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Cordial v. Grimm: In Search of Indiana's Legal Malpractice Statute of Limitations

CASE COMMENT

CORDIAL V. GRIMM: IN SEARCH OF INDIANA'S LEGAL MALPRACTICE STATUTE OF LIMITATIONS

INTRODUCTION

Traditionally lawyers have been insulated from malpractice liability by several "ancient legal principles," foremost of which are state statutes of limitations.[1] In a waning number of jurisdictions the applicable limitation period still commences to run when the attorney's negligence occurs.[2] Like medical malpractice, however, attorneys' negligence is frequently neither discovered nor discoverable until long after it occurs. Thus, under an occurrence rule, a client's compensation for malpractice often depends upon fortuity—not the merit of his claim. Nevertheless, a recent increase in litigation[3] has spawned critical examination of the attorney-client relationship and nearly universal condemnation of the occurrence rule.[4] In the general absence of legislative action, contemporary courts have rapidly begun to abandon the traditional rule altogether or to temper it with other judicial doctrines.[5]

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1. "The lawyer who commits a malpractice in the representation of his clients . . . is protected by a maze of ancient legal principles which makes it virtually impossible for the injured client to be made whole or even for the lawyer to be reprimanded." Wallach & Kelly, *Attorney Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA LAW. 257 (1970) [hereinafter cited as *Wallach & Kelly*].

2. For an excellent discussion of the occurrence rule in legal malpractice, its judicial origins and contemporary use, see MALLEN & LEVITT, LEGAL MALPRACTICE § 200 (1977) [hereinafter cited as LEGAL MALPRACTICE]. "No jurisdiction has recently returned to or embraced the occurrence rule." *Id.* at 274. *See also* Annot., 18 A.L.R.3d 978 (1968); Lahrop, *Legal Malpractice: Plaintiffs, Limiting Statutes and Heyer v. Flaig*, 37 INS. COUNSEL J. 258 (1970).

3. CASE AND COMMENT, Sept.-Oct., 1975, at 1 (leading malpractice insurance carrier commenting that successful claims against lawyers had increased twenty-five percent within the last five years); New York Times, June 18, 1975, at 44, col. 1 (claims processed by Continental National American "have just about doubled" in the last four years).

4. *E.g.*, Rothstein, *Lawyers Malpractice in Litigation*, 21 CLEV. ST. L. REV., May, 1972, at 1; *Wallach & Kelly, supra* note 1, at 260; Note, *Commencement of the Statute of Limitations in Legal Malpractice Actions—The Need for Re-Evaluation*, 15 UCLA L. REV. 230 (1967) [hereinafter cited as Note, *Commencement of the Statute*].

5. *See* notes 22-25 *infra* and accomanying text.

Despite this transition in other jurisdictions, the Indiana Supreme Court has not yet confronted the issues of which statute of limitations governs legal malpractice actions in Indiana and, more importantly, when the limitation period commences to run. In *Cordial v. Grimm*,[6] however, the Third District Court of Appeals has recently extended the protection of Indiana's "malpractice" statute of limitations[7] to lawyers; the statute contains an express occurrence rule and was previously assumed to cover only the medical profession. Similarly, the court has relied upon prior medical malpractice cases and their ameliorative "end of the relationship" test to determine when the two-year limitation commenced to run in a legal malpractice claim. One other statute was approved by the court: Indiana's general two-year statute of limitations for damage to personal property. Although that statute commences upon "accrual," a term particularly susceptible to judicial discretion and interpretation, the court focused its analysis and conclusion solely on the more restrictive malpractice statute.

One writer has concluded that the *Cordial* court merely deferred to future legislative action.[8] The court did not, in fact, defer, but actively adopted a highly protective statute of limitations as well as an impracticable and inequitable definition of when the attorney-client relationship ended in *Cordial*. The result may represent only an insignificant departure from a strictly-construed occurrence rule, if at all.

This comment will examine the holding, weaknesses and possible impact of *Cordial v. Grimm*. The analysis requires examination of prior Indiana law, contemporary treatment of the issues in foreign jurisdictions and some old and new policy arguments.

BACKGROUND OF CORDIAL V. GRIMM—POLICY ARGUMENTS AND CURRENT JUDICIAL TREATMENT

Few commentators or courts presently advocate retention of the occurrence rule or other forms of protective statutes of limitations for the legal profession. Nevertheless, both the traditional rationale for statutes of limitations and some new arguments tailored solely to the legal profession may be marshalled in support of a protective limitation. Upon analysis, these arguments appear clearly unpersuasive in light of countervailing considerations.

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6. ___ Ind. App. ___, 346 N.E.2d 266 (1976).
7. *See* notes 33 and 62 *infra* and accompanying text.
8. LEGAL MALPRACTICE, *supra* note 2, at 289.

The traditional rationales for statutes of limitations are dual. They continue to be tolerated by the judiciary as devices necessary to prevent the evidentiary problems inherent in stale claims and the possible resulting prejudice to innocent defendants. Secondly, they are said to provide temporal security for the business and personal affairs of society.[9]

In addition to the historical arguments, some lawyers have suggested that the unique nature of the legal profession may alone justify the artificial immunity of a protective statute of limitations. One of these arguments relies upon the credible assumption that attorneys have an unusual vulnerability to suit due to the highly technical, rapidly changing and unpredictable nature of the modern American legal system.[10] Thus, increased exposure to civil liability would accelerate an impending legal malpractice insurance "crisis"[11] and perhaps threaten the availability of legal services. An ancillary thesis is that increased exposure would also dampen "innovation and progress" in the profession.[12]

Despite these historical and contemporary arguments, however, an increasing number of courts and the majority of commentators favor abandonment of the occurrence rule for legal malpractice actions.[13] Traditional reasons for the statutes are, to a large degree, inappropriate to legal malpractice. Moreover, the more modern arguments for a protective statute have not been substantiated, and

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9. *See, e.g.*, Toth v. Lenk, ___ Ind. App. ___, ___, 330 N.E.2d 336, 346 (1975); *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950); Note, *Malpractice and the Statute of Limitations*, 32 IND. L.J. 528 (1957). Statutes of limitations have not always been viewed with affection by the Bar and were formerly thought to create an unconscionable defense. "I will never plead the statute . . . when based on the mere efflux of time; for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner to his knavery." Resolution XII, HOFFMAN'S FIFTY RESOLUTIONS IN REGARD TO PROFESSIONAL DEPORTMENT, 31 *Reports of American Bar Ass'n* 71 (1907).

10. *E.g.*, Floro v. Lawton, 187 Cal. App. 2d 657, 674, 10 Cal. Rptr. 98, 108 (1960) ("It would appear that the possibility of a malpractice action is an occupational hazard for a lawyer.").

11. The possibility of a legal malpractice insurance crisis has been a recent subject of concern in the A.B.A. *See, e.g., ABA National Institute on Professional Liability of Trial Lawyers, reprinted in*, 45 U.S.L.W. 2535, 2537-78 (May 17, 1977) [hereinafter cited as *ABA National Institute*]. *See also* Kroll, *Choosing The Right Legal Liability Insurance*, CASE & COMMENT, Sept.-Oct., 1976, at 26 (explaining "occurrence" and "claims made" or "discovery" policies); LeHouillier, *Legal Malpractice: The Risks and Insurance Protection*, 42 INS. COUNSEL J. 106 (1975).

12. Note, *Commencement of the Statute, supra* note 4, at 237.

13. *See generally* notes 1-4 *supra* and the cases cited in note 22 *infra*.

the harm threatened by continued vitality of the occurrence rule has become apparent.

Historical bases for statutes of limitations are indeed less persuasive in the specific area of legal malpractice. It is beyond dispute that stale claims pose inherent evidentiary problems. Yet it is also clear that a significant percentage of legal malpractice claims arise from errors which are readily discernible from court records, or even from the face of a single document.[14] Furthermore, in legal malpractice actions, loss of memory, witnesses or physical evidence will more often prejudice the plaintiff, rather than the defendant attorney. With few exceptions, the plaintiff must bear the burden of proving negligence, causation and damages in a legal malpractice suit.[15] Temporal security against suits by long-forgotten clients is maintainable by legal malpractice insurance, and, if an insurance "crisis" is indeed pending, a reduction in the frequency of malpractice appears to be the feasible and best solution.[16]

Moreover, the interests of consumers of legal services far outweigh the arguments for a protective statute of limitations. Most

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14. "[I]n matters in which an attorney's negligence is apparent on the face of a document, such as a will, contract, or title certification, there is little reason to bar a claim because memories are unclear." Comment, *New Developments in Legal Malpractice*, 26 AM. U.L. REV. 408, 441 (1977). *Cf. A.B.A. National Institute, supra* note 11, at 2538 ("The vast majority of claims arise from the attorney's failure to properly process cases, failure to observe a statute of limitations or conduct resulting in dismissals for want of prosecution or default judgments."); *Claims Control: The Florida Study*, LEGAL MALPRACTICE REV., February/March, 1978, at 2 ("only 35 percent of malpractice claims were for substantive issues of law, while 65 percent resulted from administrative and clerical errors").

15. Courts generally have not, thus far, allowed plaintiffs to invoke the doctrine of res ipsa loquitor in legal malpractice actions. For a critical analysis, see Note, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689 (1977). *See also* Note, *Legal Malpractice—Erosion of the Traditional Suit Within a Suit Requirement*, 7 U. TOL. L. REV. 328, 331 (1975). As to Indiana law, *see* Donato v. Dutton, Kappes & Overman, 154 Ind. App. 17, 288 N.E.2d 795 (1972) (approving, in dicta, application of the doctrine to legal malpractice).

Often the client's file and some or all of the documents, correspondence and records needed to prove his claim will be in the possession and control of his former attorney. Lapse of time may result in misplacement, loss or destruction of those papers. The plaintiff who attempts to retrieve the complete files before suit is filed may also face considerable difficulty if his former attorney does not voluntarily comply. *See* IND. CODE § 34-1-60-10 (1976). This statute provides that an attorney may be held in contempt if he refuses, on request, to deliver "money or papers to a person from whom or for whom he has received them in the course of his professional employment . . . ." The scope of "papers" has not, however, been determined by Indiana courts.

16. *See, e.g.*, note 14 *supra* and results of the Florida study in note 21, *infra*.

attorneys' malpractice is neither discovered nor discoverable by the client promptly after it occurs.[17] Recent decisions and articles have repeatedly emphasized that the maze of procedural rules and legal principles is mysterious to the average lay person. Generally unable to evaluate his attorney's professional performance, the client is equally unable to recognize negligence when it occurs.[18] Thus, both the available statistics and the dynamics of the attorney-client relationship indicate that a brief limitational period effectively bars a substantial number of legal malpractice claims.

Removal of the arbitrary immunity afforded by the occurrence rule would, however, effectively deter negligence, more frequently shift the loss from legal malpractice to the negligent party, and minimize the incentive for concealment.[19] The recent increase in legal malpractice litigation has already resulted in intensified efforts to reduce malpractice. Lawyers have been forced to educate themselves about the common sources of error and how to eliminate them. As the current intra-professional literature emphasizes, the

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17. Francis McCarthy, general counsel for a legal malpractice insurance carrier has noted that *"[t]he average malpractice claim . . . takes about two and one half years to be discovered."* *ABA National Institute, supra* note 11, at 2537 (emphasis added).

> A lawyer is a legal expert; his client is not, and cannot be expected to recognize substandard professional conduct. Requiring the client to ascertain malpractice at the moment of its occurrence casts upon him the unfair and impractical burden of either knowing as much about the law as does his attorney or hiring a second attorney to scrutinize the work of the first.

Comment, *New Developments in Legal Malpractice*, 26 AM. U.L. REV. 408, 439 (1977) (footnotes omitted).

18. Furthermore, the attorney can actively or passively conceal his negligence with relative ease and thus contribute to delayed discovery. Note, *Legal Malpractice—Is The Discovery Rule the Final Solution?*, 24 HASTINGS L. REV. 795, 801 (1973). *See also* Neel v. Magna, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 188-91, 491 P.2d 421, 428-30, 98 Cal. Rptr. 837, 844-46 (1971) (adopting the discovery rule for legal malpractice claims in California with a persuasive policy discussion). Unlike a doctor's patient, a client faces some difficulty in consulting a second attorney during the term of the relationship. *See, e.g.*, Kohler v. Woollen, Brown & Hawkins, 15 Ill. App. 3d 455, 460, 304 N.E.2d 677, 680 (1973); ABA CODE OF PROFESSIONAL RESPONSIBILITY, E.C. 2-30 (1974).

19. *Wallach & Kelly, supra* note 1, at 257; Note, *Commencement of the Statute, supra* note 4, at 237 ("Society's significant interest in malpractice claims as a means of encouraging attorneys to maintain a high degree of care . . . requires that such claims have a just disposition."); Note, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 708 (1977).

best way to prevent malpractice suits is to prevent malpractice.[20] Similarly, the abandonment of protective statutes of limitations will probably promote, rather than stifle, "innovation and progress" in the profession.[21] Thus continued adherence to the occurrence rule poses only long-term damage to both the profession and its clients.

In response to these and other policy considerations, foreign jurisdictions have begun to abandon the occurrence rule for legal malpractice actions or temper it with ameliorative judicial doctrines. At least twelve jurisdictions have recently adopted the "discovery rule" for legal malpractice claims. Under the discovery rule, the applicable statutory limitation does not commence to run until the client discovers or reasonably should have discovered his cause of action.[22] Other state courts have achieved partial reform by use of the doctrines of "continuous representation" (limitation commences with termination of the attorney-client relationship);[23] "fraudulent concealment" (limitation is tolled until the end of the attorney-client relationship or later);[24] and the "damage rule" (cause of action does

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20. *E.g.*, "[M]andatory continuing legal education programs, more effective peer discipline, and, perhaps, higher admission standards would go a long way toward eliminating the root causes of malpractice—negligence, greed, and outright incompetence." *ABA National Institute, supra* note 11, at 2573. *See also Wallach & Kelly, supra* note 1, at 257; Note, *A Modern Approach to The Legal Malpractice Tort*, 52 IND. L.J. 689, 691 (1977).

21. This conclusion has been pragmatically supported by the results of an educational and preventive law campaign launched by a legal malpractice insurance company in conjunction with the Florida State Bar in 1976. In 1977, the number of legal malpractice claims against Florida attorneys dropped for the first time in four years. Claims for missed statutes of limitations fell "from 115 in 1976 to just 44 in 1977." *Claims Control: The Florida Study*, LEGAL MALPRACTICE REV., February/March, 1978, at 2.

Florida has had a "discovery rule" for legal malpractice claims since 1969. Downing v. Vaine, 228 So. 2d 622, 627 (Fla. Dist. Ct. App. 1969).

22. For an exhaustive discussion of the discovery rule in legal malpractice and a list of the jurisdictions which have adopted it, see LEGAL MALPRACTICE, *supra* note 2, at § 206. However, Biberstine v. Woodworth, 81 Mich. App. 705, 265 N.W.2d 797 (1978), and Berry v. Zisman, 70 Mich. App. 376, 377, 245 N.W.2d 758, 759 (1976), should be added as discovery rule decisions under Michigan's malpractice statute of limitation.

23. Derived from the "continuous treatment" doctrine used in medical malpractice cases, the continuous representation rule delays commencement of the statute of limitations until the attorney's representation concerning a particular matter is terminated. *See* LEGAL MALPRACTICE, *supra* note 2, at § 202.

24. The fraudulent concealment doctrine is used, in varying forms, in nearly every jurisdiction. Generally, any *affirmative* misrepresentations by the attorney which causes his client to delay suit will toll commencement of the statute of limita-

not accrue until damage or injury has resulted).[25]

Cordial v. Grimm[26] was the first Indiana appellate decision to confront the issues of which statute of limitations should govern a legal malpractice action and, more importantly, when the limitational period will commence. The court has summarily rejected application of the discovery rule and declined to decide whether the damage rule should apply to legal malpractice actions. Indiana courts have consistently applied a fraudulent concealment doctrine in *medical* malpractice cases. The statute of limitations is automatically tolled until termination of the professional relationship by a presumed constructive fraudulent concealment.[27] The result is identical to a "continuous treatment" or "end of the rela-

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tions until the client discovers his claim. The requirements of intent and knowledge associated with common law fraud are often not essential to invoke the doctrine and, in some jurisdictions, *passive* concealment is sufficient. A complete discussion of the doctrine can be found in LEGAL MALPRACTICE, *supra* note 2, at § 203. As to development of the doctrine in Indiana, see notes 44 through 56, *infra* and accompanying text.

25. *See generally* LEGAL MALPRACTICE, *supra* note 2, at § 201; Sacks, *Statutes of Limitations and Undiscovered Malpractice*, 16 CLEV.-MAR. L. REV. 65 (1967); Note, *Commencement of the Statute*, *supra* note 4, at 230-34.

In many cases attorney negligence will not result in actual damages until years after its occurrence. Primary examples are the negligently drafted will, contract or title abstract. Moreover, whether or not the error eventually causes any damage may depend upon purely fortuitous circumstances.

Although the damage rule is potentially less harsh to plaintiffs than the occurrence rule, it has proved much more difficult to define. If the defendant's act of malpractice does not initially cause compensable damage, commencement of the statute may be delayed until damage results. *E.g.*, Ft. Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967) (claim held timely since bad legal advice did not result in damage until three years before suit was filed); Budd v. Nixen, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971) ("The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." Thus the statute does not commence to run until actual injury occurs.). *See generally Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1201-03 (1950). Determined courts can, however, achieve an occurrence rule result by holding that the defendant's negligence caused immediate damages, even though there was no apparent manifestation of the injury until after the statute had run. *E.g.*, Weinstein v. Blanchard, 109 N.J.L. 332, 162 A. 601 (1932) (defendant physician failed to remove a rubber sponge; claim was barred even though no actual damage resulted until 19 years later). *Cf.* Eckert v. Schaal, 251 Cal. App. 2d 1, 58 Cal. Rptr. 817 (1967) (cause of action did not "accrue" until injury resulted, but injury existed when plaintiffs relied on the attorney's advice, not when a derivative suit was filed against the plaintiffs). *Eckert v. Schaal* was specifically overruled by the California Supreme Court. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 98 Cal. Rptr. 837, 491 P.2d 421 (1971).

26. ___ Ind. App. ___ , 346 N.E.2d 266 (1976).

27. *See* notes 46-56, *infra*.

tionship" rule. In *Cordial*, the court held that this "end of the relationship" rule applies also to legal malpractice actions. Contrary to other jurisdictions, however, the court found that the attorney-client relationship had terminated with the "last act" of the attorney and before his client's pending litigation was resolved. Thus, *Cordial* may represent only a minimal departure from a strict occurrence rule.

CORDIAL V. GRIMM—FACTS AND HOLDING

The inadequate record of facts reported in *Cordial* may have been the result of Cordial's *pro se* appearance before the trial court. In 1966 Cordial employed the defendant attorneys to pursue his workmen's compensation claim. That claim was lost in 1967 and Cordial's attorneys subsequently initiated a second claim in March, 1968, based upon the same injury. Cordial's second workmen's compensation claim was also denied in February, 1969, on the ground that it was barred by the first adverse ruling. Apparently Cordial's attorneys then filed an application for review with the full Industrial Board in June of 1969. In March, 1971, the full Board affirmed the decision of the administrative law judge, denying Cordial's second claim.[28]

One year later, after unsuccessful efforts to obtain counsel, Cordial filed suit against his former attorneys, alleging malpractice in connection with his valid workmen's compensation claim. The defendants moved for summary judgment against Cordial, contending that the action was commenced too late. Without specifying which statute of limitations it had relied upon, the trial court granted the summary judgment,[29] which was ultimately affirmed by the Third District Court of Appeals in *Cordial v. Grimm*.

Without specific legislative guidance or prior decisions to rely on, the *Cordial* court was forced to decide which of several potentially applicable statutes of limitations should govern a legal malpractice action and when those statutes commenced to run. Cordial first argued that his action was properly for breach of contract, governed by Indiana's longer statutes of limitations.[30] But the court rejected

28. 346 N.E.2d at 268.

29. *Id.*

30. Legal malpractice actions can be maintained under negligence or breach of contract terminology. *See generally* Comment, *New Developments in Legal Malpractice*, 26 AM. U.L. REV. 408, 435-39 (1977); Annot., 18 A.L.R.3d 978 (1968).

The *Cordial* court could have applied Indiana's breach of contract statutes. IND. CODE § 34-1-2-1 (1976) (oral contracts—six years); IND. CODE § 34-1-2-2 (1976) (written

the breach of contract theory, holding instead that the claim sounded in tort.[31] Thus, *two* statutes were applied to Cordial's claim: the two-year general limitation for negligent damage to personal property,[32] and Indiana's two-year limitation for medical malpractice.[33]

Application of the General Limitation for Damage to Personal Property

The two-year statute of limitations for damage to personal property was deemed appropriate because Cordial's workmen's compensation claim was a "chose in action," his intangible personal property.[34] That statute contains no legislative mandate for commence-

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contract—twenty years); Rooker v. Bruce, 45 Ind. App. 57, 58, 90 N.E. 86, 87 (1909) (an attorney impliedly contracts to exercise due care, skill and knowledge of the law). *But see* Corcellor v. Brooks, 347 So. 2d 274, 277 (La. App. 1977) ("Warranty or guarantee by an attorney of a particular result is foreign to the nature of the legal profession."); Glen Falls Ins. Co. v. Reynolds, 3 App. Div. 2d 686, 159 N.Y.S.2d 95 (1957) (malpractice action governed by negligence statute unless the attorney guaranteed a specific result).

Historically, privity of contract has been a requirement for maintainance of a legal malpractice action. *E.g.*, Savings Bank v. Ward, 100 U.S. 195, 200 (1879). Recent decisions and the majority of commentators, however, favor relaxation of the requirement. *E.g.*, Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962) (no privity requirement for intended beneficiaries of a negligently drawn will); Williams v. Polga, 391 Mich. 6, 215 N.W.2d 149 (1974) (liability for defective title abstract extended to any third party who could reasonably be expected to rely on it). *See generally* LEGAL MALPRACTICE, *supra* note 2, at § 59; Note, *Public Accountants and Attorneys: Negligence and the Third Party*, 47 NOTRE DAME LAW. 588, 609 (1972).

31. 346 N.E.2d at 269. This is consistent with the general trend in other jurisdictions. *See* LEGAL MALPRACTICE *supra* note 2, at §§ 193-98. The court was also determined to discourage plaintiffs from pleading several causes of action in an attempt to bring themselves within the most favorable statute. 346 N.E.2d at 269.

32. "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards. For injuries to person or character, for injuries to personal property . . . within two (2) years." IND. CODE § 34-1-2-2 (1976).

33. IND. CODE § 34-4-19-1 (1976):

> No actions of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, ommission or neglect complained of.

This statute has been re-enacted nearly verbatim in Indiana's new Medical Malpractice Act. IND. CODE § 16-9.5-3-1 (1976). However, the new Act applies only to "qualified" health care providers. *See Survey—Torts*, 9 IND. L. REV., 340, 360-61 (1975).

34. 346 N.E.2d at 270.

ment, but is triggered by "accrual," a term peculiarly open to judicial discretion.[35]

The court did not exercise its authority to define "accrual" of a legal malpractice action liberally. Cordial's argument that his cause of action had not accrued until his discovery of malpractice was summarily rejected: "[S]uch is not the law in Indiana."[36] Cordial next asserted a damage rule theory, contending that his cause of action had not accrued until he had suffered damage[37] and that his damage had not matured until his appeal was denied by the full Industrial Board, one year before suit was filed. Without deciding whether a damage rule was indeed applicable in Indiana, the court found that any injury or damages had occurred in 1967, when Cordial's first workmen's compensation claim was denied.[38] Therefore, the plaintiff's claim could not be saved by the damage rule since suit was not commenced until 1971.[39] The primary emphasis of *Cordial*, however, is devoted to adoption of Indiana's medical malpractice statute, with its express occurrence rule, as the appropriate limitation for legal malpractice claims.

Extended Scope of the Medical Malpractice Statute of Limitations

Cordial's extension of Indiana's medical malpractice statute of limitations to embrace the legal profession rested ostensibly upon legislative intent. Although members of the health professions are the only enumerated objects of the statute,[40] its title and broad language were held to supercede Cordial's "*ejusdem generis*" argument.[41] The statute is titled simply as "malpractice" and, as the

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35. *See, e.g.*, Woodruff v. Tomlin, 511 F.2d 1019, 1020-21 (6th Cir. 1975) (On the basis of a medical malpractice decision rendered before *Woodruff*, the court overruled prior Tennessee law to hold that a legal malpractice action did not accrue until the client discovered or should have discovered his claim.); Kohler v. Woolen, Brown & Hawkins, 15 Ill. App. 3d 455, 460, 304 N.E.2d 677, 681 (1973); Hendrickson v. Sears, 365 Mass. 83, 88, 310 N.E.2d 131, 134 (1974) ("[I]n general, the definition of accrual has been left to judicial rationalization and interpretation."). *See generally* LEGAL MALPRACTICE, *supra* note 2, at § 204.

36. 346 N.E.2d at 273.

37. Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928) (an action does not "accrue" until both injury and "*damages susceptible of ascertainment*" have occurred) (emphasis added). *Accord*, Wabash County v. Pearson, 120 Ind. 426, 428, 22 N.E. 134, 135 (1889). Neither of these Indiana Supreme Court decisions, under the general negligence statutes of limitations, was cited by the *Cordial* court.

38. 346 N.E.2d at 273.

39. *Id.*

40. *See* note 33 *supra*.

41. In the construction of laws . . . the '*ejusdem generis* rule' is, that where general words follow an enumeration of persons or things, by

court duly noted, that terminology encompasses attorneys' as well as physicians' negligence.[42] Moreover, the specific list of health care providers designated in the statute is followed by the nebulous phrase, "or others."[43] Thus the language of the malpractice statute, if not its history, provided some basis for bringing Indiana lawyers within its protective canopy. In determining when the malpractice statute had commenced to run against Cordial's claim, the court attempted to assimilate prior medical malpractice decisions and the "end of the relationship" rule, established prior to *Cordial*. A preliminary discussion of these prior cases is, therefore, essential to an understanding of *Cordial v. Grimm*.

Commencement of the Malpractice Statute: Fraudulent Concealment

Since 1956, Indiana's strict malpractice statute of limitations has been judicially tempered by principles of equitable estoppel and an expanded fraudulent concealment doctrine. In *Guy v. Shuldt* the Indiana Supreme Court first held that an action for medical malpractice was not demurrable, even though commenced more than twelve years after the "act, omission or neglect complained of."[44] The court determined that equity would not allow a fiduciary to gain the protection of a statute of limitations by a breach of his duty to disclose all material information.[45] Such a breach of the duty to inform was

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> words of a particular and specific meaning, such general words are . . . to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

BLACKS LAW DICTIONARY 608 (rev. 4th ed. 1968).

Plaintiff argued that the doctrine should have excluded legal malpractice from the ambit of the malpractice statute of limitations, since lawyers are not among the professionals enumerated there. *See* note 33 *supra*. Nevertheless, the court rejected plaintiff's argument, noting that the *ejusdem generis* doctrine "should not become a device for unduly narrowing the scope and operations of statutes to an extent never envisioned . . . ." 346 N.E.2d at 271.

42. *Id.* Curiously, the court went on to hold that the term applies only to the medical and legal professions. *Id.* at 272.

43. *See* note 33 *supra*. 346 N.E.2d at 269.

44. IND. CODE § 34-4-19-1 (1976). The physician's negligence occurred in 1941. A broken drill bit was discovered in the plaintiff's leg in November, 1952, and suit was commenced in August, 1954. Reversing judgment for the physician, the court held that the complaint was not demurrable because the question of concealment was one of fact, even though not pleaded. 236 Ind. 101, 110, 138 N.E.2d 891, 896 (1956).

45. *Id.* at 108-09, 138 N.E.2d at 895. *Accord*, Dawson, *Fraudulent Concealment and the Statutes of Limitations*, 31 MICH. L. REV. 875, 887 (1933) (The fiduciary relationship imposes upon the professional a duty to disclose all material facts, a breach of which constitutes concealment and fraud.).

Attorneys also have a duty to disclose all material facts which are important to

held to constitute constructive concealment and toll commencement of the malpractice statute until termination of the professional relationship.[46]

Fraud terminology is, perhaps, unfortunate because *Guy* and its progeny have transformed the fraudulent concealment doctrine into a nearly automatic tolling provision for actions within the malpractice statute of limitations. Active concealment is not required; silence alone is sufficient to invoke the doctrine against a fiduciary who has a duty to speak.[47] Furthermore, proof of the traditional elements of fraud—intent and scienter—is not required to toll commencement of the statute.[48] A fiduciary has the duty to know as well as to disclose what he knows.[49] Thus a physician or an attorney who is unaware that he has fallen below the professional standard of care[50] may, nevertheless, "fraudulently conceal" his negligence.

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the client. ABA CODE OF PROFESSIONAL RESPONSIBILITY, E.C. 9-2 (1974). *See also* Hall v. Indiana Department of State Revenue, ___ Ind. App. ___, ___, 351 N.E.2d 35, 40 (1976); Manley v. Felty, 146 Ind. 194, 45 N.E. 74 (1896).

46. 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956). The *Guy* court expressly held that *silence* will be sufficient to constitute constructive fraudulent concealment: "[T]he estoppel to plead limitations may arise . . . from the defendant's conduct *or even from his silence when under an affirmative duty to speak.*" *Id.*, *citing* 53 C.J.S., *Limitation of Actions*, § 25, pp. 962, 964 (emphasis in original).

Constructive fraudulent concealment has consistently been held to terminate with the doctor-patient relationship in Indiana. "[W]here the duty to inform exists by reason of a confidential relationship, when that relationship is terminated, concealment then ceases to exist." Guy v. Shuldt, 236 Ind. at 109, 138 N.E.2d at 895. *Accord*, Cordial v. Grimm, ___ Ind. App. ___, ___, 346 N.E.2d 266, 272 (1976), *citing* Ostojic v. Brueckman, 405 F.2d 302 (7th Cir. 1968); Toth v. Lenk, ___ Ind. App. ___, ___, 330 N.E.2d 336, 339 (1975).

47. *Id.*

48. "Fraud *may* consist of intentional deception . . . ." Guy v. Shuldt, 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956) (emphasis added); Marcum v. Richmond Auto Parts, 149 Ind. App. 120, 127, 270 N.E.2d 884, 888 (1971) ("[I]t is not essential that the representations or conduct giving rise to its application should be fraudulent in the strictly legal significance of that term, or with intent to mislead or deceive . . . .") *Accord*, Toth v. Lenk, ___ Ind. App. ___, ___, 330 N.E.2d 336, 339 n.3 (1975).

49. This is particularly true in the attorney-client relationship. "A fiduciary such as an attorney . . . [has] the duty to investigate the law and facts applicable to the transaction and to disclose the results to his clients. The duty is that imposed upon a trustee who must disclose all material facts . . . the trustee knows or should know." Burien Motors, Inc. v. Balch, 9 Wash. App. 573, 578, 513 P.2d 582, 586 (1973). *Cf.* Boss-Harrison Motel Co. v. Barnard, 148 Ind. App. 406, 407, 266 N.E.2d 810, 811 (1971) (good appellate advocacy demands regular reading of Advance Sheets). For a general discussion of the attorney's duty to know, see *Malpractice and the Under-Informed Lawyer Or, What You Don't Know May Really Hurt You After All*, 44 INS. COUNSEL J. 333 (1977).

50. Three fundamental ingredients underlie the *Guy* rule for fraudulent con-

The ameliorative end of the relationship test established in *Guy* was also arbitrary, resting upon the assumption that a patient would not rely on his doctor's silence after the relationship ended.[51] In *Van Bronckhorst v. Taube*,[52] however, the Second District Court of Appeals clearly distinguished those cases where active misrepresentation is alleged, and held that *affirmative* concealment would toll commencement of the malpractice statute until the patient discovered or should have discovered his cause of action.[53] *Van Bronckhorst* appeard to be consistent with both the earlier Indiana Supreme Court decision in *Guy* and the underlying principle of equitable estoppel.[54] In dicta only, the second district also indicated that it might decline to apply the arbitrary "end for the relationship" test, even in the absence of affirmative concealment.[55] Thus, prior to *Cordial*, a line of medical malpractice cases had converted the fraudulent concealment doctrine into a rather clear rule for commencement of the malpractice statute of limitations. Despite the occurrence rule in the statute, it would not commence to run until the

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cealment—a fiduciary relationship, a corresponding duty to disclose all material facts and a right to rely on the professional's compliance with that duty. These are well-established elements of the attorney-client relationship. *See, e.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY, E.C. 9-2 (1974); Hall v. Indiana Dept. of State Revenue, ___ Ind. App. ___, ___, 351 N.E.2d 35, 40 (1976).

51. *See* note 46 *supra*.

52. ___ Ind. App. ___, 341 N.E.2d 791 (1976).

53. [W]e hold that such termination of relationship where there has been affirmative misrepresentation as here alleged does not, as a matter of law, commence the clock ticking on the statute of limitations.

The legal consideration then translates into a question of whether, and when, if at all, the patient has a reasonable opportunity to discover his condition, so that reliance upon the representations of his former physicians became unreasonable.

Id. at 798. The court further held that Ostojic v. Bruekman, 405 F.2d 302 (7th Cir. 1968), was an incorrect interpretation of Indiana law, not binding on Indiana courts. *Id.*

54. 341 N.E.2d at 797. Indeed, the possibility of affirmative concealment is the only reasonable explanation for the Indiana Supreme Court's remand in the *Guy* case. The record clearly showed that the doctor-patient relationship had ended more than twelve years before suit was filed. Guy v. Shuldt, 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956).

There is authority in Indiana that affirmative fraudulent concealment of a claim for negligence will not, alone, bring the plaintiff's action within the six year statute of limitations for fraud, IND. CODE § 34-1-2-1 (1976). Miladin v. Istrate, 125 Ind. App. 46, 119 N.E.2d 12, *reh. denied*, 125 Ind. App. 46, 119 N.E.2d 901 (1954). *See generally* Note, *Malpractice and the Statute of Limitations*, 32 IND. L.J. 528, 535 (1956). *But see* IND. CODE § 34-1-60-9 (Supp. 1978) ("An attorney who is guilty of deceit or collusion, or consents thereto, with intent to deceive . . . a party to an action or judicial proceeding . . . shall forfeit to the party injured treble damages, recoverable in a civil action.").

55. 341 N.E.2d at 798.

end of the fiduciary relationship or discovery of negligence by the patient, whichever came first.[56] If affirmative concealment existed, however, the statute would be tolled until the patient discovered or should have discovered his claim, regardless of when the relationship had terminated.

This peculiar development of the fraudulent concealment doctrine reflected the circuitous route taken by the courts, prior to *Cordial*, to avoid strict compliance with the malpractice statute and its harsh occurrence rule. Nevertheless, the statute had clearly served to inhibit judicial adoption of a pure discovery rule for medical malpractice cases. Since the *Cordial* court held that the malpractice statute governed the plaintiff's claim, the court also relied on the fraudulent concealment doctrine to determine when the statute had begun to run against Cordial.

Application of the Fraudulent Concealment Doctrine in Cordial

Without significant analysis, the *Cordial* court held that application of the fraudulent concealment doctrine could not save the plaintiff's claim. Cordial had filed his suit in March, 1972, only one year after his workmen's compensation claim was denied by the full Industrial Board on review.[57] Nevertheless, the attorney-client relationship and, therefore, any *constructive* concealment were found to have terminated in June, 1969, with the attorneys' "last act" on behalf of their client.[58] The relationship did not continue beyond that "last act," apparently because Cordial had not consulted with his attorneys after that date and because the appeal was not a "proper procedure."[59] Affirmative concealment was not alleged by Cordial, but the court did indicate impliedly that affirmative concealment, if alleged, would have been a bar to summary judgment: "The appellant has never asserted that he consulted with either of the appellees after such dates, or that they acted after such dates to conceal their alleged malpractice."[60] Therefore, since the attorney-client

56. When the patient has "actual knowledge" of the injury, the presumption of fraudulent concealment is destroyed and the statute will commence from the date of discovery. Toth v. Lenk, ___ Ind. App. ___ , ___, 330 N.E.2d 336, 342 n.2 (1975) (Hoffman, J., concurring) (third district).

57. 346 N.E.2d at 268.

58. 346 N.E.2d at 272-73. It is not clear from the reported facts what this "last act" was. June 27, 1969, may have been the date on which Cordial's attorneys filed his application for review by the full Industrial Board.

59. *Id.*

60. *Id.* Cordial may have tried to articulate a theory that the appeal itself was an act of concealment. "[A]ppellant infers that a constructive fraudulent concealment of

relationship and any constructive concealment ended over two years before suit was filed, summary judgment against Cordial was affirmed.[61]

CRITICAL ANALYSIS OF *CORDIAL V. GRIMM*

The implicit but unstated objectives of the *Cordial* opinion were to apply identical law to the medical and legal professions and to maximize the procedural protection available to defendant attorneys. Future decisions should not, however, share the objectives or conclusions of the *Cordial* court. Moreover, the barriers against liability which *Cordial* has erected may be easily eroded without a significant departure from existing law. A result more equitable to victims of legal malpractice may be achieved by rejecting *Cordial*'s application of the medical malpractice statute, expanding the fraudulent concealment doctrine or simply redefining when the attorney-client relationship ends.

Cordial's application of the medical malpractice statute of limitations to legal malpractice may not be affirmed by the Indiana Supreme Court or other districts. The statute has traditionally been viewed with disaffection by the courts and limited in scope to the medical profession because of the express occurrence rule as well as the apparent history and purpose of the statute.[62]

Although not apparent from the *Cordial* decision, the general negligence statute of limitations (also two years) allows for much greater judicial discretion. First, the general negligence statute com-

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his cause of action occurred after the termination of professional relationships . . . 'owing to the concatenation of events . . . .'" The court did not address the issue of whether an appeal may constitute *affirmative* fraudulent concealment, holding only that any constructive concealment ended with the relationship. *Id.*

61. *Id.*

62. In Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974), the medical malpractice statute was challenged on state constitutional grounds. The court held that: "The classification at issue does not appear unconstitutional *per se*. There exists a reasonable basis for distinguishing between those rendering medical services and those who do not." *Id.* at 702, 310 N.E.2d at 970. *Accord*, Meier v. Combs, 147 Ind. App. 617, 263 N.E.2d 194 (1970).

> [A]n action should not be held to be based on the rendition of 'professional services' (for the purpose of barring it by the statute) [IND. CODE § 34-4-19-1 (1976)] unless the rendition of some service which cannot legally be rendered except by . . . a licensed physician, dentist or surgeon is an integral and essential part of the cause of action.

Id. at 625, 263 N.E.2d at 199; Toth v. Lenk, ___ Ind. App. ___, ___, 330 N.E.2d 336, 338 (1975) (Third District). None of these cases were cited in *Cordial*.

mences upon "accrual";[63] the courts retain the freedom to define liberally when a legal malpractice action should accrue.[64] Secondly, unlike the malpractice statute, the general negligence statute of limitations does not inhibit the courts from expanding the equitable doctrine of fraudulent concealment. In the highly fiduciary attorney-client relationship, *silence* may conceal injury or a cause of action just as effectively as may affirmative misrepresentations. The general negligence statute of limitations contains no legislative occurrence rule, and the courts are free to rely on equity to toll commencement of the statute until the client discovers or should have discovered his cause of action.[65] Nevertheless, in *Cordial* the court failed to note the inherent distinctions between the two statutes it adopted for legal malpractice claims.

The most fragile portion of the *Cordial* opinion, however, is its tortured and premature delineation of when the attorney-client relationship terminated. The court's conclusion that the relationship had ended with the attorneys' "last act" and before Cordial's appeal was resolved is inconsistent with both the weight of legal authority and the policy underlying Indiana's fraudulent concealment doctrine.

The stated purpose of the fraudulent concealment doctrine is to prevent a fiduciary from gaining immunity for his malpractice by a

63. *See* note 32 *supra* and accompanying text.

64. *See* note 35 *supra* and accompanying text.

65. Marcum v. Richmond Auto Parts, 149 Ind. App. 120, 270 N.E.2d 884 (1971), appears to be the leading case concerning application of Indiana's fraudulent concealment doctrine to the general statutes of limitations. In *Marcum* the plaintiff brought an action for personal injury. The insurance carrier for the defendant had represented to the plaintiff that settlement would be made, but denied liability after the statute had run. *Id.* at 121-22, 270 N.E.2d at 885.

The court held that both affirmative and constructive fraudulent concealment would toll the statute of limitations in a negligence action until the plaintiff discovered or should have discovered his claim. "It cannot be seriously contended that one could surrender a legal right of which he has no knowledge." *Id.* at 125, 270 N.E.2d at 886-88 (citations omitted). Furthermore, the opinion emphasized that equitable estoppel would prevent a fiduciary from gaining protection of a statute of limitations by a breach of his duty to disclose, and that silence alone could effectively conceal injury. *Id.* at 127, 270 N.E.2d at 888. There is no indication in *Marcum* that a general statute of limitations governing negligence actions will necessarily commence to run when a professional relationship terminates.

IND. CODE § 34-1-2-9 (1976), provides that "if any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation, after the discovery of the cause of action." The courts have held that this statute, enacted in 1881, is not an "exception" to the malpractice statute of limitations. Guy v. Shuldt, 236 Ind. 101, 104, 138 N.E.2d 891, 893 (1956). No decision, however, had held it to be inapplicable to the general statutes of limitations.

second breach of his duty to disclose all material facts.[66] Certainly, Cordial's attorneys had an ethical and legal obligation to advise their client if his workmen's compensation appeal was indeed an improper procedure and had no possibility of success.[67] But the court found that the relationship had terminated *before* the appeal was decided, apparently because the appeal had no chance of success and because the attorneys did not "act" or consult with their client after June, 1969.[68] Thus, the result of the *Cordial* analysis and holding is that negligent attorneys will be encouraged to seek immunity from suit by "appearing to represent the client when in fact representing [their] own interests."[69] The negligent attorney who is acquainted with the *Cordial* decision may well conclude that he can escape all liability by simply filing a frivolous appeal or "holding on to the case"[70] for two more years. Not only would the statute of limitations expire during that time, but the client would be lulled into acquiescence and hindered from consulting a second attorney.[71]

Several foreign jurisdictions have properly defined when the attorney-client relationship ends—definitions which would prevent the abuse inherent in the *Cordial* opinion. The relationship continues until litigation has reached final judgment,[72] until the client has discharged his attorney from employment, or until a court has formally relieved the attorney of his professional obligation.[73] In any event, the attorney's representation in a particular matter cannot be unilaterally terminated by the attorney without notice to his client.[74] While a "last act" rule may be appropriate to determine when a

66. Guy v. Shuldt, 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956) ("[W]hen a defendant . . . by deception *or any violation of duty* toward the plaintiff caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which the court will not allow him to hold.").

67. 346 N.E.2d at 273.

68. *Id.*

69. LEGAL MALPRACTICE, *supra* note 2, at 275. An analytical and thorough discussion of the continuous representation rule or end of the relationship test, as used in other jurisdictions, has been provided at *id.* at § 202.

70. Wilson v. Econom, 56 Misc. 2d 272, 274, 288 N.Y.S.2d 381, 383-84 (1968).

71. *See* note 18 *supra.*

72. Woodruff v. Tomlin, 511 F.2d 1019, 1021 (6th Cir. 1975).

73. Berry v. Zisman, 70 Mich. App. 376, 377, 245 N.W.2d 758, 759 (1976) (construing prior law that an action based on professional malpractice must be brought within two years of the end of the relationship or within two years of the time when the plaintiff discovers or should discover the alleged malpractice, *whichever is later*). This is the inverse of the present rule in Indiana.

74. *See, e.g.*, Jones v. Schreiber, 47 U.S.L.W. 2451 (N.Y. Cty. Sup. Ct. Jan. 23, 1979).

doctor-patient relationship ends, *Cordial* is the only reported opinion to use such simplistic analysis in the setting of the attorney-client relationship. The attorney's "last act" may come well before the client's litigation is resolved and may even come before the legal malpractice *occurs.*[75] In fact, the rule announced in *Cordial,* if applied to future cases, might well be even more protective than the traditional strict occurrence rule. *Cordial*'s "last act" rule for determining when the attorney-client relationship ends is not only inequitable, but functionally and legally unsound.

CONCLUSION

In the absence of other appellate decisions or legislative guidance, *Cordial v. Grimm* remains the sole specific precedent to determine when a legal malpractice action is temporally barred in Indiana. The apparent rule established by *Cordial* can be formulated as follows: unless affirmative concealment exists, a two-year limitation period commences when the attorney-client relationship ends or when the client discovers or should have discovered his cause of action, whichever occurs first. What will constitute affirmative concealment has not been defined by *Cordial,* and the relationship may terminate as early as the attorney's "last act" on behalf of his client. Thus, at least on its particular facts, *Cordial* has not significantly departed from a strict occurrence rule for legal malpractice actions. The decision cannot, however, be explained as a product of judicial deference to the legislature.[76] No authority cited in *Cordial* or elsewhere indicates that Indiana's "malpractice" statute of limitations was intended to protect anyone other than the medical profession. Moreover, the courts may be the institution best suited to deal with legal malpractice issues.[77]

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75. For example, when an attorney fails to file his client's tort claim before the statute of limitations runs, the date when the client's underlying claim became barred is also the date when the attorney's negligence occurred. Yet if the attorney had performed some "last act" before his negligence occurred, the *Cordial* rationale would mark that earlier date as the end of the relationship and the statute of limitations would commence to run.

76. *See* note 8 *supra* and accompanying text.

77. When dealing with a judicially defined concept, legislative inaction may equally reflect deferring the issue to the branch of government most capable of dealing with legal problems. Thus, that branch of government is free to exercise its own judgment. Yet some courts have recently refused to adopt the discovery rule upon the rationale that the legislature has not acted on the issue.

LEGAL MALPRACTICE, *supra* note 2, at 289, *citing* Cordial v. Grimm, ___ Ind. App. ___, 346 N.E.2d 266 (1976). That rationale could be implied, but was not stated in the *Cordial* decision.

As emphasized in the earlier background discussion of *Cordial*, there appear to be no persuasive arguments against a discovery rule for legal malpractice actions. The policy arguments against any arbitrarily protective form of limitation are overwhelming. If the legal profession is unusually susceptible to suit, the boundaries of civil liability should be determined by the legal standard of care required,[78] not by artificial immunity for both conscientious and negligent attorneys. Furthermore, the discovery rule, in every jurisdiction where it is used, does not allow the plaintiff to "sit on his rights" and thereby contribute to the staleness of his claim. Suit must be commenced within the statutory period after the client discovers or should have discovered his cause of action, whichever comes first. As the Florida experience has demonstrated, a discovery rule for legal malpractice may ultimately decrease rather than increase litigation.[79]

Indiana courts may eventually arrive at a test for legal malpractice which is less favorable to plaintiffs than a pure discovery rule. Equitable use of the continuous representation doctrine and damage rule to determine when a claim "accrues" under the general negligence statute of limitations would achieve substantial justice.[80] The *Cordial* decision, however, should not be followed.

> [W]hen an attorney raises the statute of limitations to occlude a client's [legal malpractice] action before that client has had a reasonable opportunity to bring suit, the

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78. For a thorough discussion of the standard of care required for attorneys and current case law, see Comment, *New Developments in Legal Malpractice*, 26 AM. U.L. REV. 408, 408-21 (1977). *See also* LEGAL MALPRACTICE, *supra* note 2, at §§ 111-249; Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771 (1967).

79. *See* note 21 *supra*.

80. *See* notes 23 and 25 *supra* and accompanying text. That is, liberal judicial application of the above rules would save most legal malpractice claims from the temporal bar. A proper definition of when the attorney-client relationship ends, notes 72-74 *supra*, would prevent premature commencement of the statute of limitations, allowing the attorney an opportunity to correct his error, if possible, and allowing the client to trust and rely on his attorney until litigation has been concluded. In those cases where the attorney's negligence does not cause immediate damage, such as negligently drafted wills, contracts, title documents or bad legal advice, the statute should not commence to run until actual injury has occured. *See generally* note 25 *supra* and authorities cited therein.

Other writers have proposed legislation which would combine the discovery rule with an outside limitation. Note, *Legal Malpractice—Is the Discovery Rule the Final Solution?*, 24 HASTINGS L.J. 795, 808-11 (1973); Note, *Commencement of the Statute*, *supra* note 4, at 243. Any such outside limitation, however, would arbitrarily bar those claims for negligence which do not result in immediate damages.

resulting ban of the action not only starkly works an injustice upon the client but partially impugns the very integrity of the legal profession.[81]

81. Neel v. Magana, Olney, Levy, Cathcart and Gelfand, 6 Cal. 3d 176, 192, 98 Cal. Rptr. 837, 847, 491 P.2d 421, 431 (1971).