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Winding Down the Clock: The Statute of Limitations for Legal Malpractice in Pennsylvania

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COMMENTS

Winding Down the Clock: The Statute of Limitations for Legal Malpractice in Pennsylvania

I. Introduction

Actions for legal malpractice were once anomalies of very little interest to the average practitioner or client. In recent years, however, this minor area of the law has experienced exponential growth, such that there are few attorneys today who are not affected by the subject in some capacity—as counsel for a party, witness, or even defendant.[1] Frequently, the attorney's first line of defense to a legal malpractice claim is that the plaintiff's action is barred by the statute of limitations. This has proven to be the most successful defense, and the only viable affirmative defense.[2] As a consequence, the statute of limitations for legal malpractice should be a matter of great concern to all lawyers and their clients.

Twenty years ago, the rules governing the limitation of attorney malpractice actions in Pennsylvania were quite clear. Pennsylvania courts consistently held that a six-year statute of limitations applied.[3] Additionally, these courts adhered to the occurrence rule, under which the statute began to run at the moment the breach of duty occurred, regardless of whether the prospective plaintiff suffered consequential damages.[4] Legislative enactments have destroyed

1. McCabe, *Legal Malpractice—The Lawyer as a Target*, 56 PA. B.A.Q. 209, 210 (1985). According to one of the leading authorities in this area, 90% of legal malpractice cases reported between 1799 and 1980 were reported in the 1970s. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 6, at 18 (2d ed. 1981).

2. D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 5:1, at 65 (1980). *See also* R. MALLEN & V. LEVIT, *supra* note 1, § 380, at 426.

3. Belden, Belden & Lappas, *Professional Liability of Lawyers in Pennsylvania*, 10 DUQ. L. REV. 317, 340-41 (1972).

4. Moore v. Juvenal, 92 Pa. 484, 490 (1880).

the validity of the former proposition. Likewise, the judiciary, concerned with the perceived injustice inherent in the occurrence rule, questioned the latter proposition.[5] Consequently, a profusion of doctrines has resulted, creating confusion for attorneys, clients and judges.[6] More significantly, this confusion undermines the fundamental policies that underlie the statutes of limitations.[7]

The purpose of this Comment is to examine the statute of limitations as applied to legal malpractice suits in Pennsylvania. A brief history of statutes of limitations is discussed. Special attention is given to the rationale underlying the limitation doctrine. The appropriate statute of limitations for legal malpractice cases in Pennsylvania is examined. Next, the basic approaches to determining when the statute begins to run are explored, including consideration of how each approach furthers or hinders the goals of the statute, with particular emphasis on the application of each approach by Pennsylvania courts. Finally, possible avenues of reform are considered, including both legislative and judicial action, which could clarify this area of Pennsylvania law.[8]

II. Statutes of Limitations: History and Theory

Although statutes of limitations can be traced back to Mosaic law,[9] the roots of the modern law of personal action limitations lie in England.[10] The Limitation Act of 1623[11] was incidentally designed

5. For a discussion of the occurrence rule and its attendant harshness, *see infra* notes 34-52 and accompanying text.

6. In Garcia v. Community Legal Servs. Corp., 362 Pa. Super. 484, 524 A.2d 980 (1987), the court felt obliged to admonish the attorneys involved in the case:

> We must note that we are surprised and disappointed at the turn of events in this case. Mrs. Garcia's underlying claim was not filed until the statute of limitations had expired. Her attorney then brought a malpractice action against CLS alleging negligent failure to file within the period of limitation, but he also failed to file within the applicable period of limitation. A professional playwright would be hooted out of the theater if he employed such an unbelievable plot device.

Id. at 498, 524 A.2d at 987. *But cf.* W. SHAKESPEARE, THE TRAGEDY OF JULIUS CEASAR, Act I, ii, 140-41 ("The fault, dear Brutus, is not in our stars,/But in ourselves . . . .").

7. For a discussion, *see infra* notes 106-14 and accompanying text.

8. This Comment does not discuss specific acts of malpractice; however, for a complete discussion, *see* Annotation, *When Statute of Limitations Begins to Run Upon Action Against Attorney for Malpractice*, 32 A.L.R.4th 260 (1984).

9. *Deuteronomy* 15:1-2 (King James) declares:

> At the end of every seven years, thou shalt make a release. And this is the manner of the release: Every creditor that lendeth ought unto his neighbour shall release it; he shall not exact it of his neighbour, or of his brother; because it is called the Lord's release.

10. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1178 (1950).

11. Limitation Act, 1623, 21 Jac., ch. 16.

to protect impoverished defendants, but its central purpose was to insure that the King's courts were not cluttered with trivial claims.[12] In 1713, the General Assembly of the Province of Pennsylvania enacted the colony's first statute of limitations.[13] The law applied a six-year limitation period to most personal actions, and virtually mirrored the language of the Limitation Act of 1623.[14]

Statutes of limitations have become such an integral part of the law that modern legislatures seldom define the underlying functions of such statutes. Consequently, courts are forced to justify the statutes.[15] The primary purpose of modern statutes of limitations is to protect the defendant. The establishment of periods of time, after which individuals may safely assume that ancient obligations have been forgotten, furthers this policy.[16] Modern statutes are also designed to bar stale claims and avoid proof problems resulting from the passage of time, which may destroy evidence and fade memories.[17] In addition, statutes of limitations serve to penalize claimants who sleep on their rights by eliminating otherwise valid claims.[18]

Although statutes of limitations clearly achieve significant goals, they inevitably lead to some unjust results. Since the period of limitation is arbitrary in nature, some plaintiffs' injuries go unremedied, while the wrongdoer is protected.[19] The injustice may be particularly acute in actions for professional malpractice, in which the plaintiff may discover that the cause of action exists only after the statute of limitations has expired.[20] As a result, legislatures and courts should

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12. *Developments in the Law—Statutes of Limitations, supra* note 10, at 1178.

13. Act of March 27, 1713 (1 Sm. L. 76).

14. W. TRICKETT, THE LAW OF LIMITATIONS OF ACTIONS IN PENNSYLVANIA § 154, at 205 (1888).

15. *Developments in the Law—Statutes of Limitations, supra* note 10, at 1185.

16. *Id.*

17. As the United States Supreme Court recently noted:

> Making out the substantive elements of a claim for relief involves a process of pleading, discovery, and trial. The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh . . . . [T]here comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely . . . to impair the accuracy of the fact-finding process . . . .

Board of Regents v. Tomanio, 446 U.S. 478, 487 (1980). *See also* Garcia v. Community Legal Servs. Corp., 362 Pa. Super. 484, 493, 524 A.2d 980, 984 (1987); Med-Mar, Inc. v. Dilworth, 214 Pa. Super. 402, 406, 257 A.2d 910, 912 (1969).

18. The Pennsylvania Supreme Court noted: "Statutes of limitation are intended to promote promptness and punctuality in business; the settlement of claims while parties are alive, and before witnesses die; and he who will not take the hint, must take the consequences." Campbell's Adm'r v. Boggs, 48 Pa. 524, 526 (1855).

19. Case Comment, *Civil Procedure—Statute of Limitations Accrual in Attorney Malpractice Actions:* Thorpe v. DeMent, 20 WAKE FOREST L. REV. 1017, 1022 (1984).

20. Skyline Builders, Inc. v. Kellar, 50 Pa. D. & C.2d 19, 25 (C.P. Leh. Co. 1970).

periodically examine statutes of limitations and consider whether the negative ramifications outweigh the beneficial action of the statutory bar.

III. Selecting the Applicable Statute

Traditionally, Pennsylvania courts applied a six-year statute of limitations to legal malpractice actions.[21] The Lehigh County Court of Common Pleas, in *Skyline Builders, Inc. v. Kellar*,[22] was the first court to explain the rule. The court held that the six-year statute of limitations for breach of contract actions applied because the attorney's malpractice breached an implied contract with the client.[23] Some attorneys valiantly argued that the two-year statute of limitations that controlled actions for medical malpractice should govern legal malpractice suits. This argument, however, gained little acceptance.[24]

In recent years, the legislature and judiciary have acted to eliminate this traditional view. The legislature has virtually amended the six-year statute of limitations out of existence.[25] Because the Pennsylvania Supreme Court has held that an action for legal malpractice may be brought under either a tort theory or a contract theory,[26] actions for legal malpractice are now governed by a four-year limita-

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21. *In re* Huffman's Estate, 349 Pa. 59, 36 A.2d 640 (1944); Schwab v. Cornell, 306 Pa. 536, 160 A. 449 (1932); Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897); Owen v. Western Savs. Fund, 97 Pa. 47 (1881); Moore v. Juvenal, 92 Pa. 484 (1880); Morgan v. Tener, 83 Pa. 305 (1877); Rhine's Adm'rs v. Evans, 66 Pa. 192 (1870); Stephens v. Downey, 53 Pa. 424 (1866); Fleming v. Culbert, 46 Pa. 498 (1864); McCoon v. Galbraith, 29 Pa. 293 (1857); Campbell's Adm'r v. Boggs, 48 Pa. 524 (1855); Miller v. Wilson, 24 Pa. 114 (1854); Downey v. Garard, 24 Pa. 52 (1854); McDowell v. Potter, 8 Pa. 189 (1848); Derrickson v. Cady, 7 Pa. 27 (1847).

22. 50 Pa. D. & C.2d 19 (1970).

23. The court observed:

> In Pennsylvania, the default or malpractice of an attorney has been treated as a breach of contract between attorney and client: Campbell's Administrator v. Boggs, 48 Pa. 524; Rhines' Administrators v. Evans, 66 Pa. 192; Huffman Estate (No. 3), 349 Pa. 59. The period of limitations to be applied to such actions is six years: Act of March 27, 1713, 1 Sm. L. 76, 12 PS § 31.

Id. at 20-21.

24. McCabe, *supra* note 1, at 215.

25. 42 PA. CONS. STAT. § 5527 (1982) now provides: "Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation) must be commenced within six years."

26. "Under present Pennsylvania law, an individual who has an attorney-client relationship may sue his attorney for malpractice under either a trespass or assumpsit theory." Guy v. Liederbach, 501 Pa. 47, 55, 459 A.2d 744, 748 (1983) (an action for malpractice may be brought against an attorney by a named legatee of a negligently-drafted will as an intended third-party beneficiary of a contract between the testator and attorney).

tion for contract actions[27] or a two-year period applicable to tort actions.[28] The legal malpractice plaintiff should be advised to include a contract claim in the complaint, in order to benefit from the longer statute of limitations.[29]

A series of recent decisions suggests that Pennsylvania courts are growing disenchanted with basing legal malpractice actions on a breach of contract theory. As a result, the four-year statute may not be applied if courts can characterize the plaintiff's legal malpractice action in such a way as to bring it under the operation of the two-year statute.[30] Moreover, a breach of contract count will not be

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27. 42 PA. CONS. STAT. § 5525 (1982) declares:

> The following actions and proceedings must be commenced within four years:
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> . . . .
>
> (3) An action upon an express contract not founded upon an instrument in writing.
>
> (4) An action upon a contract implied in law, except an action subject to another limitation specified in this subchapter.

28. 42 PA. CONS. STAT. § 5524 (1982) provides:

> The following actions and proceedings must be commenced within two years:
>
> . . . .
>
> (3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.
>
> . . . .
>
> (7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter.

29. *See* Garcia v. Community Legal Servs. Corp., 362 Pa. Super. 484, 524 A.2d 980 (1987) (failure to include specific assumpsit count in complaint renders four-year statute inapplicable).

30. In Moore v. McComsey, 313 Pa. Super. 264, 459 A.2d 841 (1983), a superior court panel concluded that a plaintiff's cause of action against his public defenders for negligently handling his criminal case could not be based on breach of contract because "there was no contract of employment between appellant and trial counsel, for counsel had been court appointed." *Id.* at 269, 459 A.2d at 844. The court applied the two-year statute:

> Appellant's pro se complaint describes his cause of action in various ways, but his claim for damages is based upon conduct of counsel which allowed his conviction and subsequent incarceration. This, in a broad sense, is a claim for injury to his person. As such, we hold that it must be commenced within two years.

Id. at 270, 459 A.2d at 844.

In Garcia v. Community Legal Servs. Corp., 362 Pa. Super. 484, 524 A.2d 980 (1987), the plaintiff accused the defendant of negligently handling her claim against a demolition company by allowing the statute of limitations to expire before filing the claim. The court noted:

> [T]he ordinary meaning of an injury to personal property includes damage to a chose in action which may be redressed by means of a civil action. Mrs. Garcia is complaining that her chose in action against the demolition company was damaged in that she lost its potential value and she is seeking redress through a civil action.

Id. at 492, 524 A.2d at 983-84. The two-year statute for injury to personal property was held to apply. *Id. See supra* note 28.

treated as such if it is based merely on the allegation that the attorney failed to exercise the requisite duty of care. Instead, the plaintiff must allege either that the attorney failed to follow specific instructions or that a breach of a specific contractual provision occurred.[31] Perhaps it is time for courts to abandon the nebulous contract-tort distinction and apply the two-year statute consistently.[32]

IV. Commencement Doctrines

Once the applicable statute has been determined, the next step is to determine when the statute begins to run.[33] American courts have applied a variety of rules to determine when the statute of limitations commences in a legal malpractice action. Nevertheless, four major doctrines currently dominate the field. A split of authority has recently developed among Pennsylvania courts, with each of the four major doctrines gaining adherents. Therefore, an examination of each of these doctrines, and how each balances the fundamental statute of limitations goals with the basic desire for justice, is necessary.

A. The Occurrence Rule

The oldest American commencement doctrine, the occurrence rule, is rooted in the United States Supreme Court's decision in *Wilcox v. Executors of Plummer*.[34] In *Plummer*, the plaintiffs had retained Plummer to collect on a note.[35] Plummer first sued the maker of the note, Banks, who proved to be insolvent; he then brought suit against the endorser of the note.[36] When the latter action was actually tried, four and one-half years later, it was discovered that Plummer had erroneously named his client, and a nonsuit was granted.[37] Meanwhile, the applicable statute of limitations had run in favor of the endorser.[38] Since Plummer died during this period, the client brought suit against the executors of Plummer's estate, who offered

31. *See* Hoyer v. Frazee, 323 Pa. Super. 421, 470 A.2d 990 (1984); Duke & Co. v. Anderson, 275 Pa. Super. 65, 418 A.2d 613 (1980). *See also* Koffler, *Legal Malpractice Statutes of Limitations: A Critical Analysis of a Burgeoning Crisis*, 20 AKRON L. REV. 209, 221-23 (1986).

32. For a discussion, *see infra* notes 117-22 and accompanying text.

33. *But see* Trice v. Mozenter, 356 Pa. Super. 510, 515 A.2d 10 (1986), *alloc. granted*, 514 Pa. 643, 523 A.2d 1132 (1987) (determination of date of accrual relieves court of burden of determining which statute applies).

34. 29 U.S. (4 Pet.) 172 (1830).

35. *Id.* at 172-73.

36. *Id.* at 173.

37. *Id.*

38. *Id.*

as a defense the expiration of the statute of limitations.[39] The plaintiffs contended that the statute should not have commenced on the action against the executors until the plaintiffs suffered actual damage, which occurred when the statute had run on the underlying claim against the endorser.[40] Writing for the Court, Justice Johnson disagreed, concluding that the cause of action accrued and the statute of limitations began to run at the time of Plummer's negligent act (misnaming his client) even though the plaintiffs suffered no actual damage until later.[41]

Pennsylvania quickly adopted the occurrence rule,[42] and it became the dominant commencement doctrine in virtually every United States jurisdiction.[43] The rule is relatively simple to apply since the court need only determine the date of the defendant's wrongful act.[44] Thus, courts do not have to engage in the frequently arbitrary process of determining when the plaintiff knew or should have known of the existence of the cause of action,[45] or choosing the point at which the plaintiff suffered relevant damage.[46] The occurrence rule also serves the goal of protecting defendants from stale claims.[47]

Despite its advantages, the occurrence rule has been abandoned in most jurisdictions.[48] Even those that retain the rule appear to lack legitimate policy reasons for its application.[49] The occurrence rule is inequitable in professional malpractice actions because the client often becomes aware of the professional's negligent act only after the statute has run.[50] Similarly, the rule conflicts with the policy of dis-

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39. 29 U.S. (4 Pet.) at 174.

40. *Id.* at 175.

41. Noting that the action against the attorney was based upon a breach of contract theory, Justice Johnson observed:

> When the attorney was chargeable with negligence or unskilfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but on the other hand, it is perfectly clear, that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the *damage* is not the cause of action.

Id. at 182 (emphasis in original).

42. *See* Campbell's Adm'r v. Boggs, 48 Pa. 524 (1855).

43. R. MALLEN & V. LEVIT, *supra* note 1, § 389, at 446; D. MEISELMAN, *supra* note 2, § 5:6, at 72.

44. Comment, *Attorney Malpractice: Towards an Illinois Statute of Limitations*, 1982 U. ILL. L. REV. 479, 481.

45. For a discussion of the discovery rule, *see infra* notes 69-89 and accompanying text.

46. See discussion of the damage rule *infra* notes 53-68 and accompanying text.

47. Comment, *supra* note 44, at 481.

48. R. MALLEN & V. LEVIT, *supra* note 1, § 389, at 451.

49. *Id.*

50. Skyline Builders, Inc. v. Kellar, 50 Pa. D. & C.2d 19, 25 (C.P. Leh. Co. 1970).

couraging trivial claims because a client whose attorney has committed an error may be required to sue before any damage is incurred and before it is certain that the error will result in any damage.[51] In spite of these defects, Pennsylvania courts continue to adhere to the occurrence rule, but they endeavor to ameliorate harsh results by utilizing the discovery rule on a case-by-case basis.[52]

B. The Damage Rule

Although the occurrence rule appears to be the leading commencement doctrine in Pennsylvania, at least one court has rejected the theory that a cause of action for legal malpractice arises at the moment the negligent act is committed. In *Trice v. Mozenter*,[53] a panel of superior court judges reasoned that the plaintiff's cause of action accrued at the time when the elements necessary for a cause of action were present, including the element of actual damage.[54]

The damage rule was first applied in *Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson*,[55] a federal case from the District of Columbia. The district court applied the occurrence rule and concluded that the action was time-barred.[56] The court of appeals reversed the decision, noting that an essential element of any negligence action is proof of injury, and that malpractice is based in negligence.[57] The statute of limitations in a legal malpractice action, therefore, should run from the moment the plaintiff suffers injury.[58]

The damage rule is based on the theory that a cause of action for legal malpractice sounds in tort, not in contract.[59] The advantages of the damage rule are evident: (1) it recognizes that legal malpractice is not much different from other forms of professional malpractice, and applies the same rule to each;[60] (2) it offers further

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51. R. MALLEN & V. LEVIT, *supra* note 1, § 389, at 450-51.

52. *See* Garcia v. Community Legal Servs. Corp., 362 Pa. Super. 484, 494, 524 A.2d 980, 984 (1987); Moore v. McComsey, 313 Pa. Super. 264, 270, 459 A.2d 841, 844 (1983). *See also* notes 77-83 and accompanying text.

53. 356 Pa. Super. 510, 515 A.2d 10 (1986), *alloc. granted*, 514 Pa. 643, 523 A.2d 1132 (1987).

54. 356 Pa. Super. at 517, 515 A.2d at 13.

55. 381 F.2d 261 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 946 (1967).

56. 381 F.2d at 262.

57. *Id.*

58. *Id.*

59. Since the cause of action for negligence accrues at the time of injury, the court applied the same rule to legal malpractice actions and reasoned: "We see no good reason for drawing such a distinction between malpractice suits and other negligence actions." *Id.*

60. A panel of the Pennsylvania Superior Court has offered the following criteria for determining when a plaintiff may bring a professional negligence action for legal malpractice: "1. The employment of the attorney or other basis for duty; 2. The failure of the attorney to exercise ordinary skill and knowledge; and 3. That such negligence was the proximate cause of

protection to the prospective plaintiff by postponing the time of commencement of the statute in cases where negligence does not result in immediate injury;[61] and (3) the damage rule furthers the goal of minimizing trivial suits by requiring actual harm to the plaintiff.[62]

The damage rule has some weaknesses, as well. Naturally, the rule is less effective than the occurrence rule at protecting the defendant from stale claims.[63] The damage rule requires courts to determine the point at which the plaintiff suffered recognizable damage, and is consequently more difficult to apply than the occurrence rule.[64] This calculus can become particularly complex when the alleged malpractice leads to litigation. Should the statute begin to run the moment the plaintiff suffers defeat in the underlying litigation, or should the statute be tolled until the plaintiff exhausts the appeal mechanism?[65] The former rule would require the client to take opposing positions on the same issue in two simultaneous actions.[66] On the other hand, the plaintiff has incurred actual damage, even if it amounts to nothing more than the cost of the underlying litigation.[67]

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damage to the plaintiff." Schenkel v. Monheit, 266 Pa. Super. 396, 399, 405 A.2d 493, 494 (1979) (citations omitted). *Accord* Gans v. Gray, 612 F. Supp. 608, 615 (E.D. Pa. 1985); Duke & Co. v. Anderson, 275 Pa. Super. 65, 71, 418 A.2d 613, 616 (1980).

61. The damage rule is particularly effective when applied together with the discovery rule. *See infra* notes 69-89 and accompanying text.

62. *See supra* notes 12, 51 and accompanying text.

63. *See supra* note 47 and accompanying text.

64. Boehm v. Wheeler, 65 Wis. 2d 668, 223 N.W.2d 536 (1974), provides a basic example of the kind of determination courts must make. In *Boehm*, plaintiffs alleged that the defendant failed to timely file their patent application and then advised them that it would be safe to send models of their device to another company. The other company subsequently marketed the device without remunerating them. *Id.* at 676, 223 N.W.2d at 540. The plaintiffs urged that they did not suffer injury until the other company began marketing their device. *Id.* at 678, 223 N.W.2d at 541. The court did not accept this reasoning, concluding that the plaintiffs suffered injury with respect to their first claim, for untimely filing of their application, when they lost the right to get a patent, *id.*, and were injured by the attorney's negligent advice when they sent the models to the other company. *Id.* at 679, 223 N.W.2d at 541.

65. *See* AMFAC Distrib. Corp. v. Miller, 138 Ariz. 152, 673 P.2d 792 (1983); Neylan v. Moser, 400 N.W.2d 538 (Iowa 1987) (the statute of limitations should be tolled until the appellate process is complete). For discussion of this question by a Pennsylvania court, *see* Garcia v. Community Legal Servs. Corp., 362 Pa. Super. 484, 496-97, 524 A.2d 980, 986 (1987).

66. *Cf.* MacGill, Shideler v. Dwyer: *The Beginning of Protective Legal Malpractice Actions*, 14 IND. L. REV. 927 (1981).

67. Considerable debate still exists concerning what constitutes "damage" sufficient to start the statute of limitations running. In Budd v. Nixen, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971), the California Supreme Court held that the cause of action was established when the client suffered "appreciable and actual harm." *Id.* at 201, 491 P.2d at 436, 98 Cal. Rptr. at 852. The court failed to define what was meant by that phrase, and California has since adopted a statute which confines the court's attention to the *fact* of harm, rather than its extent. *See infra* note 147.

In Jankowski v. Taylor, Bishop & Lee, 246 Ga. 804, 273 S.E.2d 16 (1980), the Georgia Supreme Court concluded that dismissal of a lawsuit was sufficient to cause actual damage, even though the statute of limitations had not run on the underlying claim. "Before the dismis-

Despite these defects, the damage rule continues to grow in popularity.[68]

C. *The Discovery Rule*

Pennsylvania courts have recognized the injustice in strictly applying the occurrence rule when "the attorney has been guilty of concealment or some act to put his client off guard."[69] In such cases, the statute of limitations did not run against the plaintiff until the time the "fraud" was discovered.[70] More recently, courts have recognized that the statute should be tolled when the plaintiff is unable to discover the attorney's negligence, even when the attorney is guilty of no concealment.

The discovery rule prevents the statute of limitations from running until discovery of the cause of action is reasonably possible.[71] The plaintiff must use reasonable diligence to become informed of the facts, and the statute will not be tolled for "mere mistake, misunderstanding or lack of knowledge."[72] Pennsylvania courts have long applied the discovery rule in cases involving hidden subterranean injuries,[73] medical malpractice,[74] architectural malpractice,[75] and other personal injuries,[76] but its application to legal malpractice

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sal occurred, the plaintiff had a lawsuit pending which was ripe for trial. After the dismissal, there was no lawsuit pending, court costs would be cast upon the plaintiff and obvious delays would be occasioned in having the cause of action adjudicated." *Id.* at 806, 273 S.E.2d at 18.

One commentator has expressed concern that allowing plaintiffs to benefit from tolling the statute of limitations while they appeal might encourage attorneys who have committed malpractice to counsel their injured clients to appeal, wasting the clients' time and money and discouraging malpractice suits. Koffler, *supra* note 31, at 226-27. Courts might prevent this by simply awarding additional damages to clients whose attorneys have involved them in pointless appeals.

68. R. MALLEN & V. LEVIT, *supra* note 1, § 390, at 452.

69. Rhine's Admn'rs v. Evans, 66 Pa. 192, 195 (1870). *See also* Morgan v. Tener, 83 Pa. 305 (1877); Fleming v. Culbert, 46 Pa. 498 (1864); Campbell's Adm'r v. Boggs, 48 Pa. 524 (1855); Derrickson v. Cady, 7 Pa. 27 (1847).

70. Morgan v. Tener, 83 Pa. 305, 308 (1877).

71. "Likewise, if the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitation does not begin to run until discovery of the injury is reasonably possible." Schaffer v. Larzelere, 410 Pa. 402, 406, 189 A.2d 267, 270 (1963) (citations omitted).

72. *Id.* at 405, 189 A.2d at 269. *See also* Walter v. Ditzler, 424 Pa. 445, 227 A.2d 833 (1967); Nesbitt v. Erie Coach Co., 416 Pa. 89, 204 A.2d 473 (1964); McNair v. Weikers, 300 Pa. Super. 379, 446 A.2d 905 (1982).

73. *See* Smith v. Bell Tel. Co., 397 Pa. 134, 153 A.2d 477 (1959); Lewey v. H.C. Frick Coke Co., 166 Pa. 536, 31 A. 261 (1895); Gotshall v. Langdon & Co., 16 Pa. Super. 158 (1901).

74. *See* Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Held v. Neft, 352 Pa. Super. 195, 507 A.2d 839 (1986).

75. Med-Mar, Inc. v. Dilworth, 214 Pa. Super. 402, 257 A.2d 910 (1969).

76. *See* Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 505 A.2d 973 (1985); Irreira v. Southeastern Pa. Transp. Auth., 231 Pa. Super. 508, 331 A.2d 705 (1974).

actions is a recent development.

The first Pennsylvania appellate decision applying the discovery rule to legal malpractice was *Moore v. McComsey*.[77] Moore was convicted of first degree murder and sentenced to life imprisonment; his sentence was affirmed by the Pennsylvania Supreme Court in 1975.[78] In 1979, Moore brought suit against his public defenders, asserting that his conviction and incarceration were a result of their negligence.[79] After determining that the two-year statute of limitations applied to Moore's action,[80] the superior court noted that the statute would commence at the time of the negligent act[81] unless Moore could bring his case under the discovery rule exception.[82] Moore was precluded from relying on this exception, however, because he failed to explain why he was unable to obtain the requisite knowledge.[83]

In Pennsylvania, the discovery rule has been used as a tolling provision, in conjunction with both the occurrence rule and the damage rule.[84] The central advantage of the discovery rule is that it relieves the harshness of the general rules by insuring that the plaintiff is given a reasonable opportunity to detect the attorney's negligence.[85] Since the discovery rule is generally used to toll the statute for other types of professional malpractice actions, applying it to legal malpractice actions serves to promote consistency.[86]

There are some problems with the discovery rule, however,

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77. 313 Pa. Super. 264, 459 A.2d 841 (1983). *But see* Bowman v. Abramson, 545 F. Supp. 227, 229 (E.D. Pa. 1982) ("The early case of *Derrickson v. Cady*, 7 Pa. 27 (1847) seems to imply that the statute commences when the attorney's negligence is discovered by the client.").

78. 313 Pa. Super. at 266, 459 A.2d at 842.

79. *Id.* at 266-67, 459 A.2d at 842.

80. *See supra* note 30.

81. 313 Pa. Super. at 270, 459 A.2d at 844.

82. *Id.* at 271, 459 A.2d at 844.

83. Moore argued that his attorneys deceived him by failing to disclose that they had made mistakes at trial and on appeal which could give rise to a cause of action against them. The court rejected this argument, noting that Moore was present at the trial, where counsel's alleged errors were committed, and that those errors were preserved in the public record. The court held: "Appellant simply failed to act promptly to preserve his rights. He will not be excused from the consequences of his delay because, as he contends, his public defenders didn't tell him that they had been negligent." *Id.* at 272, 459 A.2d at 845.

84. Garcia v. Community Legal Servs. Corp., 362 Pa. Super. 484, 524 A.2d 980 (1987); Trice v. Mozenter, 356 Pa. Super. 510, 515 A.2d 10 (1986), *alloc. granted*, 514 Pa. 643, 523 A.2d 1132 (1987); Moore v. McComsey, 313 Pa. Super. 264, 459 A.2d 841 (1983). *See also* Skyline Builders, Inc. v. Kellar, 50 Pa. D. & C.2d 19 (C.P. Leh. Co. 1970).

85. "Moreover, to impose upon the client the duty of ferreting out his lawyer's mistakes, a burden which in the usual situation can be met only by employing a second attorney, is to discourage the trust and confidence which are essential to a sound attorney-client relationship." Skyline Builders, Inc. v. Kellar, 50 Pa. D. & C.2d 19, 25 (C.P. Leh. Co. 1970).

86. *Id.*

which offset the advantages to some degree. The discovery rule clearly provides less protection to the defendant.[87] The discovery rule is less easily applied than the damage rule because the court is required to engage in the speculative task of determining when the plaintiff could reasonably have discovered the attorney's negligence.[88] In occurrence rule jurisdictions, a plaintiff may discover the attorney's negligence before any damage has accrued, in which case the plaintiff may be required to sue for nominal damages.[89]

D. The Continuous Representation Rule

The fourth major American commencement doctrine is of relatively recent vintage. It is grounded in the "continuous treatment" doctrine, under which a patient's cause of action against a physician does not commence the statute of limitations until the doctor-patient relationship terminates.[90] The doctrine was designed to protect the interests of the patient, who must be able to rely on the doctor's ability until the case is terminated.[91] The doctor is also protected by being given an opportunity to correct his mistake.[92]

The continuous representation rule was first applied to legal malpractice actions in New York.[93] Courts recognized that the relationship between attorney and client involves greater trust than a physician-patient relationship, since an attorney will not usually advise the client to seek a second opinion.[94] When the occurrence rule governs, there is some danger that unscrupulous attorneys, having made mistakes, will assure clients that everything is in order until

87. Comment, *supra* note 44, at 481.

88. Pennsylvania courts have apparently shifted this burden from the courts to plaintiffs by requiring that plaintiffs explain why they were unable to obtain knowledge of the cause of action before the discovery rule will be applied. *See* Moore v. McComsey, 313 Pa. Super. at 271, 459 A.2d at 845. This may remove some of the concern about potentially unlimited liability for attorneys.

89. R. MALLEN & V. LEVIT, *supra* note 1, § 389, at 450-51.

90. *Id.* § 391, at 458; D. MEISELMAN, *supra* note 2, § 5:8, at 81.

91. *See, e.g.*, Keaton Co. v. Kolby, 27 Ohio St. 2d 234, 237, 271 N.E.2d 772, 774 (1971).

92. The New York courts were also concerned with the absurdity of requiring a patient under a doctor's treatment to interrupt that treatment in order to sue the doctor. *See, e.g.*, Borgia v. City of New York, 12 N.Y.2d 151, 156, 187 N.E.2d 777, 779, 237 N.Y.S.2d 319, 321-22 (1962).

93. R. MALLEN & V. LEVIT, *supra* note 1, § 391, at 458. The rule was first applied by a trial court, Wilson v. Econom, 56 Misc. 2d 272, 288 N.Y.S.2d 381 (1968), and a month later by the appellate division, Siegel v. Kranis, 29 A.D.2d 477, 288 N.Y.S.2d 831 (1968).

94. One court noted: "Sick patients often consult several doctors while under treatment by one but clients rarely consult other attorneys while their case is pending." Wilson v. Econom, 56 Misc. 2d at 274, 288 N.Y.S.2d at 383.

the statute has run.[95] Perhaps a client's only recourse would be to hire a second attorney to look over the shoulder of the first, a clearly unrealistic expectation.[96] The New York courts, therefore, held that the statute does not begin to run on a client's cause of action until the attorney-client relationship terminates, at least with respect to the matter at issue.[97]

Pennsylvania courts have never applied the continuous treatment doctrine to medical malpractice cases, although the courts recognize that cessation of the doctor-patient relationship may serve as an indication that the doctor has lost the confidence of the patient, who should, at that point, have reasonably discovered the doctor's malpractice.[98] The superior court, however, has recently suggested that the continuous representation doctrine may have some applicability in Pennsylvania.[99] In *Trice v. Mozenter*,[100] the plaintiff sued his attorney for malpractice in connection with his conviction in a criminal matter.[101] Trice filed a petition for a writ of habeas corpus, alleging that he had been prejudiced by inadequate assistance of counsel.[102] The writ was ultimately granted and Trice sued the attorney, who asserted the statute of limitations as a defense.[103] The su-

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95. "The author of the disaster should not be enabled to chart the strategy to avoid the liability for his own negligence. Otherwise, negligence could be disguised by the device of delay, and an attorney rewarded by immunity from the consequence of his negligence." Siegel v. Kranis, 29 A.D.2d at 480, 288 N.Y.S.2d at 835.

96. *See supra* note 85.

97. The continuous representation rule has gained popularity in other jurisdictions. *See* McClung v. Johnson, 620 S.W.2d 644 (Tex. Civ. App. 1981). The Ohio Supreme Court adopted this rule soon after New York, in Keaton Co. v. Kolby, 27 Ohio St. 2d 234, 271 N.E.2d 772 (1971), but overruled that decision in Skidmore & Hall v. Rottman, 5 Ohio St. 3d 210, 450 N.E.2d 684 (1983), concluding that the discovery rule applied instead. *But cf.* Vail v. Townsend, 29 Ohio App. 3d 261, 504 N.E.2d 1183 (1985) (the continuous representation rule may still serve as a tolling rule).

Some states have adopted this rule in statutory enactments. *See, e.g.*, CAL. CIV. PROC. CODE § 340.6 (West 1982); MICH. STAT. ANN. § 27A.5838 (Callaghan Supp. 1988). Other jurisdictions have explicitly rejected the rule. *See* Boehm v. Wheeler, 65 Wis. 2d 688, 223 N.W.2d 536 (1974) (adoption of the continuous treatment rule is a decision for the legislature). For an early Pennsylvania case dealing with the continuous representation doctrine, *see* Derrickson v. Cady, 7 Pa. 27 (1847) (rejecting the notion that the statute of limitations does not run until the attorney-client relationship ends).

98. *See* Held v. Neft, 352 Pa. Super. 195, 507 A.2d 839 (1986); DeMartino v. Albert Einstein Medical Center, N.D., 313 Pa. Super. 492, 460 A.2d 295 (1983).

99. Pennsylvania courts have historically rejected the continuous representation rule. *See, e.g.*, Derrickson v. Cady, 7 Pa. 27 (1847).

100. 356 Pa. Super. 510, 515 A.2d 10 (1986), *alloc. granted*, 514 Pa. 643, 523 A.2d 1132 (1987).

101. Trice was convicted in federal court and sentenced to fifteen years in prison. 356 Pa. Super. at 512, 515 A.2d at 11.

102. Trice claimed that his attorney had acted improperly in failing to obtain information concerning whether a voice exemplar, alleged to be that of plaintiff, and an intercepted recording, the sole evidence linking Trice to the crimes, in fact contained the same voice. *Id.*

103. Trice's conviction was affirmed by the Third Circuit in 1976. *Id.* He was released

perior court found that the statute began to run while the plaintiff was in prison because the documents he filed in connection with his pro se appeal indicated that he had a full understanding of his legal rights.[104] The court also recognized that the plaintiff initiated his lawsuit seven years after the termination of his relationship with the attorney.[105] The court may have merely intended to suggest that this was further evidence that the client was aware of his rights long before he actually brought suit, but the language the court used may be interpreted as opening the door for the continuous representation rule. The creative plaintiff's attorney should not overlook this argument.

V. Defects of the Current Law

There is currently a wide range of opinion about when the statute of limitations begins to run on a legal malpractice claim in Pennsylvania. Two recent decisions adhere to the traditional occurrence rule, but allow the statute to be tolled in the event that the plaintiff is able to demonstrate circumstances warranting application of the discovery rule.[106] Another decision holds that the statute runs from the time of the damage, although the statute may be tolled under the discovery rule. The decision also suggests that the continuous representation rule may be applicable in Pennsylvania.[107] The legal malpractice plaintiff may bring suit in tort or contract,[108] but several superior court decisions suggest that the contract theory is fading from Pennsylvania jurisprudence.[109]

The current lack of judicial uniformity in this area serves the

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from prison on September 17, 1982, and brought suit on August 9, 1984. Trice v. Mozenter, 356 Pa. Super. 510, 513, 515 A.2d 10, 11 (1986), *alloc. granted*, 514 Pa. 643, 523 A.2d 1132 (1987). The defendant asserted that Trice was aware of any alleged negligence on the defendant's part by no later than June 30, 1980, when the Third Circuit remanded Trice's habeas corpus petition for an ineffectiveness hearing. *Id.* at 513-14, 515 A.2d at 10-11.

104. "Suffice it to say, based on our review of the record, the plaintiff knew or should have known that he had sustained an injury by the date he signed the Motion, Affidavit and Memorandum in support of his contention that trial and appellate counsel was ineffective." *Id.* at 519, 515 A.2d at 14-15.

105. "We find that, premised on the defendant's cessation of representation of the plaintiff in 1977 and the plaintiff's cognizance of his *legal* rights, as evidenced by the trio of memoranda filed with the trial court, that the plaintiff's cause of action bore fruition in 1978." *Id.* at 520, 515 A.2d at 15 (footnote omitted; emphasis in original). Under either the two-year or four-year statute, therefore, Trice's claim was barred.

106. Garcia v. Community Legal Servs. Corp., 362 Pa. Super. 484, 524 A.2d 980 (1987); Moore v. McComsey, 313 Pa. Super. 264, 459 A.2d 841 (1983).

107. Trice v. Mozenter, 356 Pa. Super. 510, 515 A.2d 10 (1986), *alloc. granted*, 514 Pa. 643, 523 A.2d 1132 (1987).

108. *See supra* note 26 and accompanying text.

109. *See supra* notes 30-32 and accompanying text.

best interests of no one. Until unifying principles are set forth, lower courts will lack guidance and, consequently, plaintiffs and defendants will litigate without direction.[110] Laymen will be suspicious of judicial action in this area, presuming that decisions are designed primarily to protect the bar rather than to advance justice.[111] More importantly, the fundamental policy choices that underlie the statutes of limitations will be forgotten, while puzzled plaintiffs bring suit hoping that more liberal rules will soon be adopted and defendants spend time and money to defend against such suits.[112]

VI. Approaches to Reform

Change in this area may emerge from either of two directions. Ideally, the legislature will perceive that the day has arrived when a fundamental review of the statute of limitations matter is in order. This appears unlikely, however.[113] Instead, courts will probably continue to bear the burden of insuring, on a case-by-case basis, that the statute serves the important goals it was designed to further and that the interests of justice are not ignored.[114]

A. Judicial Action

Any prescription for judicial action must begin with the understanding that the legislature has offered very little guidance in the form of specific statutory enactments. Indeed, the Pennsylvania statute of limitations does not specifically address malpractice.[115] The

110. For an excellent example of the intricacy that can arise in legal malpractice cases, *see* Garcia v. Community Legal Servs. Corp., 362 Pa. Super. 484, 524 A.2d 980 (1987). *See also supra* note 6.

111. The statute of limitations appears unjust to many nonattorneys, simply because it deprives plaintiffs of claims which may well be meritorious, for no other reason than the passage of time. *See supra* notes 19-20 and accompanying text. The problem is made more acute when the rules are unclear, because of the suspicion that judges, as former attorneys, will juggle the rules in order to protect the profession. *Cf.* Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 190, 491 P.2d 421, 429-30, 98 Cal. Rptr. 837, 845-46 (1971) ("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." (footnote omitted)).

112. For a discussion of these policies, *see supra* notes 9-20 and accompanying text.

113. The Pennsylvania statute of limitations remains quite brief, offering little guidance to the courts when considering which rule should apply to specific actions, or when the statute should begin to run. *See infra* notes 115-16 and accompanying text.

114. There are certain benefits in leaving these considerations to the courts. Courts have greater freedom to be flexible, and to consider exceptional circumstances that may not be addressable in a legislated rule. As the current Pennsylvania situation suggests, however, courts will not always be consistent in applying rules, leading to the problems discussed previously. *See supra* notes 110-12 and accompanying text.

115. While Pennsylvania courts have been consistent in applying the two-year personal injury statute, 42 PA. CONS. STAT. § 5524 (1982), *supra* note 28, to medical malpractice ac-

statute offers no particular guidance for courts attempting to determine what event causes the statute to commence.[116] The judiciary must therefore determine which statute to apply and when the statute commences.

1. Which Statute.—An action for legal malpractice appears to involve elements of tort and contract.[117] Because the Pennsylvania statute offers a longer period of limitation for an action grounded in contract,[118] the Pennsylvania legal malpractice plaintiff is encouraged to file an action in contract, even if the claim sounds in negligence.[119] If the tort statute has run, a plaintiff may choose to denominate the claim as one in contract, hoping to take advantage of the longer statute. Although this strategy may ultimately prove unsuccessful, the attorney will be forced to expend time and effort until the action is dismissed.[120]

If courts continue to offer plaintiffs the option of suing in tort or contract, complaints should be carefully examined to ensure that plaintiffs wishing to take advantage of the longer statute have actually set forth valid contract claims.[121] Recent superior court decisions display considerable creativity in characterizing legal malpractice claims in order to apply the two-year statute.[122] As a result, a day can be envisioned when Pennsylvania courts will altogether abandon the practice of recognizing dichotomous claims.

2. When to Commence.—The central question that Pennsylva-

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tions, no such consistency may be found in recent Pennsylvania decisions involving legal malpractice. *See supra* notes 21-32 and accompanying text.

116. The Pennsylvania statute of limitations provides for tolling of the statute in the event of certain occurrences, such as the absence or concealment of the defendant, 42 PA. CONS. STAT. § 5532 (1982), or war, 42 PA. CONS. STAT. § 5534 (1982). Absent such circumstances, however, the typical preamble to any given section merely states: "The following actions and proceedings must be commenced within _____ years[.]" *See, e.g.*, 42 PA. CONS. STAT. § 5525 (1982). No indication is given as to what event starts the statute. The courts must make that determination on their own.

117. R. MALLEN & V. LEVIT, *supra* note 1, § 382, at 428; D. MEISELMAN, *supra* note 2, § 5:2, at 66-67.

118. *See supra* note 27 and accompanying text.

119. Pennsylvania courts have shown a willingness to look beyond the plaintiff's characterization of the action, in order to arrive at a more realistic view of the nature of the claim. *See supra* note 31 and accompanying text.

120. Comment, *supra* note 44, at 491.

121. *See supra* note 31 and accompanying text. *See also* Koffler, *supra* note 31, at 216-19.

122. *See* Garcia v. Community Legal Servs. Corp., 362 Pa. Super. 484, 524 A.2d 980 (1987) (legal malpractice suit treated as suit for injury to personal property); Moore v. McComsey, 313 Pa. Super. 264, 459 A.2d 841 (1983) (malpractice suit for negligence leading to plaintiff's imprisonment characterized as suit for personal injury).

nia courts must answer is whether the statute begins to run at the time of the negligent act or at the time the plaintiff suffers damage. The damage rule, though difficult to apply,[123] is clearly preferable.[124] Although it appears to afford less protection for defendants, it will relieve defendants of the burden of being sued for nominal damages by plaintiffs who wish to protect their claims.[125] Tolling the statute until the plaintiff exhausts the appeal process will further protect attorneys from protective claims.[126]

As an alternative, courts may choose to adopt a split rule to accompany the contract-tort dichotomy. Since the occurrence rule is grounded in the theory that legal malpractice is a contract action,[127] a case could be made for the proposition that a legal malpractice suit brought on a contract theory ought to be subject to the occurrence rule. Tort actions could be governed by the damage rule. Such a division would appear to better protect the defendant than the damage rule alone. This approach, however, fails to effectively deal with the protective claim.

The discovery rule should continue to apply as a tolling provision when its use would avert injustice. The rule allows courts a measure of flexibility, which is valuable in cases involving special considerations.[128] This rule can function equally well with either the occurrence rule or the damage rule.[129] In its pure form, the discovery rule requires some potentially difficult calculations by the court,[130] yet this burden may be relieved if the onus of showing good cause

123. *See supra* notes 64-67 and accompanying text.

124. Several recent Pennsylvania decisions have held that an essential element of any malpractice action, whether brought on a contract theory or a tort theory, is proof of actual damage. *See* Mariscotti v. Tinari, 335 Pa. Super. 599, 601, 485 A.2d 56, 57 (1984); Pashak v. Barish, 503 Pa. Super. 559, 561, 450 A.2d 67, 69 (1982); Duke & Co. v. Anderson, 275 Pa. Super. 65, 73-74, 418 A.2d 613, 617 (1980). To suggest that the statute should begin to run before actual damage has been suffered is to suggest that the client must sue before the complaint would survive preliminary objections—leaving the victim of professional malpractice in a legal catch-22.

For a favorable discussion of *Duke & Co.*, see Koffler, *supra* note 31, at 221-23.

125. *Cf.* MacGill, *supra* note 66.

126. *See* AMFAC Distrib. Corp. v. Miller, 138 Ariz. 152, 673 P.2d 792 (1983); Richards Enters., Inc. v. Swofford, 495 So. 2d 1210 (Fla. Dist. Ct. App. 1986); Neylan v. Moser, 400 N.W.2d 538 (Iowa 1987). *But see* Luick v. Rademacher, 129 Mich. App. 803, 342 N.W.2d 617 (1983) (plaintiff's cause of action accrued when he discovered that attorney entered into consent judgment without his approval; statute not tolled until plaintiff was denied leave to appeal).

127. "The ground of action here, is a contract to act diligently and skilfully; and both the contract and the breach of it admit of a definite assignment of date. When might this action have been instituted, is the question; for from that time the statute must run." Wilcox v. Ex'rs of Plummer, 29 U.S. (4 Pet.) 172, 181 (1830).

128. *See supra* note 114 and accompanying text.

129. *See supra* note 84 and accompanying text.

130. *See supra* note 88 and accompanying text.

why the statute should not commence at the point of damage (or occurrence) is placed upon the plaintiff.[131] The material drawback to use of this rule is its lack of limit. If the plaintiff can convince the court that discovery of the cause of action was not reasonably possible for many years, an attorney (or the attorney's estate) may be subject to liability after an indefinite period of time has elapsed.[132]

Finally, the continuous representation rule should be adopted in some form. The relationship between attorney and client is highly fiduciary.[133] At the lowest level, the client should be able to invoke protection if the attorney breaches that trust by acting to conceal or failing to disclose acts of neglect.[134] This rule ensures that the plaintiff is not deprived of a rightful cause of action by an attorney who blithely assures the client that all is well. Protection is also provided to the attorney who makes a correctable error.[135] The period of liability may be limited if the rule protects the client only while the attorney represents the client in a particular matter. When that aspect of the relationship is over, the client might reasonably be expected to become more alert to the possibility that the attorney acted negligently.

B. Legislative Action

One of the more significant developments in statute of limitations law is the recent enactment of specific statutes aimed at settling the questions surrounding the accrual rules for legal malpractice.[136] Several states have created laws directed solely at legal malpractice,[137] while others have generated statutes covering mal-

131. *See* Held v. Neft, 352 Pa. Super. 195, 507 A.2d 839 (1986); Moore v. McComsey, 313 Pa. Super. 264, 459 A.2d 841 (1983).

132. R. MALLEN & V. LEVIT, *supra* note 1, § 394, at 476.

133. "[T]he dealings between practitioner and client frame a fiduciary relationship. The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests." Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 188-89, 491 P.2d 421, 428-29, 98 Cal. Rptr. 837, 844-45 (1971) (footnote omitted).

134. As the California Supreme Court has indicated, many legal matters are so complex that the client must rely on the advice of the attorney, lacking any reasonable means of verifying its accuracy. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d at 188, 491 P.2d at 428, 98 Cal. Rptr. at 844. Of course, some courts adhere to the presumption that all persons know the law. This can lead to results that are nothing short of fanciful. Compare Millwright v. Romer, 322 N.W.2d 30 (Iowa 1982) (lay persons held to understanding of rule against perpetuities), with Lucas v. Hamm, 56 Cal. 2d 583, 363 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962) (attorney not held to understand rule against perpetuities).

135. R. MALLEN & V. LEVIT, *supra* note 1, § 391, at 460.

136. *Id.* § 387, at 437-38; D. MEISELMAN, *supra* note 2, § 5:3, at 69.

137. *See* ALA. CODE § 6-5-574 (Supp. 1988); CAL. CIV. PROC. CODE § 340.6 (West

practice actions in general.[138] In states that do not have such statutes, courts are free to characterize each case as contract or tort, applying whatever statute of limitations suits the court at the time.[139]

The current Pennsylvania statute of limitations offers little guidance to courts concerning how a legal malpractice action is to be characterized, what period of limitations should apply, or when the statute ought to run. As a result, courts have split on these questions, leaving litigators without guidance. The legislature should take advantage of the opportunity to establish a uniform rule that will protect the interests of both attorney and client, as well as further the policies that underlie statutes of limitations.[140] The drafters should examine whether legal malpractice should be subject to different periods of limitation depending upon whether the claim is grounded in contract or in tort.[141] The statute should provide an accrual rule that is flexible enough to take into account extraordinary circumstances, yet will not subject the attorney to an indefinite period of potential liability.

1. Establishing a Uniform Rule.—While an action for legal malpractice consists of elements of contract and tort actions, it is not readily apparent why the applicable statute of limitations should depend upon the plaintiff's decision to characterize the action as one in contract or in tort. Such a practice merely encourages plaintiffs to statute-shop.[142] Some states have chosen to continue this distinction by enacting statutes that apply different limitation periods to con-

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1982); ME. REV. STAT. ANN. tit. 14, § 753-A (Supp. 1988); MONT. CODE ANN. § 27-2-206 (1987); R.I. GEN. LAWS § 9-1-14.3 (Supp. 1988); S.D. CODIFIED LAWS ANN. § 15-2-14.2 (1984).

The following statutes, while not aimed solely at legal malpractice, contain language making it clear that malpractice actions against attorneys are covered: MASS. GEN. LAWS ANN. ch. 260, § 3A (West Supp. 1988); NEV. REV. STAT. § 11.207 (1987); TENN. CODE ANN. § 28-3-104 (1980).

138. The following statutes apply to professionals licensed by the state: IDAHO CODE § 5-219(4) (1979); KY. REV. STAT. ANN. § 413.245 (Baldwin Supp. 1988); MICH. STAT. ANN. § 27A.5838 (Callaghan Supp. 1988).

Some states have merely enacted statutes which apply to broad classes of malpractice, without specifying whether or not they apply to legal malpractice: FLA. STAT. ANN. § 95.11(4)(a) (West 1982); NEB. REV. STAT. § 25-222 (1985); N.Y. CIV. PRAC. L. & R. 214(6) (McKinney Supp. 1988); N.C. GEN. STAT. § 1-15 (1983); N.D. CENT. CODE § 28-01-18(3) (Supp. 1987); OHIO REV. CODE ANN. § 2305.11(A) (Baldwin Supp. 1987). Courts in these states have frequently been required to determine whether these general statutes apply to legal malpractice. *See* R. MALLEN & V. LEVIT, *supra* note 1, § 387, at 441-45.

139. D. MEISELMAN, *supra* note 2, § 5:3, at 70-71.

140. *See supra* notes 9-20 and accompanying text.

141. Comment, *supra* note 44, at 490.

142. *See supra* notes 117-22 and accompanying text.

tract and tort actions.[143] Others have abolished the distinction, offering a single statutory period.[144]

Ideally, a Pennsylvania legal malpractice statute of limitations would abolish the tort-contract dichotomy and offer a uniform rule applicable to all legal malpractice claims. If the statute offers a just rule of accrual, tolling the statute until the client may reasonably discover the attorney's malpractice, there is no reason to provide two separate limitation periods. Such a policy does nothing to protect the defendant; it does not ensure that the courts will be free of trivial or frivolous claims.[145] Further, it is not necessary to prevent injustice to the plaintiff, who should be able to bring suit within the shorter of the limitation periods. As long as the statute of limitations is drafted carefully with respect to such considerations, a single statutory period applicable to both tort and contract actions ensures fairness to both parties.

2. Fixing the Time of Commencement.—The most difficult task confronting the legislature when creating a statute of limitations for legal malpractice is establishing a commencement rule which is uniform but flexible. Many state statutes ignore the issue altogether, leaving the determination of accrual rules to the courts.[146] The California statute clearly demonstrates that it is possible for a legislature to provide for flexible commencement rules.[147] This statute currently

143. Comment, *supra* note 44, at 490.

144. This has become the most popular approach. The Maine statute is quite explicit on this point, providing that the statute shall apply to "[a]ctions alleging professional negligence or breach of contract, for legal service, by a licensed attorney . . . ." ME. REV. STAT. ANN. tit. 14, § 753-A (Supp. 1988). *See, e.g.*, FLA. STAT. ANN. § 95.11(4)(a) (West 1982); KY. REV. STAT. ANN. § 413.245 (Baldwin Supp. 1988); NEV. REV. STAT. § 11.207 (1987); TENN. CODE ANN. § 28-3-104 (1982).

145. *See supra* note 12 and accompanying text.

146. *See* N.Y. CIV. PRAC. L. & R. 214(6) (McKinney Supp. 1988); OHIO REV. CODE ANN. § 2305.11(A) (Baldwin Supp. 1987). This, of course, leads to many of the problems which currently plague the Pennsylvania courts. *See supra* notes 106-12 and accompanying text.

147. CAL. CIV. PROC. CODE § 340.6 (West 1982) provides:

> (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
>
> (1) The plaintiff has not sustained actual injury;
>
> (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

represents the apogee of the legislative enactment, balancing the interests of attorney and client and presenting a commencement rule which is calculated to be as equitable as possible.

The California statute utilizes both the occurrence rule and the discovery rule to determine the time of accrual. The plaintiff is entitled to bring an action one year after discovery or four years after the alleged wrongful act, whichever occurs first.[148] This rule provides several advantages. First, is provides an outer limit on the attorney's liability, barring applicability of any of the tolling provisions,[149] thereby assuring the attorney a measure of repose. The plaintiff is required to act within a reasonable period of time after the malpractice is discovered, in order to encourage plaintiffs to act quickly and to prevent the evidentiary problems which accompany the passage of time. The primary weakness of this rule, however, is its failure to consider the situation in which the plaintiff discovers the malpractice in the final year of the four-year occurrence rule period. Such a plaintiff would be denied the full one-year discovery rule period, absent applicability of one of the tolling provisions. In addition, by failing to provide explicitly that the statute applies to both tort and contract actions, the statute encourages California courts to apply the statute only to actions brought in tort.[150]

The California statute offers four tolling provisions, which provide further flexibility and protection for the plaintiff who might otherwise be deprived of an opportunity to recover because of the basic rule. First, the statute is tolled in the event that the plaintiff has not suffered "actual injury."[151] This is a significant provision, and might

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(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

By contrast, some state statutes follow the more strict occurrence rule. *See* ME. REV. STAT. ANN. tit. 14, § 753-A (Supp. 1988) (with exceptions for negligence in rendering real estate opinions and drafting of wills); S.D. CODIFIED LAWS ANN. § 15-2-14.2 (1984).

148. CAL. CIV. PROC. CODE § 340.6(a) (West 1982).

149. Pennsylvania courts have recently used the discovery rule as a tolling provision. *See supra* notes 77-84 and accompanying text.

150. Despite this fact, the California courts have not hesitated to apply the statute to contract actions. One court concluded that the legislature "deleted the breach of a written contract exception from the [statute] because it intended that section 340.6 apply to both tort and breach of contract malpractice actions." Southland Mechanical Constructors, Inc. v. Nixen, 119 Cal. App. 3d 417, 429, 173 Cal. Rptr. 917, 923 (1981).

151. CAL. CIV. PROC. CODE § 340.6(a)(1) (West 1982). *See also supra* note 67 and

have better served as the basic rule. The tolling provision recognizes that attorneys' errors do not always result in immediate damages and allows the plaintiff to wait to sue until damage actually arises. This offers a particular benefit to victims of negligent draftsmanship of wills, who may not suffer injury until years after the negligence is committed.[152] Used as a tolling provision, however, the damage rule fails to protect attorneys from suits for nominal damages. A plaintiff who wished to do so could bring suit before suffering any injury, thereby drawing the attorney into costly litigation.

The second tolling provision enacts the continuous representation rule, delaying the running of the statute until the attorney has ceased to represent the client in the specific matter in which the alleged malpractice occurred.[153] This provision reflects concern for the attorney-client relationship, which is one of trust and confidence. The chance of abuse of trust by attorneys justifies this provision.[154]

The remaining two tolling provisions are minor in nature, and may be unnecessary. First, the statute will be tolled if the attorney is guilty of "willfully" concealing the wrongful act or omission from the client.[155] Such a provision would not be beneficial in Pennsylvania, where courts recognize that acts of fraudulent concealment toll the statute and find the statute tolled when the attorney is guilty merely of reassurances that lull the client into a false sense of security.[156] Finally, the statute will toll if the plaintiff is under a legal or physical disability that prevents commencement of legal action.[157] The Pennsylvania statute of limitations does not recognize the traditional legal disabilities, such as infancy, insanity and imprisonment,[158] taking the view that infants and incompetents have access to legal process through their guardians, and those in prison have the ability to bring suit on their own behalf.[159] This is not an unreasona-

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accompanying text.

152. In Millwright v. Romer, 322 N.W.2d 30 (Iowa 1982), the will was drafted in 1944. The testator died in 1945. In 1978, it was discovered that the will contained a provision which violated the rule against perpetuities. The court held that the statute of limitations began to run in 1945, when the testator died. 322 N.W.2d at 33.

153. CAL. CIV. PROC. CODE § 340.6(a)(2) (West 1982).

154. For a discussion of the continuous representation rule, *see supra* notes 90-105 and accompanying text. Michigan has also adopted the continuous representation rule in its malpractice statute: MICH. STAT. ANN. § 27A.5838 (Callaghan Supp. 1988).

155. CAL. CIV. PROC. CODE § 340.6(a)(3) (West 1982).

156. *See supra* notes 69-70 and accompanying text.

157. CAL. CIV. PROC. CODE § 340.6(a)(4) (West 1982).

158. 42 PA. CONS. STAT. § 5533 (1982) provides: "Except as otherwise provided by statute, infancy, insanity or imprisonment does not extend the time limited by this subchapter for the commencement of a matter."

159. *See* Moore v. McComsey, 313 Pa. Super. 264, 271, 459 A.2d 841, 845 (1983).

ble policy, considering that the statute of limitations must give some repose to the attorney. If an infant acquires a cause of action at a very young age, the attorney may wait years before the statute finally commences.[160] It is better to require the infant's guardian to be alert.

Some commentators have criticized the final provision of the California statute as redundant.[161] This provision delays the statute's commencement in the case when the cause of action is based on a written instrument which does not become effective until some future act or event takes place and starts the statute running on the date when the act or event occurs.[162] This is primarily designed to deal with the situation in which a person sues the drafter of a will for negligent draftsmanship, when such negligence leads to the plaintiff's total or partial disinheritance. Some argue that the inclusion of the damage rule as a tolling provision makes this rule unnecessary,[163] but this is not the case. The statute clearly establishes the date when a cause of action accrues for negligent draftsmanship, a matter which has been a source of considerable debate among courts confronted with the situation.[164] Although the California statute may have chosen the wrong moment to start the running of the statute in this instance,[165] it should not be criticized for trying to settle the question.

The California statute represents an excellent attempt to fashion a rule that furthers the basic policies of statutes of limitations while assuring that plaintiffs are allowed some benefits in the form of tolling provisions. The Pennsylvania legislature should certainly consider the advantages offered by this statute, but should also consider the areas in which this statute is based on theories of legal malprac-

160. The situation is more difficult with insanity. Infants cease to be infants within a specified period of time, either through attainment of majority or by death. Insanity does not fall under any limitation as to length.

161. *See* Comment, *supra* note 44, at 495.

162. CAL. CIV. PROC. CODE § 340.6(b) (West 1982).

163. An intended beneficiary of a negligently-drafted will cannot suffer damage until the death of the testator, since it is only upon the testator's death that a beneficiary may acquire rights under the will.

164. *See, e.g.*, Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Shideler v. Dwyer, 386 N.E.2d 1211 (Ind. Ct. App. 1979), *vacated and remanded*, 417 N.E.2d 281 (Ind. 1981); Millwright v. Romer, 322 N.W.2d 30 (Iowa 1982); Price v. Holmes, 198 Kan. 100, 422 P.2d 976 (1967).

165. If the statute runs at the time of the testator's death, a beneficiary may be forced to uphold the negligently-drafted provision in one proceeding while fighting it in another proceeding, leading to problems similar to those encountered when underlying litigation is on appeal. *See supra* notes 65-67 and accompanying text.

tice that are outdated or inapplicable to Pennsylvania law.[166] The legislature should consider the advantages and disadvantages of traditional Pennsylvania rules, and should endeavor to treat lawyers and other professionals equally, though not necessarily identically.[167]

VII. A Proposed Pennsylvania Statute

In order to effectively further the underlying policies of statutes of limitations while assuring that meritorious claims are preserved, the Pennsylvania legislature should adopt a statute of limitations designed specifically to cover legal malpractice actions. The following proposal abandons the traditional occurrence rule in favor of the damage rule, and adopts as a limitation period the two-year period currently applied to tort actions in Pennsylvania. The statute offers several provisions that toll the running of the statute in exceptional circumstances, but establishes a more stringent one-year limitation period when the tolling condition ceases.

The proposed statute provides:

> (a) An action against an attorney for a wrongful act or omission, whether based upon tort or breach of contract, shall be commenced within two years of the date when the plaintiff suffers actual injury as a result of the wrongful act or omission, except that the statute shall be tolled under the following circumstances:
>
> (1) If the plaintiff is unaware of the existence of the injury, or is unaware of the causal relationship between the wrongful act or omission and the injury, the statute shall be tolled until the plaintiff obtains such knowledge, or through the exercise of reasonable diligence should have obtained such knowledge; the plaintiff shall then commence the action within one year.
>
> (2) If the attorney continues to represent the plaintiff regarding the specific subject matter in which the wrongful act or omission occurred, the plaintiff shall commence the action within one year of the termination of that relationship.
>
> (3) If the actual injury suffered by the plaintiff arises in the course of litigation, the statute shall be tolled until the appellate process is completed or the period to file an appeal has passed; the plaintiff shall then

166. Continued reliance on the occurrence rule, though tempered with the utilization of the discovery rule in the California statute, should not be encouraged in Pennsylvania. *See supra* notes 48-51 and accompanying text.

167. *See* Skyline Builders, Inc. v. Kellar, 50 Pa. D. & C.2d 19, 25 (C.P. Leh. Co. 1970).

commence the action within one year.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event, unless tolled by another provision of this section.

This proposal clarifies the limitation period for legal malpractice actions in Pennsylvania and provides a just balance of the competing interests which demand recognition. The statute is drafted to include actions based on contract and tort theories, in order to prevent clients from resorting to the longer contract statute of limitations.[168] Pennsylvania courts have already noted that clients will bring claims sounding in tort but labeled in contract.[169] This statute would eliminate benefits from such mislabeling.

The statute offers a flexible commencement rule, recognizing that a cause of action for legal malpractice does not actually arise until the plaintiff has suffered actual injury.[170] Tolling provisions are included to protect the plaintiff in certain exceptional circumstances. The discovery rule is adopted as one tolling provision, requiring that the plaintiff who benefits from the discovery rule must act quickly once the rule ceases to apply. The continuous representation rule is adopted in order to afford the attorney an opportunity to correct any mistakes and to protect the attorney-client relationship. The appeal rule is designed to prevent the client from being forced to defend the attorney's work in one proceeding and attack it in another simultaneous proceeding.[171]

The proposed statute's final provision is primarily designed to confront the particular problems that arise when an intended beneficiary of a will sues the drafting attorney under a third-party beneficiary theory.[172] Under this statute, the cause of action would arise at the time of the testator's death. However, the statute would be tolled in the event, for example, that the plaintiff is unable to reasonably discover the existence of the attorney's negligence until later. This is not an uncommon circumstance. Yet, several courts have strictly held that the cause of action arises at the time of the testator's death, despite any discovery problems.[173] This statute is designed to

168. *See supra* notes 26-32 and accompanying text.
169. *See, e.g.*, Hoyer v. Frazee, 323 Pa. Super. 421, 426, 470 A.2d 990, 992-93 (1984).
170. *See supra* notes 123-26 and accompanying text.
171. *See supra* notes 65-67 and accompanying text.
172. *See supra* notes 161-65 and accompanying text.
173. *See supra* note 164 and accompanying text.

avoid that result.

VIII. Conclusion

Pennsylvania courts, in addition to others throughout the country, have struggled to balance the policies that underlie statutes of limitations while preserving meritorious claims when possible. Although just results may be achieved in individual cases, recent judicial attempts to define commencement rules lack uniformity, leaving lower courts, as well as plaintiffs and defendants, confused as to when the statute of limitations begins to run in an attorney malpractice case. Recently, many state legislatures have attempted to confront this problem by creating statutes specifically designed to apply to the policy considerations inherent in the legal malpractice area. The Pennsylvania legislature should not ignore this trend.

By enacting a legal malpractice statute of limitations, the legislature can provide guidance to state courts in the determination of the date of commencement, while providing uniform rules upon which both plaintiffs and defendants can rely. The proposed statute would not entirely relieve courts of making difficult choices in this area. However, it offers a greater degree of guidance than is provided by the present statute. In addition, a better balance of flexibility and uniformity is offered than is provided by the current case law and statutory law. Issues that have not arisen or have been alluded to in Pennsylvania decisions are considered. The statute is designed, not to relieve the courts of the burden of making close calls, but to provide greater guidance when difficult situations arise.

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