. 2d 735 (1983). *Contra:* Sinopoli v. Cocozza, 105 A.D. 2d 743, 481 N.Y.S. 2d 177 (1984); Kramer v. Belfi, 106 A.D. 2d 615, 482 N.Y.S. 2d 898 (1984). For a discussion of the differing views in New York and their bases, see Section VIII, *infra,* at the point where Video Corporation of America v. Frederick Flatto Associates, Inc., 58 N.Y. 2d 1026, 462 N.Y.S. 2d 439 (1983), is discussed.

[48] *Id.*

[49] 527 F. Supp. 561 (N.D. Ill. 1981).

[50] *Id.* at 566.

[51] *Id.*

[52] 627 P.2d 641 (Alaska 1981).

[53] *Id.* at 643.

[54] *Id.*

[55] *Id.*

[56] 102 F.R.D. 834 (V.I. 1984).

that it was settled in the jurisdiction that legal malpractice was subject to the two-year general tort statute of limitations. "To sound in contract, and thereby be governed by the six-year statute of limitations, a legal malpractice suit must be based on the *nonperformance of a specific undertaking or promise* contained in the contract"[57] (emphasis added).

If the principles in these cases are applied where the question is whether an action is to be treated as one in contract or tort for the purpose of determining whether the *Wilcox* doctrine requires application of the occurrence rule — as it will if the action is treated as one in contract — it appears that the following conclusions are viable: If an alleged contractual breach was caused by the negligence of the attorney, the court will, generally, treat the action as one in tort for negligence, irrespective of the posture of the pleadings. If the jurisdiction applies the damage rule in legal malpractice actions in tort for negligence, the complaint will be found timely if the period of limitation, measuring from the time actual damage was sustained, has not expired.[58] This will result *provided* (and dependent upon the particular jurisdictional view) that the action is not based upon 1) a failure to live up to an agreement to obtain a specific or particular result;[59] 2) a failure to perform precisely what the attorney contracted to do;[60] 3) a failure to perform a specific undertaking or promise contained in the contract between attorney and client;[61] or 4) a failure to live up to an agreement which assured the effect of legal services.[62]

In this manner, in jurisdictions applying the *Wilcox* doctrine, legal malpractice actions may be sustained against the defense of the statute of limitations in a vast majority of cases, because fact patterns in legal malpractice cases are generally grounded in negligence, and relatively few cases fall within the provisos set forth above. Thus, the unconscionable result that may flow from *Wilcox* — having the statute of limitations run before the client has suffered actual damage and can maintain an action to recover for such damage — will be precluded in most instances.

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[57] *Id.* at 836.

[58] *See* Sections III, VI and VII for discussion of Damage Rule.

[59] *See* DiPietro v. Hecker, 43 Misc. 2d 630, 251 N.Y.S. 2d 704 (1984); Glens Falls Insurance Co. v. Reynolds, 3 A.D.2d 686, 159 N.Y.S.2d 95 (1957). *See also* Albany Sav. Bank v. Caffry, Pontiff, Stewart, Rhodes & Judge, 95 A.D. 2d 918, 463 N.Y.S. 2d 896 (1983); Brainard v. Brown, 91 A.D.2d 287, 458 N.Y.S. 2d 735 (1983). *Contra:* Sinopoli v. Cocozza, 105 A.D. 2d 743, 481 N.Y.S. 2d 177 (1984); Kramer v. Belfi, 106 A.D. 2d 615, 482 N.Y.S. 2d 898 (1984). For a discussion of the differing views in New York and their bases, see Section VIII, *infra,* at the point where Video Corporation of America v. Frederick Flatto Associates, Inc., 58 N.Y.S. 2d 1026, 462 N.Y.S. 2d 439 (1983), is discussed.

[60] Bonanno v. Potthoff, 527 F. Supp. 561 (N.D. Ill. 1981).

[61] Moorehead v. Miller, 102 F.R.D. 834 (V.I. 1984).

[62] *See* Glens Falls Insurance Co. v. Reynolds, 3 A.D.2d 686, 159 N.Y.S. 2d 95 (1957). *See, also,* Albany Sav. Bank v. Caffry, Pontiff, Stewart, Rhodes & Judge, 95 A.D.2d 918, 463 N.Y.S.2d 896 (1983); Brainard v. Brown, 91 A.D. 2d 287, 458 N.Y.S.2d 735 (1983). *Contra:* Sinopoli v. Cocozza, 105 A.D. 2d 743, 481 N.Y.S. 2d 177 (1984); Kramer v. Belfi, 106 A.D. 2d 615, 482 N.Y.S. 2d 898 (1984). For a discussion of the differing views in New York and their bases, see Section VIII, *infra,* at the point where Video Corporation v. Frederick Flatto Associates, Inc., 58 N.Y.S. 2d 1026, 462 N.Y.S. 2d 439 (1983), is discussed.

Second: Application of the contract or tort statute of limitations may depend upon the nature of the injury alleged in the pleadings and the damages requested. In *Hillhouse v. McDowell,*[63] the plaintiff sought to have the longer contract statute of limitations applied, rather than the shorter statute for negligence, in order to prevent the action from being time-barred. The court distinguished *Bland v. Smith,*[64] which applied the tort statute of limitations. In that case "the plaintiff not only based his action upon tort but also upon *injuries to his person* and therefore this one year [tort] statute applied"[65] (emphasis added). The court stated that the six-year contract statute was applicable only where the recovery sought was based upon contract, and *no element of personal injury.*[66] Furthermore, in *Bland,* "it was obvious that the plaintiff was seeking *punitive damages* as well as compensatory damages"[67] (emphasis added). Punitive damages, the court observed, are generally allowed only in certain tort actions and not in actions for breach of contract.[68]

Although the plaintiff sought to have the contract statute of limitations applied in *Hillhouse,* the principles of that case may be applied in circumstances where, to have a viable action, it is necessary for the plaintiff to avoid the consequences of the *Wilcox* doctrine. Thus, if a jurisdiction applies the occurrence rule to breach of contract actions, and the damage rule to tort actions, the problem of having the statute of limitations expire before plaintiff suffers actual damage (as in *Wilcox*) will be prevented if the plaintiff alleges personal injury or requests punitive damages in his complaint, because this will cause the court to treat the action as one in tort. This could prevent dismissal on the pleadings where the contract period of limitation has expired, but the tort period of limitation has not expired, measuring from the time actual damage was sustained, and the allegation of personal injury or the request for punitive damages causes the court to treat the action as one in tort.

Assuming a court is prepared to follow this view, important questions still remain to be answered. What should the result be if the plaintiff, as a matter of law, fails to establish personal injury or entitlement to punitive damages upon the trial of the action? Should the court, rather than sending the case to the jury, dismiss the action on the ground that the tort statute of limitations does not apply, and measuring from the time of breach, the contract period of limitation has expired? What if the facts warrant the questions of personal injury or entitlement to punitive damages going to the jury? Should the court ask for a special verdict, and if the jury finds neither personal injury nor punitive damages, dismiss the action at that time on the ground that the tort statute of

[63] 219 Tenn. 362, 410 S.W. 2d 162 (1966).

[64] 197 Tenn. 683, 277 S.W.2d 377 (1954).

[65] 219 Tenn. 362, 366, 410 S.W. 2d 162, 163 (1966).

[66] *Id.*

[67] *Id.* at 366, 410 S.W. 2d at 164.

[68] *Id.*

limitations does not apply, and measuring from the time of breach the contract period of limitation has expired? Applying *Hillhouse,* it appears that the answers to these questions should be in the affirmative.

Third: An interesting question may be posed as to whether, if there is a breach of contract by an attorney, this is to be treated as breach of an express contract or an implied contract. In *Hillhouse,* the court stated that the action was based upon an attorney-client relationship of trust and "in addition to being an implied contract it was an express contract that he [the attorney] would exercise reasonable skill and diligence in doing what was undertaken . . ."[69]

Even if a court were to apply the occurrence rule to both the breach of an express contract and an implied contract, the statute of limitations in a jurisdiction may differ for each of them. The result in a particular case, i.e., whether the period of limitation has expired, may be determined by whether a court concludes that the legal malpractice action involves the breach of an express or an implied contract. If *Hillhouse* is applied, the plaintiff should have a choice of remedies. But, notwithstanding the conclusion in *Hillhouse,* it is questionable whether the obligation that an attorney "exercise reasonable skill and diligence in doing what was undertaken"[70] may be properly considered an express contract.

Fourth: The argument may be advanced that in *all* instances where an attorney negligently performs legal services, the client should be entitled to maintain an action in tort, even if the attorney's conduct also involves a breach of contract. This is consistent with the principle that where conduct results in both a breach of contract and a tort, the plaintiff has a choice of remedies.[71] Furthermore, if the action is treated as one in tort for negligence, under traditional concepts, the damage rule should be applied.[72] Application of these principles would effectively circumvent the *Wilcox* doctrine and preclude the possibility of the statute of limitations expiring on the client's cause of action before the client sustains actual damage.

Fifth: The position may be taken that *irrespective* of whether the action is treated as one for *breach of contract or for tort,* there can be no recovery in the absence of actual damage, and the statute of limitations therefore begins to run only after actual damage has been sustained. Recent developments in the substantive law of legal malpractice, and an examination of *Duke & Co. v. Anderson,*[73] provide a viable basis for this conclusion.

In *Duke,* the action was *assumpsit,* and the allegation was that the at-

[69] *Id.* at 371, 410 S.W. 2d at 166.

[70] *Id.*

[71] *See* PROSSER ON TORTS § 92 (5th Ed. 1984).

[72] PROSSER ON TORTS § 30 (5th Ed. 1984); Note, *supra* note 9, at 1201.

[73] 275 Pa. Super. 65, 418 A.2d 613 (1980).

torney had failed to file a defamation action after agreeing that he would file "some kind of a notice"[74] with respect thereto. Plaintiff's position was that even though it was determined in advance that no actual loss occurred, still, "so long as the action is in assumpsit rather than trespass, the case should go to the jury so that the jury may enter an award of nominal damages."[75] This embraces the *Wilcox* doctrine, but was rejected by the court in *Duke.* The court in *Duke* sustained a compulsory nonsuit against the plaintiff on the ground that it had failed to show any injury, because plaintiff had failed to prove that it *would have been successful* in a defamation action if the attorney had instituted such an action on its behalf. The court concluded that where it is alleged that an attorney has breached his professional obligations to his client, "an essential element of the cause of action, whether the action be denominated in assumpsit or trespass, is proof of actual loss."[76] This articulates a standard pursuant to which it appears that actual damage must occur for a legal malpractice action to accrue, in either tort or contract, and it would follow that actual damage must occur before the statute of limitations begins to run.

The *Duke* court recognized that its holding might be contrary to earlier Pennsylvania cases, but pointed out that when the earlier cases were decided, "the law of malpractice had not developed to the point it has reached today."[77] A substantial body of substantive law has now developed in legal malpractice to the effect that if the attorney, due to wrongful conduct, fails in the prosecution or defense of an action, the client is not entitled to recover against the attorney unless the client would have been successful in the prosecution or defense of the action.[78] The holding in *Duke* requires that in a legal malpractice action predicated upon wrongful failure of an attorney to prosecute an action, actual damage must be proven for the action to succeed. The language of the court, quoted above, is clearly broad enough to cover all legal malpractice actions. In any event, if actual damage is required in legal malpractice actions arising in factual situations such as that in *Duke,* this requirement should, logically and equitably, be extended to *all* legal malpractice actions.

Another aspect of *Duke* causes serious difficulty, but may be turned to an advantage, upon analysis and revision. The court indicated that no purpose is served by creating two distinct classes of malpractice actions, each with its own rule of damages, "according to whether the action was denominated as an action in assumpsit or an action in trespass."[79] This was coupled with the court's

[74] *Id.* at 67, 418 A.2d at 614.

[75] *Id.* at 73, 418 A.2d at 617.

[76] *Id.*

[77] *Id.*

[78] *See,* e.g., Duke & Co. v. Anderson, 275 Pa. Super 65, 418 A.2d 613 (1980); Lieberman v. Employers Insurance of Wausau, 171 N.J. Super. 39, 407 A.2d 1256 (1979), *modified,* 84 N.J. 325, 419 A.2d 417 (1980); Zych v. Jones, 84 Ill. App. 3d 647, 40 Ill. Dec. 369, 406 N.E. 2d 70 (1980).

[79] Duke & Company v. Anderson, 275 Pa. Super. 65, 73, 74, 418 A.2d 613, 617 (1980).

conclusion that, if the action is in *trespass,* the client is required to prove *actual loss* if the case is to get to the jury.[80] The court cites Pennsylvania authority for this last proposition. However, this is *not* the traditional and generally developed common law rule that has evolved subsequent to the Statute of Westminster II (1285).[81] In addition, under traditional and generally developed common law principles, a legal malpractice action would not meet the requirements for an action of trespass. In *Leame v. Bray,*[82] it was held that either trespass or trespass on the case lies for negligent conduct that directly causes injury, but only trespass on the case lies for negligence that indirectly causes injury. The damage that results from an attorney's negligent failure to file an action (if there is damage) *indirectly* results from the attorney's negligence. Therefore, in invoking the common law forms of action as a basis for decision in this area, it would generally be proper to invoke the action of trespass on the case, and *not* trespass.

The following basis for decision would in most instances be correct, if a court chooses to invoke the common law forms of action: 1) The proper common law form of action for legal malpractice is trespass on the case, because the wrongful conduct of the attorney indirectly causes damage; 2) In trespass on the case, "unlike trespass, damage is usually an essential element of liability"[83]; 3) Therefore, a legal malpractice action must be treated as one in trespass on the case, and actual damage must occur for the action to accrue, and for the statute of limitations to begin to run.

VI. A CLOSER EXAMINATION OF THE DAMAGE RULE — WHEN DAMAGE OCCURS

Even where courts adhere to the damage rule in legal malpractice actions, a surprisingly broad spectrum of criteria has been developed in various jurisdictions to determine when damage occurs for the purpose of causing an action to accrue. It has been said that an action accrues when damages are ascertainable;[84] when there is identifiable and appreciable loss;[85] when substantial injury is first caused;[86] and when the alleged negligence is irremediable.[87]

In terms of particular applications, it has been said that an action accrues on the date when a negligently drafted settlement agreement is entered into;[88]

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[80] *Id.* at 73-74, 418 A.2d at 617 (1980).

[81] 13 Edw. I, c. 24 (1285), 1 Pickering's Statutes at Large 196.

[82] 3 East. 593, 102 Eng. Rep. 724 (1803).

[83] J. KOFFLER, COMMON LAW PLEADING, 187 (1969).

[84] *See, e.g.,* Jarmillo v. Hood, 93 N.M. 433, 601 P.2d 66 (1979); Jepson v. Stubbs, 555 S.W. 2d 307 (Mo. 1977) (en banc).

[85] *See, e.g.,* Luick v. Rademacher, 129 Mich. App. 803, 342 N.W.2d 617 (1983).

[86] *See, e.g.,* Pancake House Inc. v. Redmond, 239 Kan. 83, 716 P.2d 575 (1986).

[87] *See, e.g.,* Banton v. Marks, 623 S.W.2d 113, 116 (Tenn. App. 1981); Heyer v. Flaig, 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969).

[88] *See, e.g.,* Arizona Management Corp. v. Kallof, 142 Ariz. 64, 688 P.2d 710 (1984).

when a tax penalty is assessed for failure to file a return;[89] or when plaintiff is notified of a tax assessment.[90] Where the beneficiary of a will is suing an attorney for alleged negligence in drafting a will, thereby causing loss to the beneficiary, the action may accrue upon the death of the testator.[91]

In *Jepson v. Stubbs,*[92] the court applied the principle that an action accrues when damage is ascertainable. The court was confronted with various factual choices as to when this occurred. The action was brought by the plaintiff against his former attorney, alleging negligence in connection with the attorney's representation of the plaintiff on a charge of refusing to submit to induction into military service, as a result of which plaintiff was convicted and imprisoned. By statute it was provided that an action acrued when "the damage resulting therefrom [from the wrong] is sustained and is capable of ascertainment . . ."[93]

The court held that the action accrued and the statute of limitations began to run when the plaintiff was released from confinement and placed on parole for the remainder of his term. At that time, the court reasoned, the plaintiff was in a position to inform the jury that his actual imprisonment continued to that date, and that he would be on parole for the remainder of his term. The court stated that the "[p]laintiff has not suggested anything affecting *the elements or extent of his damage*"[94] which could have been proven at a later date that could not have been proven on the date he was released from confinement and placed on parole (emphasis added). This reasoning of the court is consistent with the conclusion that it would require that *all* of the damage be ascertainable before the action accrues. If the court were to explicitly adopt this position, it would be harsh and unmanageable. It would be unfair to require a client to delay his action if substantial damage has occurred simply because additional damage might occur. Furthermore, it may frequently be speculative as to whether additional damage will occur.

Many courts, when requiring that the damage be ascertainable for an action to accrue, clearly do not require that all of the damage must be ascertainable. But these courts have sharp differences as to what meets the ascertainable test. Thus, in *Jepson* the court specifically rejected the view that ascertainable means discoverable, observing that the legislature, in establishing the "capable of ascertainment" test "does not establish a rule of discovery"[95] for purposes of determining when the cause of action accrues and the statute of limitations begins to run. On the other hand, in *Jaramillo v. Hood,*[96] the court

[89]United States v. Gutterman, 701 F.2d 104 (9th Cir. 1983).

[90]Snipes v. Jackson, 69 N.C. App. 64, 316 S.E.2d 657 (1984).

[91]Heyer v. Flaig, 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969).

[92]555 S.W.2d 307 (Mo. 1977) (en banc).

[93]*Id.* at 309, *citing* Mo. Rev. Stat. § 516.100 (1969).

[94]*Id.* at 312.

[95]*Id.*

[96]93 N.M. 433, 601 P.2d 66 (1979).

concluded that the cause of action did not accrue "until the harm or damage was ascertainable or discoverable."[97] If a jurisdiction has adopted the ascertainable test for damage, but not the discovery rule, the *Jaramillo* conclusion (which appears to equate ascertainable with discoverable) might be used to introduce the discovery rule "by the back door." The court might simply conclude (if its view of policy favored the discovery rule) that the discovery rule in fact existed in the jurisdiction because of the requirement that damage be ascertainable. Or, a court might conclude that the policy favoring the discovery rule is so firmly established that a necessary and proper result is to expressly adopt the discovery rule in the jurisdiction.

In *Banton v. Marks*[98] the court adopted the view that a legal malpractice action accrues as of the date the alleged negligence of the attorney becomes "irremediable."[99] It was alleged in this case that the attorney negligently allowed the statute of limitations to run on his client's medical malpractice action. The court stated that if there was malpractice by the attorney, the injury occurred on "the date on which the statute of limitations prevented plaintiff from filing suit against the [sic] alleged doctor and medical facility."[100] On that date, "the alleged negligence was 'irremediable'."[101]

The conclusion in *Banton* is disarmingly simple. But in *AMFAC Distribution Corp. v. Miller,*[102] which involved alleged malpractice of an attorney in the course of litigation, the court approved the view that the cause of action accrued "when the plaintiff knew or should reasonably have known of the malpractice and when plaintiff's damages are certain and *not contingent upon the outcome of an appeal*"[103] (emphasis added).

Assume a case where an attorney has apparently allowed the period of limitation to run on his client's claim. Before a legal malpractice action is commenced against him by the client, the attorney commences the underlying action on behalf of the client, with the apparent purpose of alleging that, on some ground, the statute has been tolled. This may be a good faith effort to pursue the client's claim, or it may be a dilatory tactic to preclude the client from instituting a legal malpractice action against the attorney at that time. Even if the action is then dismissed on the ground that the period of limitation has expired, can the attorney further preclude a legal malpractice action at this time by advising the client to institute an appeal? It would appear that he could under *Miller.*

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[97] *Id.* at 434, 601 P.2d at 67.

[98] 623 S.W.2d 113 (Tenn. App. 1981).

[99] *Id.* at 116.

[100] *Id.*

[101] *Id.*

[102] 138 Ariz. 155, 673 P.2d 795, *aff'd* 138 Ariz. 152, 673 P.2d 792 (1983) (en banc).

[103] *Id.* at 156, 673 P.2d at 796.

At this point, the client may be induced to settle his legal malpractice claim against the attorney rather than submit to the further expense and delay of an appeal. If the attorney throughout has acted in good faith, this result may be appropriate. But if the attorney filed the action on the client's claim after the limitations period had expired as a dilatory tactic, the result may be far from just. The client may at this time be induced to accept less in settlement of his legal malpractice claim than the client would otherwise accept, in order to avoid the additional time, expense and burden of an appeal.

But, it may be asked, why shouldn't the client simply advise the attorney not to proceed with the appeal? The answer is that a well informed client will learn that if he does not appeal, but at this point in time brings a legal malpractice action, he may be required to prove that an appeal would have been unsuccessful.[104] This implies time, expense, and uncertainty, if he rejects the attorney's advice to appeal. The viable alternatives, at this time, may be to appeal or settle his claim for legal malpractice for less than the client would otherwise accept.

Is there a solution to this problem? A rule could be evolved to the effect that if a patently frivolous appeal is recommended by an attorney, and acceded to by the client, and is unsuccessful, punitive damages may be awarded in a subsequent legal malpractice action. A reasonable ceiling might be established (by ratio or otherwise) as to the amount recoverable in punitive damages in such a circumstance. Similarly, punitive damages might be made recoverable for originally commencing the action on the client's behalf after the limitation period had expired, if this was patently frivolous.

VII. QUANTUM OF DAMAGES REQUIRED BY VARYING PRINCIPLES

The question of when damage occurs for the purpose of causing a legal malpractice action to accrue, discussed above, may inexorably be bound to the question of *how much* damage is required for this purpose. There is burgeoning authority that looks to the *quantum* of damage in determining whether an action accrues and the statute of limitations begins to run, and does not require a showing of "all."[105] Where a jurisdiction applies the discovery rule,[106] it may be necessary that the damage is ascertainable before the statute of limitations will begin to run, if the word ascertainable is used synonomously with discoverable.[107]

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[104] *See, e.g.*, AMFAC Distribution Corp. v. Miller, 138 Ariz. 155, 673 P.2d 795, *aff'd* 138 Ariz. 152, 673 P.2d 792 (1983).

[105] *See, e.g.*, Budd v. Nixen, 6 Cal. 3d 195, 98 Cal. Rptr. 849, 491 P.2d 433, 436 (1971) (En Banc); Northwestern National Insurance Co. v. Osborne, 573 F. Supp. 1045 (E.D. Kentucky 1983); Arizona Management Corp. v. Kallof, 142 Ariz. 64, 688 P.2d 710 (1984); Rosnick v. Marks, 218 Neb. 499, 357 N.W.2d 186 (1984); Luick v. Rademacher, 129 Mich. App. 803, 342 N.W.2d 617 (1983); Wall v. Lewis, 366 N.W.2d 471 (N.D. 1985); Jankowski v. Taylor, Bishop & Lee, 246 Ga. 804, 273 S.E. 2d 16 (1980).

[106] *See* Section IX for discussion of Discovery Rule.

[107] *Id.*

Budd v. Nixen,[108] a case to which many courts pay homage[109] on the question of the *quantum* of damage necessary for an action to accrue, is impressive for its elusiveness on this question. The opinion employs a vast range of concepts, and is also self-contradictory. In *Budd,* the court applies the damage rule together with the discovery rule, and holds that a legal malpractice action in tort does not accrue until the client both sustains damage and discovers or should discover his cause of action.

On the question of damages, the court states that *"[a]ny appreciable and actual harm"*[110] (emphasis added) flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue. But in the very next sentence the court states that, once having discovered his attorney's negligence and "having suffered *some damage,* the client must institute his action within the time prescribed in the statute of limitations,"[111] (emphasis added) or he will be barred from thereafter complaining about the attorney's conduct. These criteria obviously differ.

The opinion generates additional problems. The court observes that plaintiff alleges in his complaint that "he was compelled to incur and pay attorneys fees and legal costs and expenditures."[112] Then, after enumerating attorney's fees that the plaintiff allegedly paid, the court states that if the defendant's negligence caused plaintiff "to incur or pay such fees"[113] more than two years prior to the institution of the legal malpractice action, plaintiff's action would be barred by the statute of limitations. As there is no way of knowing whether the court chose its language carefully, or whether this difference in language between the plaintiff's allegations and the court's opinion is the result of inadvertance, presumably "or" must be treated as the operative word on the question of attorney's fees.

Furthermore, as plaintiff's complaint alleged that plaintiff was compelled to "incur and pay attorney's fees and legal costs and expenditures,"[114] the question arises as to whether incurring and paying legal costs and expenditures is a sufficient basis for finding adequate damage, so as to cause the action to accrue and the statute of limitations to begin running. Additionally, must legal costs and expenditures be both incurred and paid, or is it enough if they are only incurred? The court does not address this question.

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[108] 6 Cal. 3d 195, 98 Cal. Rptr. 849, 491 P.2d 433 (1971) (en banc).

[109] *See, e.g.,* Northwestern National Insurance Co. v. Osborne, 573 F. Supp. 1045 (E.D. Kentucky 1983); Arizona Management Corp. v. Kollof, 142 Ariz. 64, 688 P.2d 710 (Ariz. App. 1984); Rosnick v. Marks, 218 Neb. 499, 357 N.W.2d 186 (Neb. 1984); Luick v. Rademacher, 129 Mich. App. 803, 342 N.W.2d 617 (1983); Wall v. Lewis, 366 N.W.2d 471 (N.D. 1985); Jankowski v. Taylor, Bishop & Lee, 246 Ga. 804, 273 S.E.2d 16 (1980); Levin v. Berley, 728 F.2d 551 (1st. Cir. 1984).

[110] Budd v. Nixen, 6 Cal. 3d 195, 201, 98 Cal. Reptr. 849, 852, 491 P.2d 433, 436 (1971).

[111] *Id.* at 201, 98 Cal. Reptr. at 853, 491 P.2d at 437.

[112] *Id.*

[113] *Id.* at 202, 98 Cal. Rptr. at 853, 491 P.2d at 437.

[114] *Id.* at 201, 98 Cal. Rptr. at 853, 491 P.2d at 437.

The possible consequences of *Budd* are startling, although this fact has been left masked by the many courts that have rushed to cite the opinion, and quote its language at length on the question of damages. These are the possibilities:

If *Budd* is applied in a jurisdiction that follows the damage rule in a tort action (as *Budd* did), and not the discovery rule (contrary to *Budd*), the plaintiff will usually be no better off in a tort action under the damage rule than he is in a contract action under *Wilcox v. Plummer*,[115] where the occurrence rule is applied. This is so because some legal fee is usually incurred when, or shortly after, an attorney is retained (where the retainer is not on a contingent basis). If "some"[116] damage is all that is required (as per one statement in *Budd*), then usually at the moment of retainer, or shortly thereafter, adequate damage has been sustained to satisfy the damage requirement in a tort action for legal malpractice. Therefore, when the attorney is negligent some time later, the action *immediately accrues* under the damage rule, as sufficient damage had *previously* been incurred to cause this result. Even if "appreciable" harm is required[117] (as per one statement in *Budd*), it appears that the result would usually be the same, as relatively modest legal expenses were testified to by plaintiff in response to interrogatories in *Budd*, and the court remanded the case to the lower court for a determination as to *when* (not in what amount) damage occurred.[118]

Even more startling is that a similar result will usually occur where the damage rule *and* the discovery rule are both applied in a tort action for legal malpractice. It will usually be the simplest of tasks to establish that the client knew or should have known that he had incurred attorney's fees at or about the time of retainer (where the retainer is not on a contingent basis), and that therefore both damage and discovery of damage exist when the attorney, at a later date, is negligent. What is terribly unfortunate — and *contrary to the policy that supports the discovery rule* — is that the discovery rule is aimed at fairness, and this undercuts fairness. This is so because a client may — as a reasonable person — simply not think of *accrued and unpaid legal fees* as damage. Yet, their existence may cause the period of limitation to expire on the claim of a client who does not initiate a legal malpractice action based upon the existence of accrued and unpaid legal fees. It is difficult to imagine that courts, applying the discovery rule, would knowingly condone such a result, which might in some circumstances be described as entrapment of the client.

It would seem that it was never intended that a tort action for legal malpractice, applying the damage rule and the discovery rule, should where

[115]29 U.S. (4 Pet.) 172 (1830).

[116]*See, e.g., Budd*, 201, 98 Cal. Rptr. at 853, 491 P.2d at 437.

[117]*Id.* at 201, 98 Cal. Rptr. at 852, 491 P.2d at 436.

[118]*Id.* at 203-204, 98 Cal. Rptr. at 854, 491 P.2d at 438.

unfairness occurs, lead to the same result as a contract or tort action applying the occurrence rule and without the discovery rule. The first set of principles (discovery rule and damage rule) are presumably applied to maximize the protection of the client, while the second set of principles (occurrence rule without the discovery rule) generally minimize the client's protection. Yet in the context of accrued and unpaid legal fees, as indicated, they would both minimize the protection of the client. A method of avoiding the quagmire into which the accrued legal fee criteria of *Budd* can lead, is for the courts to simply *reject* this aspect of *Budd.*

VIII. DETERMINING WHICH STATUTE OF LIMITATIONS APPLIES IN LEGAL MALPRACTICE ACTIONS

In this section focus is on the nature of the problems that arise, and considerations and criteria applied, in determining what statute of limitations will apply in a legal malpractice action. Where there is a statute in a jurisdiction that by its terms specifically applies to malpractice, the question may nevertheless be raised as to whether this statute is applicable to legal malpractice, or is confined to malpractice actions of a different nature, such as medical malpractice. Where a statute is found to apply to legal malpractice actions, the question arises as to whether the statute applies to all, or only some, legal malpractice actions. If interpreted not to apply to all legal malpractice actions, issues arise as to what statutes of limitations apply in particular cases, and this may involve an exploration of numerous factors and considerations, with varying degrees of complexity.

In Ohio, the statute of limitations expressly states that it covers, among other actions, "malpractice."[119] In discussing the applicability of this statute to legal malpractice, an Ohio Court of Appeals observes that malpractice "consists of 'the professional misconduct of members of the medical profession and attorneys'."[120] Having thus determined that misconduct of attorneys is governed by this statute, the court concludes that the statute applies whether the professional misconduct is grounded in tort or contract. In the process of arriving at these conclusions the court apparently reaches for the ultimate in directness when it states, "malpractice by any other name still constitutes malpractice."[121]

In *Johnson v. Haugland,*[122] the essence of the complaint was that defendants had breached their professional duty to the plaintiff by negligently handling his defense in an action, and failing to inform him of a conflict of in-

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[119]OHIO REV. CODE ANN. § 2305.11 (1981).

[120]Muir v. Hadler Real Estate Management Co., 4 Ohio App. 3d 89, 446 N.E. 2d 820, 822 (1982) (citing, Richardson v. Doe, 176 Ohio St. 370, 372, 199 N.E. 2d 878 (1964)).

[121]*Id.* at 91, 446 N.E. 2d at 822.

[122]303 N.W. 2d 533 (N.D. 1981).

terest. A statute of limitations was provided for actions to recover for damages resulting from "malpractice,"[123] but plaintiff sought application of a different and longer statute of limitations. The Supreme Court of North Dakota concluded that because a determination of which statute of limitations is applicable in a given case "turns on the nature of the subject matter and because the nature of Johnson's claim regarding the attorneys in this case is professional malpractice,"[124] the malpractice statute applies. The court ultimately relies upon a statutory rule of construction.[125]

The court refers in a footnote to an early Ohio decision[126] where, in applying to attorneys a one year "malpractice" statute of limitations that had previously been applied to physicians, rather than a six year contract statute of limitations, the Ohio court states: "No reason is conceivable why a physician should live down liability for his blunders in one year while a lawyer should fear his luckless client's shadow for five more years."[127] The Ohio court was referring to the six-year limitation in the statute governing breach of implied contracts. The court in *Johnson* also observes that the Ohio court "reasoned that a contrary holding would force a conclusion that the legislature '. . . undertook to discriminate in favor of the medical profession against that to which doubtless a great many of its members belong'."[128] *Query* whether this is an appropriate method of determining legislative intent. It appears that the Ohio court was envisioning (if it had held to the contrary) an enclave of invulnerability for physicians.[129]

In a long but carefully structured opinion, the Supreme Court of Michigan in *Sam v. Balardo*[130] concluded that the legislative intent was to include legal malpractice within a statute of limitations covering "actions charging malpractice."[131] As originally enacted in 1905 the statute provided that "all

[123]N.C. Cent. Code 28-01-18(3) (1974).

[124]Johnson v. Haugland, 303 N.W. 2d 533, 538-39 (N.D. 1981).

[125]*Id.* at 539, n.4:

> While recognizing that any alleged professional malpractice may be framed generally in either tort or contract theory, the statute of limitation regarding these general theories is not applicable when a special statute of limitations as to the malpractice exists. This conclusion is derived from application of Section 1-02-07, N.D.C.C., which reads:
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> "1-02-07. Particular controls general. — Whenever a general provision in a statute shall be in conflict with a special provision in the same or in another statute, the two shall be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest legilative intent that such general provision shall prevail."

[126]Long v. Bowersox, 8 Ohio N.P. (n.s.) 249, 19 Ohio Dec. 494, (1909).

[127]Johnson v. Haugland, 303 N.W. 2d 533, 539, n.5 (N.D. 1981), *quoting* from Long v. Bowersox, 8 Ohio N.P. (n.s.) 249, 256, 19 Ohio Dec. 494, 500 (1909), except that phrase in *Long* is "five years more," rather than "five more years."

[128]*Id.*

[129]*See* Section IX(B) for discussion, in another context, of an enclave of invunerability for attorneys.

[130]411 Mich. 405, 308 N.W. 2d 142 (1981).

[131]*Id.* at 427, 308 N.W. 2d at 151 (citing MICH. COMP. LAWS ANN. § 600.5805(3) (West 1968).

actions against physicians, surgeons and dentists for malpractice shall be commenced within two years."[132] The court referred to such professionals as being *"protected* by the short two-year limitation period"[133] (emphasis added). Focusing on what it considered to be the protective nature of the statute, the court pointed out that the 1961 amendment which deleted the words "physicians, surgeons and dentists" from the malpractice statute of limitations demonstrated a legislative intent to include attorneys. A public policy argument advanced by the court to support this conclusion is that because attorneys are called upon "to make decisions that involve the exercise of independent professional judgment of essentially the same serious quality as those made by a physician,"[134] they are "deserving of the same protection"[135] of a two year statute of limitations. It appears that the reasoning fails to ascribe sufficient weight to the fiduciary relationship between attorney and client, the dependence of the client, and the *client's* deserving *protection.* In all fairness, however, it must be observed that the Michigan courts and legislature have through the decision making process, followed by legislative enactments, adopted both a last treatment rule (a form of continuous representation rule) and a discovery rule for the protection of clients in the attorney-client relationship.[136] While the Michigan statute is wanting in some respects, as indicated in the analysis of that statute,[137] it does show that as a jurisdictional entity Michigan has been striving to protect the client with a view toward fundamental fairness.

In *Barnard v. Dilly,*[138] plaintiff contended on appeal that the trial court had improperly applied the Michigan malpractice statute of limitations to her claims, rather than statutes governing contract or general negligence. The court concluded that the claim was grounded only on malpractice and not in contract because the agreement between attorney and client was not one to perform "a specific act, but one to exercise appropriate legal skill in providing representation in a lawsuit."[139]

The court also rejected plaintiff's contention that defendant was liable to her on the general theory of negligence. The court states that "[t]o establish a tort, one must first establish a duty to the claimant imposed on the alleged tortfeasor,"[140] and the only claim of duty here "arises out of the attorney-client relationship," and "[w]here the alleged duty arises out of such a relationship,

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[132] *Id.* at 432, 308 N.W.2d at 153.

[133] *Id.* at 432, 308 N.W.2d at 153-154.

[134] *Id.* at 435, 308 N.W.2d at 155.

[135] *Id.* at 436, 308 N.W.2d at 155.

[136] *See* Section X(B).

[137] *Id.*

[138] 134 Mich. App. 375, 350 N.W. 2d 887 (1984).

[139] *Id.* at 378, 350 N.W. 2d at 888.

[140] *Id.*

the tort claim is one for malpractice and malpractice only."[141]

A triptych of Indiana cases adds additional perspective in this area. In *Shideler v. Dwyer,*[142] the Supreme Court of Indiana, in construing a statute of limitations that applied to "physicians, dentists, surgeons, hospitals, sanitariums, or others,"[143] found that under the doctrine of usudem generis, "or others" applied "to others of the medical care community."[144] Therefore, the statute does not apply to legal malpractice. In this action, plaintiff alleged that a will had been improperly drafted, causing her as a beneficiary, to be deprived of monthly monetary payments. The court rejected plaintiff's contention that the contract statute of limitations applied, and concluded that the two year statute of limitations for injury to personal property[145] was applicable, stating that this "governs all actions involving claimed losses of 'rights and interests in or to' personal property."[146]

Almost two years later, in *Whitehouse v. Quinn,*[147] the Court of Appeals of Indiana, Second Circuit, concluded that the plaintiff's complaint was predicated upon nonperformance of a promise contained in a written contract and thus governed by the applicable twenty-year limitation period provided by statute.[148] The court distinguishes *Shideler* by pointing out, among other things, that the plaintiff in *Shideler* was not the client of the attorney, but the beneficiary of a will drafted by the attorney, and there was no express promise the nonperformance of which formed the basis of the claim. In *Whitehouse,* the written contact "is more than a mere link in a chain of evidence needed to state the claim."[149] The court also concludes that, "[i]n effect, the contract was for a *specific result* — Quinn would 'prosecute' 'others' to final settlement or judgment"[150] (emphasis added).

More than a year later, the Court of Appeals of Indiana, Fourth District, in *Keystone Distribution Park v. Kennerk, Dumas, Burke, Backs, Long and Salin,*[151] was presented with a case in which it was alleged that the attorney breached an oral contract with respect to assisting in procuring the issue of economic development bonds for the client. The court refused to apply a six

[141] *Id.* at 379, 350 N.W. 2d at 888. *See also Id.*, at 378, 350 N.W. 2d at 888, where the court states: "The applicable period of limitation depends upon the theory actually pled when the same set of facts can support either of two distinct causes of action."

[142] 417 N.E. 2d 281 (Ind. 1981).

[143] IND. CODE ANN. 34-4-19-1 (Burns 1973).

[144] *Shideler,* 417 N.E. 2d at 283.

[145] IND. CODE ANN. 34-1-2-2 (Burns 1973).

[146] *Shideler,* 417 N.E. 2d at 287.

[147] 443 N.E. 2d 332 (Ind. App. 1982).

[148] IND. CODE ANN. 34-1-2-2(6) (Burns 1973).

[149] Whitehouse v. Quinn, 443 N.E. 2d 332, 337 (Ind. App. 1982).

[150] *Id.*

[151] 461 N.E.2d 749 (Ind. App. 1984).

year statute of limitations which governed actions for breaches of oral contracts.[152] As in *Shideler,* it held that the two year statute was applicable.[153] The court expressed "serious reservations"[154] about the *Whitehouse* holding, in view of the analysis in *Shideler,* but it added, "more to the point the *Whitehouse* court indicated that it was recognizing a narrowly drawn exception based upon an express promise set forth in the written contract."[155] In *Keystone* the court concludes that "the 'verbal contract' to employ the attorney and the attorney's alleged failure to perform, allege, in essence, the *tort of legal malpractice.* The claim was governed by the two year statute"[156] (emphasis added).

This triptych of Indiana cases is thought provoking, but hardly satisfying in terms of analysis. *Shideler* had ruled out application of the "malpractice" statute in legal malpractice, by limiting its application to the medical community,[157] and applied the statute governing injury to personal property.[158] *Keystone* concludes that the essence of the claim against the attorney is "the tort of legal malpractice."[159] It may be questioned whether this is "the tort of legal malpractice," as *Keystone* concludes, or, more properly understood, legal malpractice resulting from the tort of negligence.[160] Furthermore, while most instances where legal malpractice occurs may fall within the broad scope of the statutory provision applied in *Shideler,* as this provision applies "[f]or injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute,"[161] *Shideler* states that another statutory provision might "conceivably" be applicable.[162]

The Supreme Court of Tennessee, in two cases, developed criteria for determining the applicable statute of limitations. In *Hillhouse v. McDowell,*[163]

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[152]*Id.* at 751, *citing* IND. CODE ANN. § 34-1-2-1 (Burns 1973), which provides in part for a six-year statute of limitations "[o]n accounts and contracts not in writing."

[153]*Id.* at 751, *citing* IND. CODE ANN. § 34-1-2-2 (Burns 1973).

[154]*Id.* at 751.

[155]*Id.*

[156]*Id.*

[157]Shideler v. Dwyer, 275 Ind. 270, 272, 417 N.E.2d 281, 283 (1981).

[158]IND. CODE ANN. § 34-1-2-2 (Burns 1973).

[159]Keystone Distribution Park v. Kennerk, Dumas, Burke, Backs, Long and Salin, 461 N.E.2d 749, 751 (Ind. App. 1984).

[160]Absent clear legislative intent to the contrary, a statute of limitations which by its terms applies to "malpractice," should not be construed to terminate rights clients would otherwise have to maintain actions under existing theories of liability. Statutes of limitations are intended as statutes of repose, and absent clear legislative intent should not be construed to truncate existing rights. Thus, for example, they should not form a basis for denying a client a right of action in contract, if absent this statute of limitations the client would otherwise have such a right, unless it is clearly established that this was the legislative intent. See Johnson v. Haugland, 303 N.W.2d 533, 539 (N.D. 1981), where a statutory rule of construction was found determinative.

[161]IND. CODE ANN. § 34-1-2-2(1) (Burns 1973).

[162]Shideler v. Dwyer, 275 Ind. 270, 278, 417 N.E.2d 281, 286-287 (1981).

[163]219 Tenn. 362, 410 S.W.2d 162 (Tenn. 1966).

the court, in applying the six year contract statute of limitations, distinguishes *Bland v. Smith,*[164] which applied a shorter tort statute of limitations. The court observes that in *Bland* the plaintiff had based his action on tort and also upon injuries to his person, and therefore the tort statute applied. *Hillhouse* concluded that the contract statute is applicable only where the recovery sought is based upon a contract, and no element of personal injury.[165] In addition, the plaintiff in *Bland* sought punitive damages, as well as compensatory damages, and punitive damages, the court observed, are generally allowed in certain tort actions, but not in actions for breach of contract.[166] *Hillhouse* provides a basis for asserting that the tort statute should apply where the plaintiff frames his pleading in tort, and also bases his action on injuries to the person, with the request for punitive damages being an added basis for treating the action as one in tort.[167]

In New York, a principle had developed in legal malpractice actions to the effect that if the contract between the attorney and client is an agreement to obtain a specific result, and this is breached, the six year contract statute of limitations applies, even though the breach results from negligence on the part of the attorney; but if the breached agreement is not an agreement to obtain a specific result, and negligence is the gravamen of the action, the three year tort statute of limitations applies.[168]

But a relatively recent New York Court of Appeals case, *Video Corporation v. Frederick Flatto Associates, Inc.,*[169] may have a profound effect in this area. *Video* is not a legal malpractice action, but is an action against an insurance broker for failure to provide adequate coverage. The court takes note of its earlier holding in *Sears Roebuck & Co. v. Enco Association,*[170] which was an action against architects, that had been characterized as professional malpractice,[171] and concludes "an action for failure to exercise due care in the performance of a contract *insofar as it seeks recovery for damages to property or precuniary interests* recoverable in a contract action is governed by the *six year contract* Statute of Limitations"[172] (emphasis added). This conclusion is reached in the context of the New York statutory scheme which specifically provides a *three year* statute of limitations for "an action to recover damages

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[164] 197 Tenn. 683, 277 S.W.2d 377 (Tenn. 1955).

[165] 219 Tenn. 362, 366, 410 S.W.2d 162, 163 (1966).

[166] *Id.* at 366, 410 S.W.2d at 164.

[167] See Section V for a fuller discussion of Hillhouse v. McDowell, 219 Tenn. 362, 410 S.W.2d 162 (1966) and Bland v. Smith, 197 Tenn. 683, 277 S.W.2d 377 (1955).

[168] *See* Discussion in Section V.

[169] 58 N.Y.2d 1026, 462 N.Y.S.2d 439, 448 N.E.2d 1350 (1983).

[170] 43 N.Y.2d 389, 401 N.Y.S.2d 767, 372 N.E.2d 555 (1977).

[171] *See* Video Corp. v. Flatto Assoc., 85 A.D.2d 448, 461, 448 N.Y.S.2d 498, 506 (App. Div. 1982) (Sandler, J., dissenting) *modified,* 58 N.Y.2d 1026, 462 N.Y.S. 2d 439, 448 N.E.2d 1350 (1983).

[172] *Id.* at 1028, 462 N.Y.S. 2d at 439, 448 N.E.2d at 1350 (1983) (citing CPLR 213(2) (McKinney 1972).

for *malpractice,* other than medical or dental malpractice"[173] (emphasis added).

The court in *Video* also states that to the extent that its previous decision in *Gilbert Properties v. Millstein*[174] is to the contrary, it "should not be followed."[175] *Gilbert* was a legal malpractice action in which the plaintiff claimed damages on the ground that the attorney had failed to ascertain the true owner of a building, as a consequence of which plaintiff lost his right to sue the true owner. In *Gilbert,* the New York Court of Appeals affirmed a holding that the action, based on allegations of negligence, was time-barred by the three year malpractice statute of limitations.[176]

Video, by holding that the six year contract statute of limitations applies where the complaint is the defendant's *negligence* in the performance of a contract insofar as plaintiff seeks recovery for damages to property or pecuniary interests recoverable in a contract action, applies a concept different from that which has been followed in legal malpractice actions in New York, as well as a number of other jurisdictions, that the contract statute of limitations applies only where the contract breached is one to obtain a specific result.[177]

An assault upon the conclusion that *Video* should be controlling in legal malpractice actions, might be mounted by urging that *Video* was not a malpractice action; *Sears Roebuck,* at most, was an action for architect's malpractice; the situation with respect to attorneys is significantly different from that of insurance brokers and architects, and therefore, *Video* is distinguishable and should not be applied in legal malpractice actions.

But a New York Appellate Division decision, *Sinopoli v. Cocozza,*[178] and a similar decision that followed,[179] have already found *Video* controlling in legal malpractice actions. The court in *Sinopoli* states that it is aware of contrary decisions of the Appellate Division in *Albany Sav. Bank v. Caffry, Pontiff, Stewart, Rhodes & Judge,*[180] and *Brainard v. Brown,*[181] but finds them "unpersuasive."[182] The court observes that "*Brainard* relied upon the reversed Appellate Division decision in *Video* . . ."[183] and *Albany* "simply followed *Brainard* and did not analyze the effect of [the Court of Appeals decision in]

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[173]CPLR 214(6) (McKinney Supp. 1986).

[174]33 N.Y.2d 857, 352 N.Y.S.2d 198, 307 N.E.2d 257 (1973).

[175]*Video,* 58 N.Y.2d at 1028, 462 N.Y.S.2d at 439, 448 N.E.2d at 1350 (1983).

[176]*Gilbert Properties,* 33 N.Y.2d at 858-859, 352 N.Y.S.2d at 199, 307 N.E.2d at 257, *citing* CPLR 214(6) (McKinney 1972).

[177]*See* Discussion in Section V.

[178]105 A.D.2d 743, 481 N.Y.S.2d 177 (App. Div. 1984).

[179]Kramer v. Belfi, 106 A.D.2d 615, 482 N.Y.S.2d 898 (App. Div. 1984).

[180]95 A.D.2d 918, 463 N.Y.S.2d 896 (App. Div. 1983).

[181]91 A.D.2d 287, 458 N.Y.S.2d 735 (App. Div. 1983).

[182]Sinopoli v. Cocozza, 105 A.D.2d 743, 481 N.Y.S.2d 177, 178 (App. Div. 1984).

[183]*Id.* at 743, 481 N.Y.S.2d at 178.

Video . . ."[184] *Brainard* was in fact decided before the Court of Appeals handed down its decision in *Video,* and *Albany* was decided about two and one half months after the Court of Appeals decision in *Video.*

The *Sinopoli* court is correct in observing that *Albany* did not analyze the effect of the Court of Appeals decision in *Video,* as it in fact made *no reference* to that decision. It applied what had been the traditional view in legal malpractice in New York, that the contract statute of limitations applies to attorney-client agreements "only when there [is] a promise to perform and no subsequent performance, or when the attorney has explicitly undertaken to discharge a specific task and then failed to do so."[185] The *Albany* court's failure to take cognizance of the Court of Appeal's decision in *Video* may, however, provide the court with an opportunity to consider the same question in the future in the context of *Video,* and modify its conclusion, if it deems this advisable. Or, the New York Court of Appeals may ultimately make a determination as to the applicability of *Video* in legal malpractice actions.

IX. DISCOVERY RULES[186]

A. *Policy and Rationale for Discovery Rules*

In order to prevent an action in legal malpractice from being barred by the running of the statute of limitations before the client discovers, or should have discovered the malpractice, some jurisdictions have adopted a discovery rule. The Supreme Court of Appeals of West Virginia, applying the discovery rule in *Family Savings and Loan, Inc. v. Ciccarello,*[187] a legal malpractice action based upon a defect in title, held that the time when the right of action accrued and the statute of limitations began to run was "when the defect in title was discovered or by the exercise of reasonable diligence should have been discovered."[188] The court observed that although this may reflect the minority rule, the trend of modern decisions is moving towards its adoption.

The discovery rule in legal malpractice generally finds its origin through analogy with the discovery rule in medical malpractice. In drawing upon this analogy, the California Supreme Court set out justification for adopting the discovery rule in legal malpractice, in *Neel v. Magana, Olney, Levy, Catchart*

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[184] *Id.* at 743-744, 481 N.Y.S.2d at 178.

[185] Albany Sav. Bank v. Caffry, Pontiff, Stewart, Rhodes & Judge, 95 A.D.2d 918, 919, 463 N.Y.S.2d 896, 897 (App. Div. 1983).

[186] Statutes of limitations governing fraud generally may, in limited instances, be applicable in legal malpractice actions, depending upon the nature of the statute and the nature of the wrong committed by the attorney. These general statutes governing fraud are not within the scope of this article, and accordingly are not discussed.

See R. MALLEN, LEGAL MALPRACTICE, 425-487 (2d ed. 1981), and ANNOT., 32 A.L.R.4th, 260, for a general compilation of cases on statutes of limitations in legal malpractice actions.

[187] 157 W. Va. 983, 207 S.E.2d 157 (1974).

[188] *Id.* at 993, 207 S.E.2d at 163.

& Gelfand.[189] The court observed that in ordinary tort and contract actions the statute of limitations begins to run upon the occurrence of the last element essential to the cause of action, and the plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, "postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client."[190] The special obligation of the professional is not only to use ordinary care, but to use the skill, prudence and diligence commonly exercised by practitioners in his profession. A corollary to the expertise of the professional, the court states, is the inability of the layman to detect misapplication, in that the client may not recognize the negligence of a professional when he sees it.

A person cannot be expected to know the relative medical merits of alternative anesthetics, nor the various exceptions to the hearsay rule. Furthermore, not only will a person fail to recognize negligence when he sees it, but often he will lack the opportunity to see it, as where a doctor operates upon an unconscious patient or an attorney or accountant performs his work out of the client's view. "In the legal field, the injury may lie concealed within the obtuse terminology of a will or contract; in the medical field the injury may lie hidden within the patient's body; in the accounting field, the injury may lie buried in the figures of the ledger."[191]

Finally, the dealings between practitioner and client frame a fiduciary relationship, with a duty of full disclosure resting upon the fiduciary. "Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud."[192] Although the defendant makes no active misrepresentation, this element "is supplied by an affirmative obligation to make full disclosure, and the non-disclosure itself is a 'fraud'."[193] Since the client's lack of awareness of a practitioner's malpractice implies, in many cases, a second breach of duty by the fiduciary, a failure to make such a full disclosure, the discovery rule "prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure."[194]

B. *An Enclave of Invulnerability for Attorneys*

There has been a willingness on the part of some courts to apply the discovery rule in medical malpractice actions, and not in legal malpractice actions. This may be symptomatic of an indifference towards the client and a

[189] 6 Cal. 3d 176, 98 Cal. Rptr. 837, 491 P.2d 421 (1971) (en banc).

[190] *Id.* at 187-88, 98 Cal. Rptr. at 844, 491 P.2d at 428.

[191] *Id.* at 188, 98 Cal. Rptr. at 844, 491 P.2d at 428.

[192] *Id.* at 189, 98 Cal. Rptr. at 845, 491 P.2d at 429.

[193] *Id.*

[194] *Id.*

willingness to allow the bar an enclave of invulnerability not provided to other professionals.

In Idaho, "the 'discovery' exception which tolls the accrual date for a cause of action until the act or omission is discovered or reasonably should have been discovered"[195] was applied in medical malpractice cases in 1964 and 1970, the first involving a foreign object, and the second a misdiagnosis.[196] Yet in 1978, the Supreme Court of Idaho in *Martin v. Clements,*[197] expressly declined to create a discovery exception for legal malpractice actions. Justice Bistline, dissenting, states: "The Court's opinion has the virtue of judicial integrity, because undoubtedly it will wrongly be interpreted as favoritism on behalf of the legal profession when contrasted with the Court's pioneer decisions adopting discovery rules in medical malpractice cases."[198]

In *Cox v. Rosser,*[199] the Court of Civil Appeals of Texas took cognizance of the fact that the discovery rule had been applied by the Supreme Court of Texas to toll limitations in medical malpractice cases, but found "no reason"[200] to exend the discovery rule to the legal malpractice action under consideration. The court observed that the client had not alleged any act on the part of the attorney which prevented the client from discovering the alleged wrongful acts on the attorney's part, nor had the client made any allegation of fraud. But an examination of the two medical malpractice cases in which the discovery rule had been applied, indicates that in those cases the court did not set out these requirements. In one of these cases, there were allegations of intentional and fraudulent misrepresentations, breach of implied warranty and negligence arising from the performance of a vasectomy operation on plaintiff's husband. The court's holding, however, was not predicated upon any act by the physician which prevented discovery of the wrongful act or on any fraud by the physician. The court's holding was direct and precise: "We hold that in malpractice cases arising from vasectomy operations the Statute of Limitations commences to run on the date of discovery of the true facts concerning the failure of the operation, or from the date it should, in the exercise of ordinary care and diligence, have been discovered."[201] The other case involved alleged negligence of surgeons in failing to remove a surgical sponge from the body of a patient while performing a Caesarean Section.[202]

Certainly in cases of an ineffective vasectomy and a foreign object left in

[195]Martin v. Clements, 98 Idaho 906, 909, 575 P.2d 885, 888 (1978).

[196]Billings v. Sisters of Mercy of Idaho, 86 Idaho 485, 389 P.2d 224 (1964) (foreign object); Renner v. Edwards, 93 Idaho 836, 475 P.2d 530 (1970) (misdiagnosis).

[197]98 Idaho 906, 575 P.2d 885 (1978).

[198]*Id.* at 911, 575 P.2d at 890 (Bistline, J., dissenting).

[199]579 S.W.2d 73 (Tex. Civ. App. 1979).

[200]*Id.* at 77.

[201]Hays v. Hall, 488 S.W.2d 412, 414 (Tex. 1973).

[202]Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967).

the body, the very nature of the wrong may make it undiscoverable by the patient, at least for a period of time. But this is also true of many acts which involve legal malpractice. As the Supreme Court of California aptly stated, a person cannot be expected to know the various exceptions to the hearsay rule, and an injury may lie concealed within the obtuse terminology of a will or contract.[203] The placing of attorneys in a protected class by requiring an act by an attorney which prevented the client from discovering the wrong, or fraud by the attorney, creates an injustice in that such is not a requirement in the case of a physician.

The Oklahoma law appears to have been interpreted by the federal courts as providing for the application of the discovery rule in medical malpractice actions, but not in legal malpractice. This may be gleaned from *Royal Crown Bottling v. Aetna Casualty & Surety Co.*[204] While the court in *Royal Crown* indicates that what appears to have been the adoption of the discovery rule in a medical malpractice case may have been *dictum,* it nevertheless concludes: "Moreover, even if these cases establish a special accrual exception as to medical malpractice cases"[205] the plaintiff "has not shown this court any policy considerations, analogies or precedents indicating that the exception should be extended to attorney malpractice cases or that the Oklahoma court would so extend it."[206] It seems startling that the court should place attorneys in a more favorable position than physicians, at least in part because plaintiff "has not shown" the court policy considerations and analogies. Certainly policy considerations can be independently assessed and asserted by the court, absent brief of counsel, and the analogies are evident.[207]

To the extent that the above cases indicate courts providing an area of invulnerability for attorneys not provided for other professionals, the foregoing analysis may serve a dual function. Within jurisdictions where apparent inconsistencies and injustices have developed, courts may be induced to alter their view. Perhaps even more important, where the question is dealt with in the future as a matter of first impression, the lack of a rational basis, the illogic and the fundamental unfairness that appears from the above, may persuade courts that there is the danger of developing a doctrine which upon careful analysis is abhorrent to a sense of justice.

C. *Relationship of Discovery Rules to Damage Rule and Occurrence Rule.*

Where a jurisdiction, having adhered to the occurrence rule or the

[203] Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal.3d 176, 98 Cal. Rptr. 837, 491 P.2d 421 (1971).

[204] 438 F. Supp. 39 (W.D. Okla. 1977).

[205] *Id.* at 44.

[206] *Id.*

[207] 6 Cal.3d 176, 188, 98 Cal.Rptr. 837, 844, 491 P.2d 421, 428 (1971) ("postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client").

damage rule, adopts a discovery rule, more than a substitution of rules or concepts is involved, as discovery rules vary in their *requirements*, and there is a *relationship* between the occurrence rule and the discovery rule, or the damage rule and the discovery rule, that effects these requirements. A question to be asked is whether the statute of limitations will be triggered at the time plaintiff knows or should know of the occurrence of the wrongful act or omission (which occurrence, without more, would start the statute running under the occurrence rule), *or* will the statute of limitations be triggered at the time the plaintiff knows, or should know, facts essential to establish a cause of action, including damage, (the existence of which facts, without more, would start the statute running under the damage rule). In this sense, a discovery rule is *superimposed* upon the damage rule or the occurrence rule, or, more specifically, superimposed upon what would have been the damage rule or the occurrence rule, absent adoption of the discovery rule.

While the discovery rule, as applied by courts in legal malpractice actions has frequently been superimposed upon the damage rule (or, more specifically, what would otherwise have been the damage rule), this need not be the case. If a court follows the occurrence rule in tort or contract, it can, with a less wrenching effect upon the existing rule, adopt a discovery rule that measures from the time plaintiff knows, or should know, of the occurrence of the wrongful act or omission. This was done in *Budd v. Nixen,*[208] with respect to an alleged breach of contract action. The court observes that in addition to alleging an action in tort, the plaintiff in *Budd* had alleged an action for breach of contract. "Since the cause of action for breach of such a professional service contract arises on the date of the breach, and no consequential or actual damages need be suffered to give the client a right to bring suit in contract," the court concluded that "the statutory limitations period commences when the client knows, or reasonably should know of the *breach*"[209] (emphasis added).

When courts are considering a legal malpractice action as one in tort, rather than breach of contract, they may, and should, apply the discovery rule in conjunction with the damage rule. Why? First if a court already follows the damage rule, this would be a natural and logical progression. But why do so where a court applies the occurrence rule, prior to its adoption of the discovery rule? The answer is that in adopting the discovery rule a court is reaching for a result that is fundamentally fair, and requiring that the plaintiff know, or should know, facts sufficient to meet all of the requirements of the action, including damage, is more equitable than merely requiring that plaintiff know, or should know, of the wrongful act or omission, in order to start the statute running.

But a court may be willing to apply the discovery rule only in conjunction

[208] 6 Cal.3d 195, 98 Cal.Rptr. 849, 491 P.2d 433 (1971).

[209] *Id.* at 203 n.6, 98 Cal. Rptr. at 854 n.6, 491 P.2d at 438 n.6.

with the occurrence rule, or what would otherwise have been the occurrence rule. This may be so because where a court already applies the occurrence rule, it may be unwilling, or consider itself unable, to wholly turn its back on the underlying concept that the occurrence of the wrong triggers the statute of limitations, but would be willing to apply a discovery rule in conjunction with this concept. This will still provide a benefit, as it will, in certain cases, prevent the unconscionable result that may flow from the *Wilcox* doctrine, discussed in sections IV and V, *supra.* Requiring that the plaintiff know or should know of the attorney's wrongful act or omission before the statute of limitations begins to run, will mean that in certain cases where the period of limitation would otherwise have expired by the passage of time under the occurrence rule, an action will be timely instituted, measuring from the time plaintiff knows or should know of the attorney's wrongful act or omission.

Many courts have not to this point been aware of the foregoing concepts, their meaning, usability, and effect, as is indicated by the discussions and internal inconsistencies in the opinions. Thus, in *Edwards v. Ford,*[210] where the Supreme Court of Florida expressly states that it *adopts* the rationale and language of *Downing v. Vaine,*[211] the court indicates that the statute of limitations began to run in *Edwards* from the time the plaintiffs "had knowledge of the fact that a cause of action had accrued in their favor during 1963, *with accompanying damages* (even though perhaps minimal at that point)"[212] (emphasis added). Yet, the specifically "adopted"[213] language of *Downing* states: "Under the circumstances it is our view, and we so hold, that the statute of limitations on appellee's cause of action against appellant for damages resulting from the latter's malpractice did not commence to run until appellant's act of negligence became known to appellee on March 20, 1967."[214] It therefore appears that in *Edwards* the court superimposes the discovery rule upon what would otherwise be the *damage* rule, while the "adopted" rule of *Downing* superimposes the discovery rule upon what would otherwise be the *occurrence* rule.

However, an examination of the opinion in *Downing* indicates that while the *Downing* court states that the statute of limitations did not commence to run until appellant's *act of negligence* became known to appellee on March 20, 1967, the facts may be construed to indicate that the *damage also* became known *at that time.* If this is so, the *Edwards* interpretation of *Downing,* although not in accord with the language of that opinion, whether by chance or otherwise, may indeed be correct. *Downing* may in fact be superimposing the discovery rule upon what would otherwise be the *damage* rule. The fact

[210] 279 So. 2d 851 (Fla. 1973).

[211] 228 So. 2d 622 (Fla. Dist. Ct. App. 1969).

[212] 279 So. 2d at 853.

[213] *Id.*

[214] 228 So. 2d at 627.

that questions such as these permeate opinions in this area, underscores the importance of making courts aware of the concepts, choices, and effects, set out in the above analysis, in order that clear and intended choices can be made, and justice maximized in this area.

D. *Responsibilities of Persons Invoking Discovery Rules.*

Differences in language in articulating the discovery rule, may be significant in determining the result in particular cases. This is especially important because, since the discovery rule is only now significantly emerging in legal malpractice actions, there will be choices of language and interpretation available to the courts. This is so not only for those jurisdictions which have not as yet adopted a discovery rule, but also for those which have adopted a discovery rule, because in most instances questions of interpretation still remain open, or subject to change.

An unusual and creative formulation of the discovery rule is found in *Dolce v. Gamberdino,*[215] where the Illinois court, while recognizing the discovery rule, states that there are circumstances under which it would not be applied. *Dolce* states that it "would apply the discovery rule only when discovery occurs *after* the traditional limitation period"[216] has expired, "or when discovery occurs at a time *so near the running* that the action has been, for most purposes, barred"[217] (emphasis added).

Dolce illustrates how courts in this area, in attempting to be creative, can be ineffectual. Uncertainty must, to some extent, result from the *Dolce* formulation of the discovery rule. It appears that a finding of fact would be required in each case to determine whether or not discovery occurred "at a time so near the running" of the traditional limitation period that "the action has been, for most purposes, barred." What, one may ask, is meant by "so near" and "for most purposes"? Vagueness alone makes this formulation unfair to the plaintiff. Furthermore, a plaintiff who is not given the benefit of the discovery rule under *Dolce,* may have *substantially less time* within which to bring an action than a plaintiff who, discovering the facts just a short time later (but still before the running of the traditional limitation period), is placed within the umbrella of the rule. The court reasons that "to permit the action when the plaintiff had the time in which to file before the statute of limitations ran, would frustrate the purposes of the statute of limitations and relieve little or no injustice."[218] But what is time enough to file? And what is "little" injustice?

Where the discovery rule is applied in a traditional form, there are various

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[215] 60 Ill. App. 3d 124, 376 N.E.2d 273 (1978).

[216] *Id.* at 129, 376 N.E. 2d at 277.

[217] *Id.*

[218] *Id.* at 128, 376 N.E. 2d at 276.

jurisdictional criteria for what, other than actual knowledge, will be adequate to start the running of the statute of limitations. These include the time when the client "should know;"[219] "should discover;"[220] "should reasonably discover;"[221] "should have discovered;"[222] "by the exercise of reasonable diligence should have known;"[223] or facts which the client "by the exercise of reasonable diligence should have been discovered."[224] It is difficult at this time to determine whether differences in the choice of words as between "know" and "discover" may lead to a difference in result in particular cases. It might be argued that where the word "discover" is used, this connotes that the client is expected to have a somewhat more inquiring attitude as to what is transpiring in the course of the attorney-client relationship, than is expected when the word "know" is used.

There is, however, evidence in the cases which does not support this conclusion. Thus, the court in *Neel,* in what it describes as its holding, uses the language "should know,"[225] and yet, at another point in the same opinion, which the court also describes as its holding, *Neel* uses the language "should discover."[226] Furthermore, in *Budd v. Nixen,*[227] a companion case to *Neel,* the court describes the *Neel* criteria as "should reasonably discover,"[228] and *Budd* holds the criteria to be "should discover."[229] Certainly in this and other jurisdictions where the words are used interchangeably, even within a single case, there is no basis for concluding that differences between phrases such as "should know" or "should discover" have any substantive import. It is also difficult to find evidence in other jurisdictions that these differences in language carry with them substantive differences.

The following are important inquiries in this area:

First: What is it that the plaintiff should have known or should have discovered?

Second: What must be established in order to satisfy the requirement that plaintiff should have known, or should have discovered?

Third: Are the criteria adequate or proper?

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[219]Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 190, 98 Cal. Rptr. 837, 846, 491 P.2d 421, 430 (1971) (en banc).

[220]Budd v. Nixen, 6 Cal. 3d 195, 203, 98 Cal. Rptr. 849, 854, 491 P.2d 433, 438 (1971) (en banc).

[221]*Id.* at 197, 98 Cal. Rptr. at 850, 491 P.2d at 434.

[222]Kohler v. Woollen, Brown & Hawkins, 15 Ill. App. 3d 455, 460, 304 N.E.2d 677, 681 (App. Ct. 1973).

[223]Edwards v. Ford, 279 So. 2d 851, 853 (Fla. 1973).

[224]Family Savings and Loan, Inc. v. Ciccarello, 157 W. Va. 983, 993-94, 207 S.E. 2d 157, 163 (1974).

[225]6 Cal. 3d 176, 190, 98 Cal. Rptr. 837, 846, 491 P.2d 421, 430 (1971) (en banc).

[226]*Id.* at 194, 98 Cal. Rptr. at 849, 491 P.2d at 433.

[227]6 Cal. 3d 195, 98 Cal. Rptr. 849, 491 P.2d 433 (1971) (en banc).

[228]*Id.* at 197, 98 Cal. Rptr. at 850, 491 P.2d at 434.

[229]*Id.* at 203, 98 Cal. Rptr. at 854, 491 P.2d at 438.

Fourth: If not, what are adequate or proper criteria, and how should it be required that the ultimate facts be proven?

The first question, what is it that the plaintiff should have known or discovered, is related to whether the discovery rule is applied in conjunction with, or superimposed upon, what otherwise would have been the occurrence rule or the damage rule. If the former, then from the time plaintiff should have known of the wrongful act or omission, the statute is no longer tolled. If the latter, the statute is no longer tolled from the time plaintiff should have known sufficient facts to establish the cause of action, including damage.[230] In this regard, it has been said that it is enough to show that plaintiff should have known facts meeting these requirements and it is not necessary to show that plaintiff knew the legal significance of these facts, as for example, that they establish a cause of action in malpractice against the attorney.[231]

In answering the second question, what must be established to satisfy the requirement that plaintiff "should have known" or "should have discovered," additional questions present themselves. Must it be established that the plaintiff, by the use of *reasonable care* or reasonable diligence, should have known or discovered the relevant facts? If so, is the inquiry whether a *reasonable person* should have known or discovered the facts, or whether *this* plaintiff, taking into consideration the plaintiff's personal characteristics, would have reasonably been expected to know or discover the facts?

Cases indicate that it is determinitive whether "with reasonable care plaintiff could have discovered"[232] the relevant facts; or whether plaintiff "reasonably should have known"[233] of the alleged cause of action. While such cases make the point that reasonableness is the determinant of what should

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[230]See section IX (3) for a discussion of the relationship of the discovery rule to the damage rule and the occurrence rule.

On the relationship of the discovery rule to the occurrence rule, see Budd v. Nixen, 6 Cal. 3d 195, 201, 98 Cal. Rptr. 849, 852, 491 P.2d 433, 436 (1971) (en banc), where the court observes that since the cause of action for breach of a professional service contract arose on the date of the breach, and no consequential or actual damage need be suffered to give the client a right to bring the action in contract, "the statutory period commences when the client knows, or reasonably should know of the breach."

On the relationship of the discovery rule to the damage rule, see: Thorpe v. DeMent, 69 N.C. App. 355, 362, 317 S.E.2d 692, 697 (Ct. App. 1984), aff'd, 322 S.E.2d 777 ("In other words, plaintiffs had constructive knowledge of all the essential elements of a complete malpractice cause of action."); Greater Area Inc. v. Bookman, 657 P.2d 828, 829 (1982) (". . . the statute of limitations for legal malpractice does not begin to run until the client discovers, or reasonably should discover, the existence of all the elements of his cause of action.")

[231]In McGee v. Weinberg, 159 Cal. Rptr. 86, 89, 97 Cal. App. 3d 798, 803 (1979), the court states: "The statute of limitations is not tolled by belated discovery of *legal theories,* as distinguished from belated discovery of *facts* . . . However, the Supreme Court repeatedly has explained that it is the knowledge of facts rather than discovery of legal theory, that is the test." In Graham v. Harlin, Parker & Rudloff, 664 S.W.2d 945, 947 (Ky. Ct. App. 1984), the opinion reads: "The knowledge that one has been wronged and by whom starts the running of the statute of limitations for professional malpractice not the knowledge that the wrong is actionable."

[232]Melgard v. Hanna, 45 Or. App. 133, 137, 607 P.2d 795, 797 (Ct. App. 1980).

[233]Greater Area Inc. v. Bookman, 657 P.2d 828, 830 (1982).

have been known or discovered, they do not discuss or articulate whether this is to be the reasonableness of the *objective* reasonable person, *or* reasonableness when taking into consideration the *plaintiff's characteristics.* However, where the articulated test is whether the facts were "sufficient to put a reasonable person on inquiry,"[234] this should point towards the objective reasonable person test. Furthermore, in construing the language of the cases, it would appear that presumptively the objective reasonable person test is indicated, absent relevant qualifying language. This is the traditional negligence test, and there is generally no basis for concluding, without some indication to the contrary in a particular case, that the court means otherwise.

Responding to the third question that has been posed, are the criteria adequate or proper? If it is the objective reasonable person test that is applied, the criteria are neither adequate nor proper. The objective reasonable person test developed in a wholly different context. It was deemed that, in a traditional negligence action, an adult defendant should not escape liability for harm inflicted upon an innocent plaintiff on the ground that the defendant was of low intelligence.[235] Although, even here, debilitating physical characteristics are considered.[236] This has no relevance to a legal malpractice action where there is a fiduciary attorney-client relationship, pursuant to which the attorney has wronged the client, and the question of reasonableness goes to whether the client should have known or discovered the wrong and should be barred from recovery.

With respect to the fourth question, there appears to be no sound basis for adopting a rule that does not consider the client's intelligence, education, experience, and other relevant circumstances, in determining whether the client reasonably should have known or discovered certain facts.[237] The relevant considerations are these: The attorney accepted *this* client in a *fiduciary relationship.*[238] This is a relationship in which, under our system of jurisprudence, the

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[234]McCann v. Welden, 200 Cal. Rptr. 703, 707, 153 Cal. App. 3d 814, 822, (1984). The court points out that this can determine whether the test set out in California Code, Civil Procedure, § 340.6 is met, i.e., that a person "through the use of reasonable diligence should have discovered . . . the facts constituting the wrongful act or omission . . . ."

[235]RESTATEMENT (SECOND) OF TORTS § 283 (1965). Section 283 provides: "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."

[236]RESTATEMENT (SECOND) OF TORTS § 283C (1965). Section 283 C provides: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability."

[237]Factors of this nature are already considered in a traditional negligence action where a child is involved. RESTATEMENT (SECOND) OF TORTS § 283A (1965), provides: "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances."

[238]California cases refer to a "professional relationship." In Call v. Kezirian, 135 Cal. App. 3d 189, 196, 185 Cal. Rptr. 103, 107 (1982), a medical malpractice action, the court states that "where there is a professional relationship, the degree of diligence in ferreting out the negligence for the purpose of the statute of limitations is diminished." In Baright v. Willis, 151 Cal. App. 3d 303, 311, 198 Cal. Rptr. 510, 514 (1984), a legal malpractice action, the court quotes this language from *Call.* But there is no indication as to the manner in which the required degree of diligence would be "diminished."

client generally *must* retain some attorney. It would be lacking in fundamental fairness to permit the attorney to escape liability for a wrong committed against *this* client because of *this* client's minimal intelligence, education, experience, or other relevant circumstances. Where this is permitted, it savors of entrapment.

Furthermore, when litigating the question of whether a client reasonably should have known certain facts, the burden of proof should be on the attorney to prove that the client reasonably should have known these facts, with the requirement that this be established by clear and convincing evidence, rather than by a preponderance of the evidence. This would be fair and appropriate, considering the nature of the attorney-client relationship.

Assuming it is found in a particular case that the client reasonably should have known the relevant facts, even after considering the client's intelligence, education, experience, and other relevant circumstances, should this be a bar to the client's recovery? It would appear that at this point, where a jurisdiction has adopted a comparative negligence principle, whether by statute or common law, this finding should, at most, be considered in reduction of damages.[239] Even where a comparative negligence principle has not been adopted, courts are frequently in a position to adopt such a principle, and to do so would be both appropriate and necessary, in order to achieve fundamental fairness in these circumstances.

X. Continuous Representation and Comparable Rules

A. *Development and Rationale of Continuous Representation Rule*

The continuous representation rule, or doctrine, with some modifications and differences which will presently be discussed, provides for tolling the statute of limitations on malpractice committed by an attorney in relation to a particular case or matter, as long as the attorney continues to represent the client in that case or matter. The principle source of the doctrine is New York, where it was developed by analogy with the continuous treatment doctrine, a judicially created doctrine in medical malpractice. In the leading case of *Siegel v. Kranis,*[240] the court points out that in medical malpractice cases New York had once followed the rule that the statute of limitations begins running from the incidence of the wrongful conduct. But, the court observed, this was no longer the rule in all medical malpractice cases, as it has been held "that at least

[239]While some comparative negligence statutes allow recovery even if plaintiff's contributory negligence is more than fifty per cent, in Wisconsin, pursuant to § 895.045, if the negligence of the person seeking recovery is greater than the negligence of the person against whom recovery is sought, contributory negligence will bar recovery; otherwise, the contributory negligence of the person seeking recovery will not bar recovery, but only result in diminishing the amount of recovery.

A caveat to be observed in attempting to apply a comparative negligence statute in a legal malpractice action for the purpose suggested in the text, is that the language of a statute may not be applicable to this kind of situation.

[240]29 A.D.2d 477, 288 N.Y.S.2d 831 (1968).

when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint, the 'accrual' comes only at the end of the treatment."[241] The *Siegel* court concludes that this rule is "equally applicable to the conduct of litigation by attorneys."[242] It should be observed at the outset, that some fourteen years after *Siegel,* in 1982, the New York Court of Appeals, considering the continuous treatment rule and the continuous representation rule in two cases decided within approximately a two-week period, concluded that the statute of limitations is *tolled* while the treatment or representation continues,[243] rather than finding, as in *Siegel* and other cases,[244] that the cause of action does not *accrue* until termination of the treatment or representation.

In support of the proposition that attorneys should be governed by a rule comparable to physicians, the following reasons have been advanced.[245] First, there is more than a superficial resemblance between the continuous treatment of a condition of a patient and the continuous representation of a client by an attorney, as in both instances the relationship between the parties is marked by trust and confidence. Second, in both relationships the recipient of the service is necessarily at a disadvantage to question the reason for the tactics employed or the manner in which the tactics are executed. Third, a patient would not be expected to interrupt the course of treatment by suing a delinquent physician, and a client would not be expected to interrupt the service of an attorney by suing the attorney. And finally, the client is not in a position to know the intricacies of practice and whether necessary steps in an action have been taken.

Prior to 1975, developments in the continuous treatment and the continuous representation rules in New York found their origins in judicial decisions. In 1975, New York amended its statutory requirements with respect to the statute of limitations in medical malpractice actions, and codified for the first time the continuous treatment doctrine, using this language: "An action for medical or dental malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure . . . ."[246]

However, the continuous representation doctrine was *not* then, or thereafter, codified in New York. Nevertheless, in 1982, an intermediate ap-

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[241] *Id.* at 479-80, 288 N.Y.S.2d at 834 (quoting Borgia v. City of New York, 12 N.Y.2d 151, 155, 237 N.Y.S.2d 319, 321, 187 N.E. 2d 777, 778 (1962)).

[242] *Id.* at 480, 288 N.Y.S.2d at 834.

[243] Glamm v. Allen, 57 N.Y.2d 87, 453 N.Y.S.2d 674, 439 N.E.2d 390 (1982) (legal malpractice); McDermott v. Torre, 56 N.Y.2d 399, 452 N.Y.S.2d 351, 437 N.E.2d 1108 (1982) (medical malpractice).

[244] *See, e.g.,* Greene v. Greene, 56 N.Y.2d 86, 451 N.Y.S.2d 46, 436 N.E.2d 496 (1982).

[245] These reasons are advanced by the court in Siegel v. Kranis, 29 A.D.2d 477, 288 N.Y.S.2d 831 (App. Div. 1968).

[246] N.Y. C.P.L.R. § 214-a (McKinney 1975).

pellate court, taking cognizance of the codification of the continuous treatment doctrine, but not the continuous representation doctrine, wrote: "The 1975 enactment of the CPLR 214-a, recognizing the continuous treatment theory of medical malpractice, does not preclude its extension into other professions,"[247] citing an opinion of the New York Court of Appeals[248] which stated that with respect to other types of professional dereliction [other than medical dereliction] judicial authority has been left intact. About two weeks later, a decision of the New York Court of Appeals[249] expressly reaffirmed acceptance of the continuous representation doctrine in legal malpractice, making no reference to the failure of the legislature to codify the continuous representation doctrine when, some seven years earlier, it codified the continuous treatment doctrine.

B. *Characteristics of Continuous Representation Rule and Comparable Rules*

As has been indicated, the New York cases in which the continuous representation rule was developed, initially stated that a legal malpractice action did not *accrue* until the attorney's representation of the client with respect to the particular case or matter terminated, but the New York Court of Appeals[250] has now determined that the doctrine *tolls* the statute of limitations rather than delaying the accrual of the cause of action. As a result, a client should be permitted to commence a legal malpractice action against an attorney, should the client choose to do so, *before* termination of the attorney's representation in the particular case or matter,[251] whereas if accrual were delayed, the client would be required to await termination of the representation before commencing an action.

In the process of setting out the parameters of the continuous representation rule, the New York Court of Appeals stated that "its application is limited to situations in which the attorney who allegedly was responsible for the malpractice continues to represent the client in that case. When that relationship ends, for whatever reason, the purpose for applying the continuous representation rule no longer exists."[252] But earlier lower and intermediate appellate court opinions contain concepts that are not included in this formula-

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[247]Boorman v. Bleakley, Platt, Schmidt, Hart and Fritz, 88 A.D.2d 942, 943, 451 N.Y.S.2d 179, 180 (App. Div. 1982).

[248]Greene v. Greene, 56 N.Y.2d 86, 451 N.Y.S.2d 46, 436 N.E.2d 496 (1982).

[249]Glamm v. Allen, 57 N.Y.2d 87, 453 N.Y.S.2d 674, 439 N.E.2d 390 (1982).

[250]*Id.*

[251]*See* McDermott v. Torre, 56 N.Y.2d 399, 407, 452 N.Y.S.2d 351, 355, 437 N.E.2d 1108, 1111-1112 (1982), a medical malpractice action, where the court states:

> Rather than define the action's accrual in terms of the [continuous treatment] doctrine, it is defined in terms of when the original negligent act occurred. Continuous treatment serves simply as a toll — the action may be brought at any time, but the patient will not be compelled to initiate judicial proceedings so long as the physician continues to treat the injury (see Borgia v. City of New York, *supra*).

[252]Glamm v. Allen, 57 N.Y.2d 87, 94, 453 N.Y.S.2d 674, 678, 439 N.E.2d 390, 393 (1982).

tion of the continuous representation rule, but at the same time may be considered as being basically compatible with it. These concepts are therefore worthy of examination as, in an appropriate case, they may be "incorporated" into an emergent formulation of the continuous representation rule.

In *Muller v. Sturnam,*[253] decided by an intermediate appellate court in 1981, the plaintiff alleged, in an action commenced on April 20, 1978, that she retained attorney-defendants in 1971 to handle certain matters involving her former husband, which included collection of the principal and interest on a promissory note dated May 24, 1967, and that defendants failed to effect proper and timely service of process in a lawsuit to enforce payment of the promissory note. In finding the continuous representation rule inapplicable under the facts of the case, the court stated that "it is apparent that the application of the continuous representation doctrine in attorney malpractice envisions a relationship between the parties that is marked with trust and confidence."[254] Furthermore, "[i]t is a relationship which is not sporadic but developing and involves a continuity of the professional services from which the alleged malpractice stems."[255]

If these concepts are to be accepted, questions of fact will, of course, arise as to what involves a "sporadic" relationship, as distinguished from one involving a "continuity of the professional services." More striking is the court's statement that application of the continuous representation doctrine envisions a relationship "marked with trust and confidence." Should it be appropriate to look behind each attorney-client relationship to determine whether it meets these criteria, or should the attorney-client relationship be deemed, as a fiduciary relationship, to be one involving trust and confidence? Perhaps this question answers itself.

A 1976 trial court opinion, *Dura-Bilt Remodelers, Inc. v. Albanese,*[256] deals with a factual situation dissimilar to that treated in numerous other cases applying the continuous representation rule. In *Dura-Bilt,* the attorney had an ongoing relationship with the client "and presumably represented the client with respect to a number of different matters."[257] The court concluded that "in such a case, it would be unfair to apply a simplistic rule that a cause of action with respect to any one of a multitude of transactions handled by the attorney did not accrue until the overall attorney-client relationship was terminated."[258] However, "there is no indication that the plaintiff should have concluded that the particular case in question had been concluded prior to the time when the

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[253] 79 A.D.2d 482, 437 N.Y.S.2d 205 (App. Div. 1981).

[254] *Id.* at 485-86, 437 N.Y.S.2d at 208.

[255] *Id.* at 486, 437 N.Y.S.2d at 208.

[256] 86 Misc. 2d 172, 382 N.Y.S.2d 455 (Sup. Ct. 1976).

[257] *Id.* at 174, 382 N.Y.S. 2d at 457.

[258] *Id.*

overall attorney-client relationship terminated in December, 1973."[259] Therefore, the court held that the plaintiff's cause of action "should be deemed to have accrued no earlier than December, 1973,"[260] and accordingly the action was timely commenced.

It appears, under *Dura-Bilt,* that in each legal malpractice action where there is an ongoing relationship in which the attorney represents the client in more than one matter, a factual determination would be required as to whether the client should have concluded that the particular matter had been terminated prior to termination of the overall attorney-client relationship. If the client should have so concluded, presumably the statute of limitations will cease to be tolled (or, in the alternative, the cause of action will accrue) prior to the termination of the overall attorney-client relationship. If the client should not have so concluded, presumably the statute will continue to be tolled (or, in the alternative, the cause of action will not accrue) until the overall attorney attorney-client relationship has terminated.

The *Dura-Bilt* formulation appears to be consistent with the reasoning, if not with all of the language, of cases that do not articulate it. Cases which describe the continuous representation rule as causing the statute of limitations to be tolled (or preventing the action from accruing), only as long as the attorney is handling the matter in which the malpractice occurred, are generally cases where *factually* the attorney has handled only one matter for the client. The rule stated in these cases is therefore as broad as is required under the facts.

Additionally, the justification for the continuous representation rule, when stated in terms of the general formulation, logically requires a progression to the *Dura-Bilt* formulation, when warranted by the facts. A principal justification given for the general formulation is that the relationship between attorney and client "is marked with trust and confidence."[261] If this is sufficient reason for tolling the statute of limitations (or preventing the action from accruing), until the particular matter in which the malpractice occurs is terminated, certainly where the attorney continues to handle other unrelated matters, this continuing attorney-client relationship, marked with trust and confidence, should be sufficient reason to toll the statute (or prevent the action from accruing), until the overall attorney-client relationship is terminated, if the client should not have concluded that the particular matter was earlier terminated.

It is suggested that *Dura-Bilt* does not go far enough, although it was not required, under the facts of that case, to extend its holding further. Even in a situation where an attorney is handling only *one* matter for a client, and this matter is terminated, a preferable rule would be that the statute continue to be

[259] *Id.* at 175, 382 N.Y.S. 2d at 457.

[260] *Id.*

[261] Siegel v. Kranis, 29 A.D.2d 477, 480, 288 N.Y.S.2d 831, 834 (App. Div. 1968).

tolled (or in the alternative, the action not accrue) until the client knows or should know that the matter is terminated. It is further suggested that, in view of the relationship between attorney and client, it be required that this must be established by clear and convincing evidence, rather than by a preponderance of the evidence. This would provide additional merited protection for the client, without unfairness towards the attorney.

In Michigan, in developing rules relative to statutes of limitations in malpractice actions, there was interaction, and some divergence and possible tension, between the courts and the legislature. The 1932 case of *De Haan v. Winter,*[262] and its interpretation, was pivotal in this regard. This was a medical malpractice action in which improper treatment of a fractured bone was alleged. The court states: "When did plaintiff's cause of action accrue? Until treatment of the fracture ceased the relation of patient and physician continued, and the statute of limitations did not run . . . ."[263]

At the time of the *De Haan* decision, the Michigan statute did not contain a "continuous treatment" provision. But about thirty years later, section 600.5838 of the Michigan statutes was adopted, which provided: "A claim based on malpractice of a person who is, or holds himself out to be, a member of a state licensed profession accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose."[264]

Thus, a continuous treatment (or continuous representation) rule was incorporated into statute. About a decade later, the Michigan Supreme Court, in *Dyke v. Richard,*[265] confronted the question of whether a two-year discovery rule that the Michigan courts had adopted was in conflict with this statutory provision, and the court held that it was not. The court reasoned that the statutory provision incorporating the last treatment doctrine "comports with the legislative comment accompanying it, viz: 'Section 5838 is based on the rule stated and followed in the Michigan case of *De Haan v. Winter.*'"[266] The court then concludes that "the legislature merely intended to codify the *De Haan* decision and no more intended to obviate the question of discovery than the *De Haan* court did."[267]

A question of *due process* is also raised and considered by the court in *Dyke.* It reasons that a statute which expressly extinguishes a common law right may be regarded as a proper exercise of legislative authority, citing examples of abolition of the common law causes of action for alientation of affec-

[262] 258 Mich. 293, 241 N.W. 923 (1932).

[263] *Id.* at 296, 241 N.W. at 924.

[264] MICH. COMP. LAWS ANN. § 600.5838 (West 1968).

[265] 390 Mich. 739, 213 N.W.2d 185 (1973).

[266] *Id.* at 744, 213 N.W.2d at 187.

[267] *Id.* at 747, 213 N.W.2d at 188.

tions, criminal conversation, seduction and breach of contract to marry. But, the court reasons, the statute under consideration is *not* intended to extinguish a common law right. It is rather intended as a statute of limitations, a charge on a person who would assert a claim, as "[i]t requires action on his part within a legislatively specified time, or obliges him to forego it altogether."[268] Relying on *Price v. Hopkins,*[269] the *Dyke* court concludes that as to a person who neither knows nor in the exercise of reasonable diligence could ascertain within a two-year period that he has a cause of action, the statute would have "the effect of abolishing his right to bring suit"[270] if it excluded the possibility of a discovery rule. Since the legislature did not intend to abolish a right of action, this statute, the court concludes, would be unconstitutional as violative of due process if it precluded the possibility of a discovery rule. The court accordingly concluded that the two-year discovery rule, previously adopted by the courts, remains a part of the common law of Michigan.

If this argument were urged upon and accepted by courts in other jurisdictions, statutes of limitations for legal malpractice could be found unconstitutional as violative of due process if they did not contain a discovery rule and precluded the courts from adopting a discovery rule. Furthermore, if a statute neither included nor prohibited a discovery rule, it seems that the courts would be required to adopt such a rule in order to preserve the constitutionality of the statutory scheme.

Under an extrapolation of the *Dyke* reasoning, it appears that application of the *Wilcox* doctrine, adopted by the United States Supreme Court in 1830, and discussed in sections IV and V, *supra,* which adheres to the occurrence rule, would be unconstitutional if a discovery rule were not also provided for in a jurisdiction. Similarly, acceptance of the damage rule in a jurisdiction, without a discovery rule, would, under an extrapolation of the *Dyke* reasoning, appear to be violative of due process. Suffice it to say, acceptance of this reasoning would make monumental inroads in the area of legal malpractice.

The Michigan legislature, about eighteen months after *Dyke,* incorporated a discovery rule into statute, but it was a six month, and not a two year, discovery rule. The statute[271] provides that a claim based on malpractice accrues at the time the person "discontinues treating or otherwise serving plaintiff"[272] in a professional or pseudoprofessional capacity "as to the matters out of which the malpractice arose;"[273] and further provides that an action involving a claim based on malpractice may be commenced at any time within

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[268] *Id.* at 746, 213 N.W.2d at 187.

[269] 13 Mich. 318 (1865).

[270] Dyke v. Richard, 390 Mich. 739, 746-47, 213 N.W.2d 185, 188 (1973).

[271] MICH. COMP. LAWS ANN. § 600.5838 (West Supp. 1986).

[272] *Id.*

[273] *Id.*

the applicable period (which is two years),[274] "or within six months after plaintiff discovers or should have discovered the existence of the claim, whichever is later."[275] Thus, the statute of limitations will commence running upon the termination of treatment (or the termination of representation) but the limitation period will in no event expire prior to six months after the aggrieved party discovers or should have discovered the existence of the claim.

The Michigan concept is a good one because the period of limitation cannot expire until the matter out of which the malpractice arose has been terminated for the statutory period of two years and the client has either discovered or should have discovered the existence of the claim for six months. But the Michigan statutory scheme has shortcomings. In applying the terms of the statute, the period of limitation could, absent some special interpretation by the court, expire before the client knows or should know that the matter out of which the malpractice arose is terminated, and thus while the client may be in a continuing position of dependence or reliance upon the attorney, even though the client has discovered or should have discovered the existence of the claim for six months. Furthermore, the six months provided for in the discovery rule is too short a period.

Consider the fact that generally the shortest statutory period is one year, as in defamation, assault and battery.[276] It was desirous for reasons of public policy that these acions be brought quickly. Yet one year was apparently deemed to be the shortest reasonable time. While these actions are not traditionally governed by a discovery rule, in almost all instances there is no need for a discovery rule with respect to these actions. If one year is deemed to be the shortest reasonable period for a traditional statute of limitations, why should a discovery rule, which may provide the only period within which a person can, in reality, maintain an action, encompass a lesser period? It may be urged that statutes of limitations are statutes of repose, and therefore it is desirable that the discovery period be a short one in order to achieve the benefits of "repose." But a discovery rule always cuts sharply against the concept of repose by extending the time within which an action can be maintained. If it is sound policy to do this, it is certainly unsound policy to make the discovery period unreasonably short in terms of achieving its objective.

In the application of the Michigan statute, in determining when representation terminates, the courts have dealt with factually interesting cases, and have developed interesting concepts. In *Berry v. Zismam,*[277] the Michigan Court of Appeals affirmed the trial court's dismissal of a legal malpractice action pursuant to Michigan statute. The malpractice action was commenced

[274] MICH. COMP. LAWS ANN. § 600.5805 (West Supp. 1986).

[275] MICH. COMP. LAWS ANN. § 600.5838 (West Supp. 1986).

[276] *See* R. PHELPS, LIBEL: RIGHTS, RISKS, RESPONSIBILITIES 102 (1978).

[277] 70 Mich. App. 376, 245 N.W.2d 758 (1976).

against the attorney on October 2, 1974. The client had previously, on March 1, 1971, commenced a malpractice action against the attorney for the same alleged wrong. However, on motion of the attorney, this earlier malpractice action had been dismissed. The Michigan Court of Appeals concluded that institution of the earlier malpractice action on March 1, 1971, was "equivalent to the discharge of defendant as plaintiffs' attorney"[278] and therefore the two year statute of limitations had run prior to the institution, on October 2, 1974, of the second malpractice action.

The court relied in its reasoning on *Genrow v. Flynn,*[279] where the Michigan Supreme Court found that where a client "seeks to degrade and humiliate"[280] attorneys by sending them a telegram in which the client states that the attorneys have been "guilty of falsehood and gross fraud and neglect, and that he does not intend to stand their abuse any longer,"[281] this is equivalent to a discharge of the attorneys. In *Berry,* the court stated that it could conceive of very little that was more "humiliating or degrading"[282] to an attorney than having his client sue him for malpractice.

While it appears that in the usual case it may be concluded, as in *Berry,* that suing an attorney for malpractice may be treated as discontinuing the attorney's services, an inquiry should nevertheless be made in each case to determine whether, based on the totality of facts, this is a warranted conclusion. Furthermore, it certainly seems inappropriate to reason that "humiliation" of an attorney is equivalent to discontinuing the attorney's services, with the result that the statute of limitations is triggered by such "humiliation." In *Genrow,* the client's telegram, as indicated, included the statement to the effect that he "does not intend to stand their [the attorneys'] abuse any longer."[283] It would appear that this statement, rather than the concept of "humiliation," would form a more reasonable basis for concluding that the attorneys' services were discontinued. However, even this statement, without additional facts, does not import termination of services.

Developments in Ohio demonstrate a willingness of the courts to abruptly change course when considering statutes of limitations in malpractice actions. These developments appear to have been marked with less divergence between the courts and legislature than was the case in Michigan. In 1941, in *Galloway v. Hood,*[284] a legal malpractice action, the Court of Appeals refused to accept plaintiff's contention that his cause of action "did not 'accrue' until the rela-

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[278] *Id.* at 380, 245 N.W.2d at 760.

[279] 166 Mich. 564, 131 N.W. 1115 (1911).

[280] *Id.* at 568, 131 N.W. at 1116.

[281] *Id.*

[282] 70 Mich. App. 376, 380, 245 N.W.2d 758, 760 (1976).

[283] 166 Mich. 564, 568, 131 N.W. 1115, 1116 (1911).

[284] 69 Ohio App. 278, 43 N.E.2d 631 (1941).

tionship between himself, as client, and the defendants, as his attorneys, had terminated."[285] The court adopted this position although, in the language of the court, "it [the rule for which plaintiff contended] is generally the rule applied in cases arising between patient and physician or surgeon."[286] The court's position was that, in the absence of fraud or concealment on the part of the attorney, the action for legal malpractice accrues when the acts constituting malpractice occur.

Subsequently, in *Wyler v. Tripi,*[287] a medical malpractice action, the Supreme Court of Ohio observed that it had "adopted the continuing negligence theory by stating that in all medical malpractice cases, the latest time at which the statute of limitations commences running is the time at which the physician-patient relationship finally terminates."[288] The court's reference to the *latest* time, however, raised the question of when and under what circumstances the statute would commence running at the time of termination of the physician-patient relationship, and whether, and under what circumstances, it would commence running at an *earlier* time. The *Wyler* case took on considerable significance in legal malpractice in Ohio, as the Supreme Court of Ohio, in *Keaton Co. v. Kolby,*[289] adopted the *Wyler* rule in legal malpractice. *Keaton* concluded, contrary to *Galloway,* that there was no logical basis for treating doctors and attorneys differently, and accordingly held that "a cause of action for malpractice against an attorney accrues, at the latest, when the attorney-client relationship finally terminates."[290]

But the Supreme Court of Ohio sharply changed direction in 1983 in *Oliver v. Kaiser Community Health Foundation,*[291] a medical malpractice action. Here, the court adopted a discovery rule, holding that "a cause of action for medical malpractice accrues and the statute of limitations commences to run when the patient discovers, or in the exercise of reasonable care and diligence should have discovered, the resulting injury."[292] The court's reasoning is, in part, defensive, but at the same time articulate. In *Wyler,* some twelve years earlier, in refusing to adopt the discovery rule, the court had stated that it was "convinced that to do so would place us in the obvious and untenable position of having not only legislated, but of having done so directly in the face of a clear and opposite legislative intent."[293] But in *Oliver,* the court observes that the majority in *Wyler* placed undue emphasis upon the fact that the legislature

[285] *Id.* at 280, 43 N.E.2d at 632.

[286] *Id.*

[287] 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971).

[288] *Id.* at 167, 267 N.E.2d at 421.

[289] 27 Ohio St. 2d 234, 271 N.E.2d 772 (1971), *overruled,* 5 Ohio St. 3rd 210, 450 N.E.2d 684 (1983).

[290] *Id.* at 238, 271 N.E.2d at 774.

[291] 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983).

[292] *Id.* at 117-118, 449 N.E.2d at 443-44.

[293] 25 Ohio St. 2d 164, 171, 267 N.E.2d 419, 423.

had declined to pass a bill that was introduced to add a discovery rule to the medical malpractice statute of limitations. The *Oliver* court reasons that there are many possible reasons, *extant* its view of the merits of a particular rule, why a legislature may fail to adopt a rule, and accordingly, it is erroneous to conclude that failure of the legislature to adopt the discovery rule demonstrated an intent to reject it.

The court concludes that it has the power to adopt a discovery rule and indicates what appears to be its fundamental reason for doing so when it states that the discovery rule "will ameliorate the obvious and flagrant injustice frequently resulting from the operation of the termination rule."[294] Indeed the court in *Wyler,* when it adopted the termination rule, reluctantly observed that "there is much to recommend the adoption of the discovery rule;"[295] and the dissenting opinion in *Wyler* observed that the termination rule "affords no relief to a patient whose injury is such that it is not discoverable until a time well beyond termination of treatment."[296]

In *Skidmore & Hall v. Rottman,*[297] decided just three weeks after *Oliver,* the Supreme Court of Ohio overruled *Keaton,* and adopted the discovery rule in legal malpractice, observing that in *Oliver* it had articulated policy considerations for adopting the discovery rule in medical malpractice actions, and "the policy considerations underlying the 'discovery rule' are no less compelling in *legal* malpractice actions."[298]

The central basis for the Supreme Court of Ohio overruling cases in which it had applied the termination rule appears to be the fact that the termination rule does not meet the needs served by the discovery rule. The court obviously chose not to apply a concept such as that applied in Michigan, which would result in having both rules. However, since the opinions of the Supreme Court of Ohio in *Wyler* and *Keaton* indicate that it finds no barrier to adopting the termination rule, and its opinions in *Oliver* and *Skidmore* indicate that it finds no barrier to adopting the discovery rule, in both medical and legal malpractice, perhaps the Ohio court will reconsider and re-institute the termination rule, to be applied in conjunction with the discovery rule.

The benefit that would be achieved by such a development is indicated in the foregoing analysis of the statute of limitations in Michigan.[299] The inadequacies of the Michigan statutory scheme, also analyzed at that point, could be

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[294] 5 Ohio St. 3d 111, 117, 449 N.E. 2d 438, 443.

[295] 25 Ohio St. 2d 164, 171, 267 N.E.2d 419, 423.

[296] *Id.* at 176, 267 N.E.2d at 426.

[297] 5 Ohio St. 3d 210, 450 N.E.2d 684 (1983).

[298] *Id.* at 211, 450 N.E.2d at 685.

[299] *See* discussion in section X, *supra.*

avoided.[300] If such a step were to be taken, it is suggested that consideration of the proposals set out in section XI, that follows, would also be relevant.

XI. PROPOSED RULES AND PRINCIPLES FOR LEGAL MALPRACTICE ACTIONS

Proposals for a comprehensive and integrated series of rules and principles, which are recommended with respect to statutes of limitations in legal malpractice actions, are set out in this section. In formulating these proposals or recommendations, consideration has been given to the fiduciary relationship between attorney and client, the strong element of dependence by the client upon the attorney, the realities of life experience in dealing with legal matters, that are frequently emotionally trying and vary from the relatively simple to the incredibly complex, the needs and perceptions of the client and society at large, and the legitimate expectations of attorneys and the system of justice. By maximally taking into account these considerations, the expectation is that the proposals will meet the test of fundamental fairness. Material supportive and otherwise relevant to these proposals is found in the relevant sections of this article.

It is proposed or recommended that the following be adopted or included in rules and principles relating to statutes of limitations in legal malpractice actions:

1. Where the action is in tort for negligence, the period of limitation is to be that provided in the applicable tort statute of limitations, which would preferably be three years, but not less than two years. Where the action, under relevant jurisdictional criteria, is treated as one in contract, the contract statute of limitations is to apply. Where the action is grounded in negligence, but may be treated as an action in contract under relevant jurisdictional criteria, the plaintiff is to have an election of remedies and may proceed in either tort or contract.

Where there is a malpractice statute of limitations that is deemed to apply to legal malpractice actions, the period of limitation would preferably be three years, but not less than two years. Upon the election of plaintiff, the action is to be treated as one in contract, if relevant jurisdictional criteria are met, and in this event the contract statute of limitations shall apply.

2. The damage rule, with a discovery rule superimposed or added, shall be adopted, together with a continuous representation rule. The details and characteristics of the damage rule, discovery rule and continuous representation rule, are set out in the subsequent proposals.

3. The damage rule is to provide that a cause of action for legal malpractice shall not accrue untill all of the elements of the cause of action come into existence, including damage.

[300] *Id.*

4. The damage rule is to apply whether the alleged wrong of the attorney is characterized by the court to be an action in tort or contract.

5. Substantial damage must occur before the element of damage, required by the damage rule, is deemed to be met.

6. Attorneys' fees, paid or accrued, and legal costs and expenditures, paid or accrued, including but not limited to court costs, shall not be considered damage for the purpose of the damage rule or the accrual of a cause of action for legal malpractice.

7. A discovery rule shall be adopted which is to provide that the statute of limitations is tolled until the client knows or should know facts that establish all of the elements of the cause of action that are required under the damage rule.

8. The statute of limitations shall be tolled until the attorney's representation of the client in the matter in which the alleged malpractice arose (referred to below as the particular matter) is terminated. Furthermore, more than termination is required to start the statute of limitations running as is set out below in proposals relevant to the continuous representation rule.

9. In determining whether the client "should know" facts, in applying the discovery rule, the determinative question is whether this individual client reasonably should have known the facts, taking into account the client's intelligence, education, experience, and other relevant characteristics. The objective reasonable person test is not to be applied.

10. The burden of proof is upon the attorney to establish that the client knew or should have known facts necessary to establish a cause of action, so that the requirements of the discovery rule are met.

11. The quantum of proof necessary to establish that the client knew or should have known these facts is clear and convincing evidence.

12. Where it is found that the client reasonably should have known facts necessary to establish a cause of action, the doctrine of comparative negligence shall apply, so that if it is determined that the attorney was negligent, the client's recovery shall be reduced, but not precluded.

13. A continuous representation rule shall be adopted which is to provide that the statute of limitations shall be tolled until the attorney's representation in the particular matter is terminated and the client knows or should know that it is terminated.

14. In determining whether the client should know that the attorney's representation in the particular matter is terminated, the determinative question is whether this individual client reasonably should have known that the representation terminated, taking into account the client's intelligence, educa-

tion, experience, and other relevant characteristics. The objective reasonable person test is not to be applied.

15. The burden of proof is upon the attorney to establish that the client knew or should have known that the attorney's representation in the particular matter terminated.

16. The quantum of proof necessary to establish that the client knew or should have known that the attorney's representation in the particular matter terminated is clear and convincing evidence.

17. The period of limitation *shall in no event expire* until the attorney's representation in the particular matter has been terminated and the client knows or reasonably should know that it has been terminated for at least one year, and *at the same time,* during this entire period of at least one year, the client knows or reasonably should know facts that establish all of the elements of a cause of action under the damage rule.

These proposals anchor, or cement as a first step, the damage rule in tort *and* contract. Without more, this would prevent the statute of limitations from commencing to run, and the period of limitation from running, while a client is in a position to maintain an action for only nominal damages.

This discovery rule, which is superimposed upon the damage rule, would toll the statute of limitations until the client knows or should know facts that would cause the statute to commence running under the damage rule, if there were no discovery rule. Furthermore, in no event would the period of limitation expire before at least one year has elapsed after the attorney's representation in the particular matter has terminated and the client knows or reasonably should know that it has been terminated, and *concurrently,* during this entire period of at least one year, the client knows or reasonably should know facts that establish all of the elements of a cause of action under the damage rule. This provides for fundamental fairness in the context of the attorney-client relationship, as it establishes a standard pursuant to which the client would generally be both knowledgeable and not under the influence of the attorney for at least one year.

Various additional safeguards are provided, to maximize the probability of justice in *each* case. Thus, where the critical issue is whether the client should have known facts under the discovery rule, the proposals require that it be shown that the client reasonably should have known the facts, taking into consideration the client's personal characteristics, and not measuring against the objective reasonable person. Since the attorney is a fiduciary with whom the client places reliance and trust, it would be unfair to bar the client from recovery for a wrong committed by the attorney on the basis of what the objective reasonable person would be expected to know, rather than what this client, as an individual, would be expected to know. The same requirement, for

the same reasons, is applied where the question is whether the client should have known that the attorney's representation had terminated in a particular matter.

To ask a fiduciary, who wishes to bar a client from recovery for a wrong committed by the fiduciary, to establish by clear and convincing evidence (rather than by a preponderance of the evidence) that the client knew or should have known facts, is simply taking into account the fiduciary relationship, reasonable expectations, and a striving for fundamental fairness.

Where it is proposed that the continuous representation rule require more than a showing that the representation by the attorney has terminated in the particular matter, but in addition that the client knows or should know that the representation has terminated, (using the individualized test for "should know" and requiring clear and convincing evidence), nothing beyond fundamental fairness is sought, and hopefully no less is achieved.

These proposals do not place an undue burden upon attorneys. I would simply ask that each proposal be examined in light of the material and analysis contained in this article, and any other factors or considerations that may be deemed relevant. The proposals present what is, under the circumstances of the attorney-client relationship, and the realities of its functioning within our society, a fair set of principles.[301] If these proposals are implemented, this will not only prevent erosion of respect for the legal profession, but in my view, significantly raise the respect for the profession in the eyes of individual clients, and in the eyes of the community and society at large. Attorneys have been in the forefront as leaders in society, and the surest way of preventing erosion, or continued erosion, of respect for the legal profession, is to act fairly with respect to persons who fall within the profession's care and trust.

[301] *See* ABA Standing Comm. on Lawyers' Professional Liability, *Profile of Legal Malpractice: A Statistical Study of Determinative Characteristics of Claims Asserted Against Attorneys* (1986). This study is based upon an analysis of 29,227 claims asserted against attorneys reported in the National Legal Malpractice Data Center of the American Bar Association from January, 1983, through September 30, 1985, and reports that 26% of the claims were based upon alleged administrative error. Of the claims involving personal injury plaintiffs, 50.2% of the claims were based on alleged administrative error. These errors can most readily be avoided. See also Mallen, *Legal Malpractice: Controlling the Odds*, TRIAL 24 (September 1984), which contains earlier statistics from the American Bar Association's National Legal Malpractice Data Center, indicating that with respect to claims involving personal injury plaintiffs, 48.9% of the claims were based upon administrative error, which the author concludes are avoidable errors that relate more to the manner in which attorneys conduct their business than to their legal skill or knowledge.