NOTES

THE STATUTE OF LIMITATIONS FOR PROFESSIONAL MALPRACTICE IN ALASKA AFTER *LEE HOUSTON & ASSOCIATES, LTD. V. RACINE*

I. INTRODUCTION

A recent decision by the Alaska Supreme Court carries profound implications for attorneys practicing in Alaska. On March 1, 1991, the court issued its decision in *Lee Houston & Associates, Ltd. v. Racine.*[1] This decision reflects a significant change in direction by the court with respect to the issue of statutes of limitations applicable to claims of professional malpractice. Previously, the court had treated such claims as sounding essentially in tort and applied the two-year limitations period used in negligence actions.[2] The *Lee Houston* court overruled this line of cases and applied the six-year limitations period applicable to actions on contract.[3]

This note will address the issues raised by the court's holding in *Lee Houston.* As a means of sharpening its focus, the note will concentrate on the issue of the appropriate statute of limitations for claims of legal malpractice, using such claims as an exemplar of professional malpractice claims generally. Courts have treated these claims analogously, and the analysis, reasoning and language employed by courts in legal malpractice cases are generally applicable to claims for other kinds of professional malpractice. For example, although *Lee Houston* involved a claim of malpractice against a real estate agent, the court analyzed precedent in all

1. 806 P.2d 848 (1991).

2. The two-year statute of limitations for negligence actions is codified at Alaska Statutes section 09.10.070.

3. *Lee Houston,* 806 P.2d at 855 (applying Alaska Statutes section 09.10.050).

areas of professional malpractice and concluded by explicitly overruling a case involving legal malpractice.[4]

Section II briefly discusses the growing significance of legal malpractice. Section III describes how a tort/contract dichotomy has arisen in professional malpractice jurisprudence, while Section IV examines this dichotomy within the context of Alaska case law prior to *Lee Houston.* Section V analyzes how *Lee Houston* resolves this dichotomy in favor of applying the contract statute of limitations for professional malpractice claims. This analysis reveals a strong basis for using the negligence statute of limitations for malpractice claims, and suggests that the Alaska Supreme Court erred in holding such claims subject to the limitations period applicable to contract actions. Section VI discusses various legislative attempts to resolve the tort/contract dichotomy, and Section VII offers a proposal for legislative action in this area.

II. THE GROWING SIGNIFICANCE OF LEGAL MALPRACTICE

The last few decades have seen a sharp rise in claims of professional malpractice against attorneys. According to one commentator, the decade of the 1970s saw almost as many reported legal malpractice decisions as had the entire previous history of American jurisprudence.[5] The rise in the number of claims has continued; as many claims were brought through the first six years of the 1980s as had been brought throughout the 1970s.[6] Another study concluded that by 1970, only one out of every forty attorneys had been subject to a malpractice claim, but by 1980, one out of every fourteen attorneys had submitted a claim to their malpractice insurance carriers.[7]

One issue that has sparked considerable debate in the area of legal malpractice has been the determination of the appropriate limitations period to apply to such claims. This debate stems from the fact that the attorney-client relationship is usually established by a contract for employment, yet a claim for injury "resulting from the professional incompetence of an

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4. *Id.*

5. RONALD E. MALLEN & JEFFERY M. SMITH, LEGAL MALPRACTICE § 1.6, at 19 (3d ed. 1989); *see also* Joseph H. Koffler, *Legal Malpractice Statutes of Limitations: A Critical Analysis of a Burgeoning Crisis*, 20 AKRON L. REV. 209 (1986) (arguing that the sharp rise in legal malpractice claims necessitates that courts develop rational and just rules for statutes of limitations); Harry F. Mooney & Laurie Styka Bloom, *Anatomy of a Legal Malpractice Claim*, 55 DEF. COUNSEL J. 400 (1988) (noting the rise of legal malpractice and the associated rise in insurance premiums).

6. MALLEN & SMITH, *supra* note 5, § 1.6, at 19.

7. Eugene D. Mossner, *Legal Malpractice Insurance Trends -- The National and Michigan Experience*, 65 MICH. B.J. 550, 551 (1986).

attorney is actionable under theories which are an amalgam of both tort and contract."[8] The statute of limitations issue is critical for several reasons. First, virtually all states apply a significantly longer limitations period for contract actions than they do for traditional tort actions.[9] In addition, several commentators have noted that the statute of limitations is not only the most successful defense in legal malpractice cases, but it is also often the only viable affirmative defense available to the defendant.[10]

The disagreement and confusion in this area is reflected by the only two United States Supreme Court cases addressing the issue. In *Wilcox v. Executors of Plummer*,[11] the Supreme Court analyzed a legal malpractice claim using language indicating that the Court was addressing the issue in terms of breach of contract.[12] However, forty-four years later, in *Marsh v. Whitmore*,[13] the Court treated a similar malpractice claim under a tort/negligence analysis. While these cases are instructive with respect to the tort/contract dichotomy, it is important to note that they are not binding upon any state court. Legal malpractice is a state law issue, and each state remains free to select its own approach to the limitations period.

III. THE TORT/CONTRACT DICHOTOMY IN LEGAL MALPRACTICE JURISPRUDENCE

With slight variations, states have developed three general approaches to determine the statute of limitations to be applied in actions for legal malpractice. Several state courts have held that the statute of limitations applicable to contract actions governs claims of malpractice.[14] Other state courts have found such actions to sound in tort and have applied the limitations period for traditional tortious negligence, at least where there was no breach of any specific promise.[15] In an attempt to resolve this

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8. Jones v. Wadsworth, 791 P.2d 1013, 1017 (Alaska 1990); *see also* Long v. Buckley, 629 P.2d 557, 561 (Ariz. Ct. App. 1981) (concluding that legal malpractice usually consists of both tort and breach of contract); *see generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 92-94 (5th ed. 1984).

9. *See, e.g.*, ALASKA STAT. § 09.10.050 (1983) (providing six-year limitations period for actions "upon a contract") and ALASKA STAT. § 09.10.070 (1983) (providing two-year limitations period for "any injury to the person or rights of another not arising on contract").

10. DAVID MEISELMAN, ATTORNEY MALPRACTICE LAW & PROCEDURE § 5:1 (1980); MALLEN & SMITH, *supra* note 5, § 18.1; Kevin M. Downey, Comment, *Winding Down the Clock: The Statute of Limitations for Legal Malpractice in Pennsylvania*, 94 DICK. L. REV. 131 (1989).

11. 29 U.S. (4 Pet.) 172 (1830).

12. *Id.* at 181 ("When the attorney was chargeable with negligence or unskilfulness [sic], his contract was violated . . .").

13. 88 U.S. (21 Wall.) 178 (1874).

14. *See infra* Section III.A.

15. *See infra* Section III.B. While these courts have recognized that a malpractice

dichotomy between judicial approaches, a growing number of state legislatures have enacted statutes explicitly detailing the limitations period to be applied in malpractice cases.[16]

A. The Rationale For Applying The Contract Limitations Period To Legal Malpractice Claims

Several appellate courts have treated legal malpractice claims as actions for breach of contract.[17] The reasoning of the Virginia Supreme Court in *Oleyar v. Kerr*[18] is illustrative of the rationale supporting this approach. *Oleyar* involved a claim of malpractice against an attorney in the performance of a title search pursuant to an oral contract for the attorney's services. While recognizing that a case for the negligent performance of professional services by an attorney sounded in tort, the court noted that no duty would have been owed by the defendant/attorney to the plaintiff in the absence of the employment contract.[19] The court maintained that the action was "grounded upon and [had] its inception in the contractual relationship brought about by the oral agreement."[20]

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claim based on a breach of the duty of due care sounds in tort, most have held that where an attorney breaches a specific and explicit contractual agreement, an action may be maintained for breach of contract. *See, e.g.,* Sincox v. Blackwell, 525 F. Supp. 96 (W.D. La. 1981). Examples might include situations in which an attorney explicitly agreed to represent a party at a hearing and failed to appear or explicitly agreed to file a complaint by a certain date and failed to do so. Of course, the most obvious example would be where the attorney and the client entered into a contract and the attorney failed to provide any services whatsoever.

16. *See infra* Section VI.

17. *See, e.g.,* Neel v. Magana, 491 P.2d 421, 422-23 (Cal. 1971) (noting that attorney's failure to exercise requisite skill, prudence and diligence constitutes breach of an "implied term" of attorney-client contract and applying statute covering actions upon "contract, obligation or liability"); Benard v. Walkup, 77 Cal. Rptr. 544, 549 (Cal. Ct. App. 1969) (holding that attorney "impliedly contracted to exercise degree of care, skill and knowledge" required by negligence standard); Loftin v. Brown, 346 S.E.2d 114, 116 (Ga. Ct. App. 1986) (holding that legal malpractice is based on breach of duty imposed by attorney/client contract and is subject to limitations period applied to breach of oral contract); Higa v. Mirikitani, 517 P.2d 1, 5-6 (Haw. 1973) (applying statute covering actions upon a "contract, obligation or liability" to legal malpractice claim); Church v. McBurney, 513 A.2d 22, 24-26 (R.I. 1986) (applying catch-all statute of limitations in legal malpractice case after finding breach of contractual duty "intrinsic to the attorney client relationship"); Schirmer v. Nethercutt, 288 P. 265, 268 (Wash. 1930) (holding that legal malpractice claim is based on breach of contract and controlled by statute of limitation relating to breach of contractual relation).

18. 225 S.E.2d 398 (Va. 1976).

19. *Id.* at 399.

20. *Id.*

The Virginia Supreme Court held that such an action was in essence a claim for breach of contract, subject to the statute of limitations applicable to contract actions rather than the period applicable to negligence actions.[21] The court based its decision on the following distinction between actions sounding in tort and in contract:

> If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action . . . then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort.[22]

Thus, the court concluded that an action for legal malpractice, though sounding in negligence, was governed by the limitations period applicable to contract actions because the rendering of such services originates from a contractual relationship.[23]

B. The Rationale For Applying The Tort Limitations Period To Legal Malpractice Claims

Several jurisdictions have chosen the opposite path, concluding that actions for legal malpractice are governed by the statute of limitations applicable to traditional torts, at least in the absence of a claim of a breach of a specific and explicit promise.[24] *Sincox v. Blackwell*[25] illustrates the

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21. *Id.* at 400.

22. *Id.* at 399-400 (citation omitted).

23. *Id.*

24. *See, e.g.*, Yazzie v. Olney, Levy, Kaplan & Turner, 593 F.2d 100, 105 (9th Cir. 1979) (applying Arizona law and holding that statute of limitations for action upon written contract does not apply to legal malpractice claim because claim was only indirectly connected to the instrument); Thomas v. Howard, 455 F.2d 228, 229 (3rd Cir. 1972) (applying New Jersey law and holding negligence limitations period applicable to claim that attorney failed to represent client to best of ability); Moorehead v. Miller, 102 F.R.D. 834, 836 (D.V.I. 1984) (holding that claim for legal malpractice is governed by two-year general tort statute in the absence of a claim based on the non-performance of a specific promise); Keystone Distribution Park v. Kennerk, 461 N.E.2d 749, 751 (Ind. Ct. App. 1984) (holding that failure of attorney to perform pursuant to an oral contract constituted the tort of legal malpractice not an action upon a contract); Chavez v. Saums, 571 P.2d 62, 65 (Kan. Ct. App. 1977) (holding that "where a contractual relationship exists between persons and . . . a duty is imposed by or arises out of the circumstances surrounding or attending the transaction, the breach of the duty is a tort"); McNary v. Sidak, 478 So. 2d 712, 715 (La. Ct. App. 1985) (holding that tort limitation period is applicable unless attorney breaches an express warranty); Gabel v. Sandoval, 648 S.W.2d 398, 399 (Tex. Ct. App. 1983) (holding that legal malpractice is in the nature of a tort action, subject to the two-year tort limitations period); Citizens State Bank v. Shapiro, 575 S.W.2d 375, 387-88 (Tex. Civ. App. 1978) (holding that actions for negligence and breach of fiduciary duty against attorney sound in tort for purposes of the statute of limitations); Hall v. Nichols, 400 S.E.2d 901, 904 (W. Va.

rationale for treating claims of legal malpractice as torts for statute of limitations purposes. *Sincox* involved a claim for malpractice arising from alleged omissions by the attorney during a criminal trial in which the malpractice plaintiff was the defendant.[26]

The court noted that claims of legal malpractice could spawn actions sounding in both contract and tort.[27] It held, however, that malpractice claims stating an action upon contract were limited to situations involving "specific result-oriented attorney/client contracts or those containing special warranties or situations where the attorney has simply failed to perform, which goes to the essence and existence of the contract."[28] The court found no implied warranties in the employment agreement between the attorney and client sufficient to support a breach of contract action and held that the claim was in essence that of negligence of a professional -- the failure "'to exercise at least that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in [the] locality.'"[29] Thus, the court concluded that the limitations period for traditional torts was applicable to the malpractice claim, and thus the plaintiff's claim was barred.[30]

IV. LEGAL BACKGROUND AND DEVELOPMENTS IN ALASKA

The Alaska Supreme Court has also wrestled with this tort/contract dichotomy with respect to the limitations period applicable to claims of professional malpractice. Because this conflict provided the precedential backdrop for the *Lee Houston* decision, an understanding of the reasoning and analysis utilized by the court in earlier cases is essential in evaluating *Lee Houston.*

The supreme court first addressed this statute of limitations issue in *Van Horn Lodge v. White.*[31] *Van Horn Lodge* involved a malpractice

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1990) (ruling that essence of client's legal malpractice claim was breach of duty imposed by law rather than by contract). For a discussion of contract actions for breach of explicit promise, see *supra* note 15.

25. 525 F. Supp. 96 (W.D. La. 1981).

26. *Id.* at 97. The alleged omission was the attorney's failure to object to the jury's guilty verdict after one juror stated that he had "reasonable doubt" about his guilty vote. *Id.*

27. *Id.* at 99 (citations omitted).

28. *Id.* at 100 (citations omitted); *see supra* note 15.

29. *Sincox,* 525 F. Supp. at 100 (quoting Ramp v. Saint Paul Fire & Marine Ins., 269 So. 2d 239, 244 (La. 1972)).

30. *Id.*

31. 627 P.2d 641 (Alaska 1981), *overruled by* Lee Houston & Assocs., Ltd. v. Racine, 806 P.2d 848 (Alaska 1991).

claim for an attorney's alleged failure to file an amended complaint in a timely manner.[32] At trial, the superior court held that the claim was barred by the two-year statute of limitations applicable to actions sounding in tort.[33] On appeal, the plaintiff/client argued that since the action arose out of a contractual relation with the attorney, the six-year limitations period applicable to contract actions should govern.[34]

The supreme court affirmed the superior court's decision, holding that because the claim sounded in tort, the two-year limitations period applicable to tort actions controlled.[35] After noting the absence of "an agreement to obtain a particular result or to do a particular thing," the court found that the contractual relationship merely gave rise to a general duty to exercise due and reasonable care.[36] In holding the tort limitations period applicable to a claim of legal malpractice, the court reasoned "that the essence of [the plaintiff's] complaint was negligence, and the gravamen thereof lies in tort."[37]

In *Wettanen v. Cowper*,[38] the Alaska Supreme Court was again confronted with a claim of legal malpractice. The case arose from an attorney's alleged failure to prepare for and attend trial.[39] In *Wettanen*, as in *Van Horn Lodge*, the plaintiff argued that the six-year contract limitations period applied to legal malpractice claims.[40] The court refused to resolve the issue, ruling instead on the procedural ground that the plaintiff had failed to argue at trial that the contract limitations period was applicable.[41] The court nevertheless indicated that it was amenable to a re-evaluation of *Van Horn Lodge* at some point by recognizing the plausibility of the plaintiff's argument that the attorney/client contract

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32. *Id.* at 643.

33. *Id.*; *see* ALASKA STAT. § 09.10.070 (1983) (providing that "[n]o person may bring an action (1) . . . for any injury to the person or rights of another not arising on contract . . . unless commenced within two years").

34. *Van Horn Lodge*, 627 P.2d at 643; *see* ALASKA STAT. § 09.10.050 (1983) (providing that "[n]o person may bring an action (1) upon a contract or liability, express or implied . . . unless commenced within six years").

35. *Van Horn Lodge*, 627 P.2d at 643.

36. *Id.*

37. *Id.*; *see also* Greater Area, Inc. v. Bookman, 657 P.2d 828, 829 (Alaska 1982) (following *Van Horn Lodge* and applying six-year limitations period to claim of legal malpractice).

38. 749 P.2d 362 (Alaska 1988).

39. *Id.* at 363-64.

40. *Id.* at 364.

41. *Id.* The court stated that "[a]rguments not raised in the trial court are waived and will not be considered on appeal." *Id.* (citing Miller v. Sears, 636 P.2d 1183 (Alaska 1981)).

contained an implied agreement "to do a particular thing -- namely, to prepare for and attend trial."[42]

In *Thomas v. Cleary*,[43] however, the supreme court again applied the "gravamen" approach of *Van Horn Lodge*, finding that a claim of malpractice based on an accountant's failure to file and pay the plaintiff's taxes sounded essentially in tort, making it subject to the two-year tort limitations period.[44] In *Thomas*, the court enumerated the elements of a cause of action for professional malpractice: "(1) a duty, (2) a breach of that duty, (3) a proximate causal connection between the negligent conduct and the resulting injury, and (4) actual loss or damage resulting from the professional's negligence."[45] These are the basic elements of any claim sounding in negligence.

The supreme court confronted the issue of a breach of an explicit promise by an attorney in *Jones v. Wadsworth*.[46] *Jones* involved a claim against an attorney stemming from the breach of alleged specific oral agreements to handle the case "expeditiously" and keep the client informed.[47] Citing cases applying contract statutes of limitations to breaches of specific promises or undertakings,[48] the court held that the six-year limitations period applicable to contract actions governed the claim.[49] While expressly limiting its holding to cases involving the "nonperformance of a specific promise contained in an express contract,"[50] the court openly questioned the validity of *Van Horn Lodge* and suggested that all legal malpractice claims, whether sounding in tort or contract, should be governed by a single limitations period.[51]

Bibo v. Jeffrey's Restaurant[52] is another instance in which the supreme court reached a decision calling the validity of *Van Horn Lodge* into question.[53] *Bibo* involved the analogous issue of breach of fiduciary

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42. *Id.*
43. 768 P.2d 1090 (Alaska 1989).
44. *Id.* at 1092 n.6.
45. *Id.* at 1092 (citations omitted).
46. 791 P.2d 1013 (Alaska 1990).
47. *Id.* at 1014.
48. *See supra* notes 15 & 24.
49. *Jones*, 791 P.2d at 1015-16; *see* ALASKA STAT. § 09.10.070 (1983).
50. *Jones*, 791 P.2d at 1017.
51. *Id.*
52. 770 P.2d 290 (Alaska 1989).
53. The opinion in *Bibo* did not address *Van Horn Lodge* or its progeny. However, in *Lee Houston & Associates, Ltd. v. Racine*, the supreme court argued that the breach of duty in *Bibo* was analogous to the malpractice claim in *Van Horn Lodge*, stating that "[b]oth cases involved alleged professional incompetence. In neither case was it alleged that the defendant promised (expressly or impliedly) to do a particular thing and then failed to perform." *Lee Houston*, 806 P.2d 848, 853 (Alaska 1991). The court added that both cases

duties owed to a corporation by its directors. The court found the breach of fiduciary duty action to be based on an implied contract to "honestly and diligently direct the business of the corporation."[54] Thus, the court concluded that "[a]ctions against corporate directors for breach of fiduciary duty sound in contract, and are governed by the six-year statute."[55]

Against this legal backdrop, the Alaska Supreme Court addressed the issue of the limitations period to be applied to claims of professional malpractice in *Lee Houston & Associates, Ltd. v. Racine*.[56]

V. *LEE HOUSTON & ASSOCIATES, LTD. V. RACINE*

A. The Facts of *Lee Houston*

Lee Houston involved claims against a real estate agent for negligence, misrepresentation, fraud and breach of a professional contract of employment.[57] The claims arose from the following factual scenario: the plaintiff, Racine, entered into a listing agreement with the realtor, Lee Houston, to sell property owned by the plaintiff. The plaintiff accepted an offer for the property worth $355,000, consisting of $100,000 cash and a $255,000 promissory note secured by a third mortgage on property owned by the prospective purchaser.[58] The complaint alleged that the real estate agent explained to the plaintiff that the offer represented "an exceptional deal" because the plaintiff was to receive a third mortgage on property worth over $600,000, with only $70,000 to $80,000 in debt superior to hers. A little more than a year after the closing, the purchaser ceased making payments on the promissory note. It was then discovered that the plaintiff had in fact received a *sixth* mortgage, with over $400,000 in indebtedness superior to her claims.[59]

The trial court directed a verdict for the realtor on the claims of negligence, misrepresentation and fraud, ruling that the claims were barred by Alaska's two-year statute of limitations governing tort actions.[60] The

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"dealt with a professional's alleged breach of due care which was implied by law as a result of a contractual undertaking." *Id.* The *Lee Houston* court concluded that the "substantial irreconcilability" of *Bibo* and *Van Horn Lodge* demonstrated the need to re-examine the relationship between tort and contract in malpractice claims. *Id.* at 853-54.

54. *Bibo*, 770 P.2d at 295.

55. *Id.* at 296.

56. 806 P.2d 848 (Alaska 1991).

57. *Id.* at 850.

58. *Id.*

59. *Id.*

60. *Id.* at 851; *see* ALASKA STAT. § 09.10.070 (1983).

court did submit the breach of contract claim to the jury, which returned a verdict in favor of the plaintiff. From this verdict, the realtor appealed.[61]

B. The Holding of the Alaska Supreme Court

The Alaska Supreme Court affirmed the jury verdict, holding that the claim for breach of contract was timely, having been brought within the six-year limitations period applicable to contract actions.[62] Though the court noted that there was no allegation of a breach of a specific promise, the court found that the contract between the parties created fiduciary duties that were subsequently breached.[63] Citing *Bibo v. Jeffrey's Restaurant*,[64] the court held that the language of the two-year statute of limitations, which covers actions for "any injury to the person or rights of another *not arising on contract*,"[65] did not govern since the action did in part "arise" from the contract.[66] The court explicitly overruled *Van Horn Lodge v. White*[67] and concluded that the action, "whether regarded as an action upon a fiduciary duty arising from the agreement or as professional malpractice,"[68] was subject to the six-year limitations period for an action upon a "contract or liability."[69]

C. Analysis of the Supreme Court's Decision

The *Lee Houston* court, though citing *Bibo*, did not explicitly hold that a professional malpractice action could be based on a breach of an implied contract to exercise due diligence. The court instead analyzed the language of the applicable statutes of limitations and concluded that the two-year limitations period, covering actions "for any injury to the person or rights

61. *Lee Houston*, 806 P.2d at 851.

62. *Id.* at 852; *see* ALASKA STAT. § 09.10.050 (1983).

63. *Lee Houston*, 806 P.2d at 854.

64. 770 P.2d 290 (Alaska 1989); *see supra* notes 52-55 and accompanying text.

65. ALASKA STAT. § 09.10.070 (1983) (emphasis added).

66. *Lee Houston*, 806 P.2d at 854.

67. 627 P.2d 641 (Alaska 1981), *overruled by* Lee Houston & Assocs., Ltd. v. Racine, 806 P.2d 848 (Alaska 1991).

68. *Lee Houston*, 806 P.2d at 852.

69. *Id.* at 855. After concluding that Alaska Statutes section 09.10.070 did not apply to the claim since the claim did "in part arise from the contract," the court found that the broad language of Alaska Statutes section 09.10.050 (action upon "contract or liability") governed. *Id.* at 854. The court appears to suggest that, where more than one statute could reasonably apply, section 09.10.050 is to be treated as the default statute.

of another *not arising on contract*,"[70] did not govern actions where the duty allegedly breached in part arises from a contract.[71] The court further noted that the language of the six-year statute of limitations, covering actions "upon a contract *or liability*, express or implied,"[72] must be interpreted as applying to a "category of actions broader than those based only on contract principles."[73]

In reaching this conclusion, the court appears to suggest that all torts arising in part out of a contractual relationship are to be governed by the six-year limitations period. In so doing, the court has abandoned the previously well-settled rule in Alaska that the two-year limitations statute applies to traditional tortious negligence actions, while the six-year limitations period applies to actions for breach of contract.[74]

1. *The Elements of Professional Malpractice Are Compatible with Tort, not Contract, Liability.* For statute of limitations purposes, it is the general rule that "the nature or substance of the cause of action, rather than the form of action," is the test to determine what statute of limitations applies and whether the action is barred by the running of the limitations period.[75] The Alaska Supreme Court recognized this general rule in *Van Horn Lodge* when it looked beyond the niceties of the pleading and searched for the "gravamen" of the complaint.[76] The *Lee Houston* decision, in contrast, fails to give sufficient weight to the true nature and substance of a claim for malpractice -- the *negligent and tortious* performance or nonperformance of professional services.[77]

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70. ALASKA STAT. § 09.10.070 (1983) (emphasis added).

71. *Lee Houston*, 806 P.2d at 854.

72. ALASKA STAT. § 09.10.050 (1983) (emphasis added).

73. *Lee Houston*, 806 P.2d at 854; *see also* Jones v. Wadsworth, 791 P.2d 1013, 1018 n.2 (Alaska 1990) (Moore, J., dissenting) (discussing majority's indication that it might be willing to apply the six-year contract limitations period to all cases arising out of contractual relationships and stating that the dissenter is "unwilling to overrule a line of cases dating to the earliest years of this court in order to reach that result").

74. *See Jones*, 791 P.2d at 1015 (phrasing issue as whether claim is "'action upon a contract' governed by the six year statute of limitations . . . or is an action in tort . . . governed by the two year limitations period" (footnote omitted)); Bibo v. Jeffrey's Restaurant, 770 P.2d 290, 295-96 (Alaska 1989) (analyzing whether breach of fiduciary duty claim is governed by "implied contract" or "tort" limitations statute); Thomas v. Cleary, 768 P.2d 1090, 1092 n.6 (Alaska 1989) (holding that attorney malpractice actions are "torts" for statute of limitations purposes); Van Horn Lodge v. White, 627 P.2d 641, 643 (Alaska 1981) (noting that action "sounding in tort" is governed by two-year statute), *overruled by* Lee Houston & Assocs., Ltd. v. Racine, 806 P.2d 848 (Alaska 1991).

75. *See* Koehring Co. v. National Automatic Tool Co., 257 F. Supp. 282, 292 (S.D. Ind. 1966) (applying Indiana law); Morgan v. Baldwin, 450 N.W.2d 783, 785 (S.D. 1990).

76. *Van Horn Lodge*, 627 P.2d at 643.

77. *See supra* notes 24-30 and accompanying text (discussing jurisdictions that treat malpractice claims as torts).

As recently as 1989, the Alaska Supreme Court applied the elements of a traditional negligence case in an action for professional malpractice.[78] In *Van Horn Lodge*, the supreme court determined that the duty imposed is simply "a duty of reasonable care . . . . The contract only gave rise to the duty . . . ."[79] This line of reasoning was abandoned in *Lee Houston*. Other jurisdictions have likewise recognized that the elements of a malpractice claim merely restate the elements of the traditional tort of negligence.[80] An attorney's breach of an implied warranty to exercise due care constitutes "'in effect, the negligence of a professional -- that act or omission which is below the standards of similar practitioners in the community.'"[81]

Professional liability arises from a fiduciary duty owed by professionals to their clients. This duty requires the professional to act in the client's best interests. In the context of the legal profession, an attorney is "bound 'to exercise at least that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in his locality.'"[82] The application of this broad duty more closely resembles the paradigm of tort liability for breach of the duty of due care than the paradigm of contract liability for breach of individually negotiated promises. As Justice Burke noted in his *Lee Houston* dissent, "[t]he claim arises from the defendants' breach of duties imposed upon him *regardless of the parties' intent* when the listing agreement was made; like the ordinary tort feasor's duty of reasonable care, these were duties imposed by the laws of society."[83] Breaches of these duties by professionals should be treated in the same

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78. *Thomas*, 768 P.2d at 1092 (citations omitted); *see supra* text accompanying note 45.

79. *Van Horn Lodge*, 627 P.2d at 643.

80. *See, e.g.*, Sorenson v. Pavlikowski, 581 P.2d 851, 853 (Nev. 1978) (elements of legal malpractice are: (1) duty of professional to exercise such skill, prudence and diligence as other members of profession commonly exercise and possess, (2) breach of duty, (3) proximate causal connection between breach and injury, and (4) actual loss or damage); Vollgraff v. Block, 458 N.Y.S.2d 437, 438 (N.Y. Sup. Ct. 1982) (elements are: (1) negligence of the attorney, (2) negligence was proximate cause of loss sustained, and (3) proof of actual damages); *see also* Mooney & Bloom, *supra* note 5, at 400 (elements of legal malpractice claim are existence of relationship creating duty, breach of duty, proximate cause and damages).

81. Sincox v. Blackwell, 525 F. Supp. 96, 100 (W.D. La. 1981) (quoting Corceller v. Brooks, 347 So. 2d 274, 277 (La. Ct. App. 1977)); *see also* Benard v. Walkup, 77 Cal. Rptr. 544, 549 (Cal. Ct. App. 1969) (holding that attorney is bound "to exercise a degree of care, skill and knowledge which would be required by the negligence standard"); Loftin v. Brown, 346 S.E.2d 114, 116 (Ga. Ct. App. 1986) (action for legal malpractice not suit on contract but rather suit based on tort of negligence); TENN. CODE ANN. § 28-3-104(a)(2) (Supp. 1991) (classifying actions against attorneys for malpractice as "personal tort actions" for statute of limitations purposes); Mooney & Bloom, *supra* note 5, at 400 (elements of legal malpractice claim constitute "garden-variety negligence" claim).

82. *Sincox*, 525 F. Supp. at 100 (quoting Ramp v. Saint Paul Fire & Marine Ins., 269 So. 2d 239, 244 (La. 1972)).

83. *Lee Houston*, 806 P.2d at 857 (Burke, J., dissenting) (emphasis added).

manner as all other breaches of the duty of due care, and should thus be subject to the two-year tort statute of limitations.

2. *Policy Considerations Do Not Support Application of the Six-Year Limitations Period.* The *Lee Houston* court offered several policy rationales in support of its application of the contract limitations period. First, the court stressed the need for uniformity in this area of law, stating that it "should avoid applications of the law which lead to different substantive results based upon distinctions having their source solely in the niceties of pleading and not in the underlying realities."[84] The court further stated that defenses based on statutes of limitations are "generally disfavored by the courts."[85] Thus, the court concluded that "doubts as to which of two statutes is applicable . . . should be resolved in favor of applying the statute containing the longer limitations period."[86]

While the court's desire for uniformity is sensible, the general preference for the application of longer statutes of limitations should apply only to cases where it is truly questionable which statute is appropriate; it does not support the court's disregard for the nature and substance of a claim for legal malpractice. The court's skepticism regarding the validity of defenses based on the statute of limitations underestimates the crucial role that these periods play in the litigation process. Contrary to the supreme court's assertion, other courts have recognized that such periods of limitations "are founded upon . . . sound public policy, and are, therefore, favored by the courts."[87] Indeed, in *Cameron v. State*,[88] the Alaska Supreme Court itself recognized the legitimacy of a statute of limitations defense, stating that statutes of limitations "'avoid the injustice which may result from the prosecution of stale claims . . . [and] protect

84. *Id.* at 853.

85. *Id.* at 854. The rationale behind this disfavor is a fairness concern for prospective plaintiffs who might lose their right to sue. However, Alaska's adoption of the discovery rule has significantly limited the validity of this rationale. *See infra* notes 106-12 and accompanying text. The Alaska discovery rule states that the limitations period "does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action." Cameron v. State, 822 P.2d 1362, 1365 (Alaska 1991) (citing Hanebuth v. Bell Helicopters Int'l, 694 P.2d 143, 144 (Alaska 1984)). Commentators have noted that the length of the statutory period, even if brief in duration, is rarely a problem where a viable discovery rule is in place. *See, e.g.*, MALLEN & SMITH, *supra* note 5, § 18.1, at 67.

86. *Lee Houston*, 806 P.2d at 855 (citing Bibo v. Jeffrey's Restaurant, 770 P.2d 290 (Alaska 1989)).

87. Cordial v. Grimm, 346 N.E.2d 266, 270 (Ind. Ct. App. 1976), *overruled on other grounds by* Shideler v. Dwyer, 417 N.E.2d 281 (Ind. 1981); *see also* Morgan v. Baldwin, 450 N.W.2d 783, 785-86 (S.D. 1990) (stating that "a statute of limitations defense is a meritorious defense which should not be regarded with disfavor and which should be treated like any other defense").

88. 822 P.2d 1362 (Alaska 1991).

against the difficulties caused by lost evidence, faded memories and disappearing witnesses.'"[89] In *Lee Houston*, the court suggested that the application of the six-year limitations period was consistent with these purposes.[90] The court noted that claims involving economic loss, such as the one involved in *Lee Houston*, are often based on documentary evidence rather than "unaided recollections which quickly grow stale."[91] Yet the decision does not recognize that claims based on negligence and breach of the duty of due care, even if they are claims involving economic loss, are "likely to depend on disputed facts," while actions on express contractual duties "are less likely to depend upon testimonial evidence that quickly grows stale."[92]

As an illustration of this principle, a recent study has indicated that as many as forty percent or more of legal malpractice claims stem from situations involving the following: procrastination on the part of the attorney, planning errors, inadequate discovery or investigation, conflicts of interest, failure to follow the client's instructions or failure to properly understand or apply the law.[93] Situations such as these are more likely to be based on disputed facts than on documentary evidence. Such claims raise the very evidentiary concerns which statutes of limitations are designed to address. In fact, though *Lee Houston* itself involved a claim of economic loss, the case turned on potentially stale testimonial evidence relating to the representations made by the real estate agent. Finally, the court also did not take into account that in an action upon a written contract, the agreement itself is available to prove the substance of the agreement, whereas such proof is not available in a malpractice claim based on the breach of the duty of due care.

The court's reliance on the availability of documentary evidence in claims involving economic loss[94] is likewise potentially misplaced, as it is unclear whether the court would limit the application of the six-year

89. *Id.* at 1365 (quoting Haakanson v. Wakefield Seafoods, 600 P.2d 1087, 1090 (Alaska 1979)).

90. *Lee Houston*, 806 P.2d at 855 ("The statutes are intended to encourage prompt prosecution of claims and thus avoid injustices which may result from lost evidence, faded memories and disappearing witnesses." (citation omitted)); *see* Peter M. Casey, Case Comment, Church v. McBurney, 21 SUFFOLK U. L. REV. 423, 424 n.10 (1987) (rationales for statutes of limitations include fairness to defendants, preservation of evidence, protection of business); *see also supra* text accompanying note 89.

91. *Lee Houston*, 806 P.2d at 855.

92. Jones v. Wadsworth, 791 P.2d 1013, 1018-19 (Alaska 1991) (Moore, J., dissenting).

93. STANDING COMM. ON LAWYERS' PROFESSIONAL LIAB., CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL MALPRACTICE DATA CENTER (1989); *see also* Mooney & Bloom, *supra* note 5, at 403-06.

94. *Lee Houston*, 806 P.2d at 855.

limitations period to actions for economic loss.[95] The two-year limitations period governs actions "for injury to the person or rights of another not arising on contract."[96] The *Lee Houston* court explicitly reserved judgment as to whether the phrase "not arising on contract" modifies "injury to the person" as well as "rights of another."[97] If the phrase does in fact modify "injury to the person," then claims for medical malpractice would fall under the six-year limitations period as well.[98]

The court also did not address the likely economic effects of its holding. While the court's decision ostensibly aids consumers of legal services by allowing malpractice claims to be brought after two years, it is likely that these same consumers will bear significant costs. As the potential for malpractice suits increases, insurance carriers will increase their malpractice premiums. Of course, attorneys will duly pass these costs on to their clients.

3. *The* Lee Houston *Decision Creates the Potential for Anomalous Results.* Several possible anomalies may arise from *Lee Houston's* holding. For example, the court's holding that the two-year limitations period does not apply to malpractice claims because such claims arise partly out of a contractual relationship,[99] indicates that malpractice claims which do not involve contractual privity between the professional and the client could be subject to the shorter two-year limitations period. Examples of such situations include local counsel employed by another law firm rather than the client, medical personnel who are consulted in the treatment of a patient by the patient's doctor, and engineers and other professionals employed through subcontracting relationships with architects.[100]

Another potential anomaly resulting from the court's decision involves the issue of damages. The plaintiff in *Lee Houston* sought punitive damages, as well as direct and consequential damages.[101] The court recognized that "'[p]unitive damages are not recoverable for breach of

95. *See id.* at 854.

96. *See* ALASKA STAT. § 09.10.070 (1983).

97. *Lee Houston*, 806 P.2d at 854 n.12.

98. *But see* Cameron v. State, 822 P.2d 1362 (Alaska 1991); Pedersen v. Zielski, 822 P.2d 903 (Alaska 1991). Both cases applied the two-year limitations period to medical malpractice claims, but in neither case did the plaintiff argue that the longer period should apply. Thus, the court was not forced to address the issue.

99. *Lee Houston*, 806 P.2d at 854.

100. The current limitations period applicable to malpractice claims in the construction fields is unclear because Alaska Statutes section 09.10.055, which provides a six-year limitations period for actions claiming deficiencies in the design, planning, supervision or observation of construction projects, was held unconstitutional as violative of equal protection. *See* Turner Constr. v. Scales, 752 P.2d 467 (Alaska 1988).

101. *Lee Houston*, 806 P.2d at 855-56.

contract unless the conduct constituting the breach constitutes an independent tort.'"[102] While not resolving the question, the court termed the determinative issue as "whether [the plaintiff's] hybrid action is a 'tort' for purposes of determining the availability of punitive damages."[103] Thus, it appears that the court would allow recovery of punitive damages if the breach constituted an independent tort, despite the fact that the two-year limitations period applicable to traditional torts had run.[104]

Yet another anomalous aspect of the court's opinion concerns the court's adoption of the "discovery rule,"[105] which holds that the limitations period does not begin to run until "'a reasonable person [in like circumstances would have] enough information to alert that person that he or she has a potential cause of action or should begin an inquiry to protect his or her rights.'"[106] Courts have generally applied the "occurrence" rule[107] to claims based on contract, whereby the statute begins to run immediately upon the occurrence of the breach. Notably, in *Howarth v. First National Bank*,[108] the Alaska Supreme Court held that the statute of limitations begins to run in a contract action at the time the right to maintain an action accrues, noting that this usually occurs at the time of breach.[109] In contrast, the "discovery" rule has generally been applied

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102. *Id.* at 856 (quoting ARCO Alaska, Inc. v. Akers, 753 P.2d 1150, 1153 (Alaska 1988)).

103. *Id.*

104. *But see* Sears, Roebuck & Co. v. Enco Assocs., Inc., 372 N.E.2d 555, 559 (N.Y. 1977) (holding that damages in malpractice action brought after tort limitations period had run should be limited to those damages recoverable for breach of contract).

105. For a general discussion of the approaches to accrual rules, see Koffler, *supra* note 5, at 213-26; Downey, *supra* note 10, at 136-44; Moorehead v. Miller, 102 F.R.D. 834, 837 (D.V.I. 1984).

Three general approaches have been utilized. Some courts have applied the "occurrence" rule, whereby the statute runs upon the occurrence of the essential facts constituting the cause of action, regardless of the discovery by the potential plaintiff. Wilcox v. Ex'rs of Plummer, 29 U.S. (4 Pet.) 172 (1830). Other courts have applied the "damage" rule, whereby the statute runs from the time the potential plaintiff suffers injury. This rule reflects a recognition of the tortious nature of the claim, and thus requires proof of injury. Fort Myers Seafood Packers v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967). The final approach is the "discovery" rule, whereby the statute runs once the potential plaintiff knows, or reasonably should know, of the essential facts giving rise to the claim. *See, e.g.*, Budd v. Nixen, 491 P.2d 433 (Cal. 1971).

106. *Lee Houston*, 806 P.2d at 851-52 (quoting Mine Safety Appliance v. Stiles, 756 P.2d 288, 291 (Alaska 1988)) (alteration in original); *see also* Greater Area, Inc. v. Bookman, 657 P.2d 828, 829 (Alaska 1982) (applying discovery rule to legal malpractice claim). For a further discussion of the "discovery rule" as applied by courts in Alaska, see Cameron v. State, 822 P.2d 1362, 1365 (Alaska 1991).

107. *See supra* note 105.

108. 540 P.2d 486 (Alaska 1975), *aff'd on reh'g*, 551 P.2d 934 (Alaska 1976).

109. *Id.* at 490; *see also* Loftin v. Brown, 346 S.E.2d 114, 116 (Ga. Ct. App. 1986) (holding that legal malpractice action against attorney for breach of contract accrues from date of alleged negligent act).

only to actions sounding in tort.[110] In *Neel v. Magana*,[111] for example, the California Supreme Court noted that the limitations period applicable to a breach of contract action commences immediately upon the commission of the acts constituting the breach, while an action for negligence "does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action."[112] *Lee Houston* indicates that the Alaska Supreme Court will apply a rule of accrual inconsistent with its holding that actions for professional malpractice claims are subject to the six-year contract limitations period.

VI. LEGISLATIVE ATTEMPTS TO RESOLVE THE TORT/CONTRACT DICHOTOMY

In recent years, a growing number of states have enacted statutes of limitations explicitly covering malpractice actions.[113] With some exceptions,[114] the statutes offer the benefits of predictability and consistency. These statutes generally take a somewhat restrictive approach to malpractice claims, providing for limitations periods of shorter duration than those applicable to contract actions.[115]

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110. *See, e.g.*, Greater Area, Inc. v. Bookman, 657 P.2d 828, 829 (Alaska 1982) (applying discovery rule to claim of legal malpractice, noting that such claims sound in tort); *see also* MEISELMAN, *supra* note 10, § 5:2 (1980); Casey, *supra* note 90, at 432 n.47 (discovery rule applies to actions in tort, but not in contract).

111. 491 P.2d 421 (Cal. 1971).

112. *Id.* at 433, *quoted in* Sorenson v. Pavlikowski, 581 P.2d 851, 853 (Nev. 1978).

113. *See, e.g.*, CAL. CIV. PROC. CODE § 340.6 (West 1991) (providing that "an action against an attorney for a wrongful act or omission" must be commenced within one year after the plaintiff discovers or reasonably should have discovered the facts constituting the act or omission, or within four years of the alleged act, whichever comes first); FLA. STAT. § 95.11(4)(a) (1987) (providing that an action for professional malpractice other than medical malpractice must be commenced within two years); MICH. COMP. LAWS ANN. § 600.5805(4) (West 1991) (providing for a two-year period of limitations for an action charging malpractice; held applicable to legal malpractice claims in Sam v. Balardo, 270 N.W.2d 522 (Mich. Ct. App. 1978)); N.Y. CIV. PRAC. L. & R. § 214 (McKinney 1991) (providing that "an action to recover damages for malpractice, other than medical, dental or podiatric malpractice" must be commenced within three years); OHIO REV. CODE ANN. § 2305.11 (Anderson 1991) (providing that an action for malpractice other than medical malpractice shall be commenced within one year after the cause of action accrued); TENN. CODE ANN. § 28-3-104 (1991) (providing for a one-year limitation period for actions against attorneys for malpractice, whether the actions are grounded in contract or tort).

114. *See infra* text accompanying notes 119-35; *see also* MALLEN & SMITH, *supra* note 5, § 18.8, at 87-88 (stating that these statutes suffer from a "lack of specificity and definition").

115. *Compare, e.g.*, N.Y. CIV. PRAC. L. & R. § 214 (McKinney 1991) (providing three-year statute of limitations for malpractice claims) *with* N.Y. CIV. PRAC. L. & R. § 213 (McKinney 1991) (providing six-year statute of limitations for actions on contract) *and* IND. CODE ANN. § 34-4-19-1 (Burns 1991) (providing for two-year limitations period for claims of malpractice) *with* IND. CODE ANN. § 34-1-2-1 (Burns 1991) (providing for six-year

An analysis of the development of professional malpractice law in New York provides insight into legislative response to the tort/contract dynamic. The experience in New York also reveals the care which must be taken to draft legislation broadly and carefully to ensure its uniform application in all cases of professional malpractice.[116]

The New York courts first addressed the limitations issue in *Glens Falls Insurance Co. v. Reynolds*.[117] In *Glens Falls*, the court held that a claim for professional malpractice would be governed by the three-year limitations period applicable to tortious negligence actions since there was no explicit agreement to obtain a particular result.[118] Five years after *Glens Falls* was decided, the New York Legislature enacted a statute providing that actions "to recover damages for malpractice, other than medical, dental, or podiatric malpractice" must be commenced within three years.[119] For the next fifteen years, the courts of New York consistently applied this three-year limitations period to legal malpractice actions in which there were no allegations of a breach of an explicit promise.[120]

In *Sears, Roebuck & Co. v. Enco Associates*,[121] however, the New York Court of Appeals ignored the malpractice statute and held that the six-year contract limitations period applied to a claim against an architect for failure to exercise due care in the performance of contracted services.[122] The court held that the proper consideration in determining the applicable limitations period was the form of the remedy sought, not the theory of liability.[123] Since the plaintiff's claim was for damages to pecuniary interest rather than for personal injuries, the court held that the six-year contract limitations period applied.[124] The court noted that the alleged liability "had its genesis in the contractual relationship of the parties," and that "absent the contract between them, no services would have been performed and thus there would have been no claims."[125] While acknowledging the Legislature's "general address to malpractice

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limitations period for suits upon oral contracts).

116. *See infra* Section VII.

117. 159 N.Y.S.2d 95 (N.Y. App. Div. 1957).

118. *Id.* at 97; *see also* Registered County Homebuilders, Inc. v. Stebbins, 179 N.Y.S.2d 602 (N.Y. Sup. Ct. 1958) (holding that breach of an express promise to conduct title search in a professional, skillful and workmanlike manner constituted an action on contract).

119. N.Y. CIV. PRAC. L. & R. § 214(6) (McKinney 1991).

120. *See, e.g.*, Troll v. Glantz, 293 N.Y.S.2d 345 (N.Y. Sup. Ct. 1968) (holding that complaint charging negligence, and not breach of a specific agreement, is subject to three-year limitations period applicable to legal malpractice).

121. 372 N.E.2d 555 (N.Y. 1977).

122. *Id.* at 556-57.

123. *Id.* at 557.

124. *Id.* at 557-58.

125. *Id.* at 558.

claims,"[126] the court found that the claim was not governed by the three-year malpractice limitations period[127] as that statute did not apply to malpractice claims based on breach of contract.[128]

Five years after *Sears*, a New York court chose not to apply the *Sears* rule to a case involving a claim for legal malpractice, and instead applied the three-year malpractice limitations period.[129] However, in *Video Corp. of America v. Frederick Flatto Associates*,[130] the New York Court of Appeals, in a memorandum opinion, reaffirmed its holding in *Sears* that "an action for failure to exercise due care in the performance of a contract insofar as it seeks recovery for damages . . . recoverable in a contract action is governed by the six-year contract Statute of Limitations."[131] Two cases following *Video Corp.* have applied the contract statute of limitations to claims of legal malpractice.[132]

At least one commentator has argued that the decisions in *Sears* and *Video Corp.* are not necessarily inconsistent with the line of cases developed from *Glens Falls*, since both *Sears* and *Video Corp.* involved the breach of specific contractual promises.[133] More importantly, however, the commentator argued that if *Sears* and *Video Corp.* have overruled the *Glens Falls* line of cases, the New York Court of Appeals has effectively repealed the three-year statute of limitations explicitly applicable to actions for malpractice.[134] Recent New York cases demonstrate the continuing

126. *Id.*

127. N.Y. CIV. PRAC. L & R. § 214(6) (McKinney 1991).

128. *Sears*, 372 N.E.2d at 558. Apparently, the court drew a somewhat novel distinction based on the nature of the injury between claims for malpractice, which would necessarily be subject to the three-year limitations period, and a claim for breach of an implied contractual duty to exercise due and reasonable care, which would allow the plaintiff the benefit of the contract limitations period. *See infra* Section VII for a statutory proposal which would eliminate this problem.

129. Vollgraff v. Block, 458 N.Y.S.2d 437, 439 (N.Y. Sup. Ct. 1982) (returning to rule of *Glens Falls Ins. Co. v. Reynolds* by holding that breach of a specific promise is required to maintain contract action for legal malpractice).

130. 448 N.E.2d 1350 (N.Y. 1983).

131. *Id.*

132. *See* Cohen v. Goodfriend, 665 F. Supp. 152 (E.D.N.Y. 1987); Sinopoli v. Cocozza, 481 N.Y.S.2d 177 (N.Y. App. Div. 1984).

133. Thomas A. Leghorn, *Legal Malpractice: Three-Year or Six-Year Statute of Limitations*, 6 N.Y. ST. B.J. 50 (Oct. 1990). This argument is based on the fact that both cases involved not only breaches of an implied covenant of due diligence, but also breaches of specific contractual warranties.

134. *Id.* at 51-52; *see supra* note 120 and accompanying text.

confusion in this area,[135] and illustrate the need for precision in drafting a malpractice statute of limitations.

VII. A PROPOSAL FOR LEGISLATIVE ACTION

This note argues that the Alaska Supreme Court erred in applying the six-year limitations period to claims for professional malpractice. The court failed to give sufficient weight to the fact that such actions are essentially actions for negligence. The evidentiary considerations in such cases require the application of a shorter limitations period in order to meet the goals of "avoid[ing] the injustice which may result from the prosecution of stale claims . . . [and] protect[ing] against the difficulties caused by lost evidence, faded memories, and disappearing witnesses."[136] In light of the court's decision in *Lee Houston*, it is incumbent upon the Alaska Legislature to enact a statute of limitations explicitly applicable to claims of professional malpractice that will return such claims to the shorter limitations period appropriate for claims based on the breach of the duty of due care.

In drafting a limitations statute applicable to professional malpractice, the Legislature must take care to define clearly what claims will be covered. The developments in New York are instructive in this regard. Despite the existence of a statute explicitly providing that actions to recover damages for non-medical malpractice must be commenced within three years,[137] some New York cases allow plaintiffs to benefit from the application of the longer contract limitations period for malpractice claims based on a breach of an implied contract to exercise due care.[138] The success of the New York courts in evading the intent of the statute indicates that a malpractice limitations statute should be drafted to comprehensively define those claims to which it is applicable. In addition, a statute that defines malpractice to include all actions, whether arising in

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135. Several departments of New York's Appellate Division have taken divergent views. *See* Golub v. Baer, Marks & Upham, 567 N.Y.S.2d 843 (N.Y. App. Div. 1991) (failure to use reasonable care in performing legal services provides basis for contract liability and six-year period applies); Santulli v. Englert, Reilly & McHugh, 563 N.Y.S.2d 548 (N.Y. App. Div. 1990) (applying six-year limitations period, but holding that malpractice sounds in tort absent express promise to obtain particular result); Pacesetter Communications Corp. v. Solin & Breindel, 541 N.Y.S.2d 404 (N.Y. App. Div. 1989) (applying three-year limitations period to malpractice claims and holding that breach of contract claim against attorney may only be maintained only where attorney has breached an explicit promise to obtain a specific result).

136. Cameron v. State, 822 P.2d 1362, 1365 (Alaska 1991) (quoting Haakanson v. Wakefield Seafoods, 600 P.2d 1087, 1090 (Alaska 1979)).

137. N.Y. CIV. PRAC. L. & R. § 214(6) (McKinney 1991).

138. *See supra* text accompanying notes 121-35.

contract or in tort, would provide the uniformity and predictability the *Lee Houston* court appropriately sought.[139]

Because the nature of a professional malpractice claim is essentially one of negligence,[140] the limitations period itself should match the two-year limitations period applicable to traditional tortious negligence actions in Alaska.[141] Further, considerations of fairness to prospective plaintiffs, as well as the unique nature of the professional relationship, require the application of the discovery rule. Since the plaintiff/client is generally a non-expert placing his or her trust in the professional's expertise, the limitations period should not begin to run until the client knows, or should reasonably know, of the existence of the claim.[142]

Several jurisdictions have also enacted statutes of repose under which no claim may be brought after a certain time period, regardless of the underlying limitations period and whether the claim was discoverable by that time or not.[143] The rationale for these statutes, like that for statutes of limitations, is grounded in the danger of stale claims and the loss of evidence.[144] The particular nature of professional malpractice requires that care be taken in enacting such statutes of repose, as the facts underlying such claims are often undiscoverable for a substantial period of time. For example, faulty architectural or engineering work may not manifest itself for a period of several years. Likewise, the facts giving rise to legal malpractice may not be discoverable, or may not prove injurious, until the particular case has completed its journey through the courts.[145] A period of ten years for such a statute of repose should strike an appropriate balance between the fairness considerations to the plaintiff and the dangers of stale claims and loss of evidence as time passes.[146]

With these considerations in mind, the following is offered as a proposal for a comprehensive and equitable statute of limitations applicable to claims for professional malpractice:

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139. *See supra* text accompanying note 84.

140. *See supra* part V.C.1.

141. ALASKA STAT. § 09.10.070 (1983).

142. *See* Mine Safety Appliances Co. v. Stiles, 756 P.2d 288 (Alaska 1988).

143. *See, e.g.*, ALA. CODE § 6-5-574 (1991) (providing that "in no event may the action be commenced more than four years after such act or omission or failure").

144. *See supra* text accompanying notes 87-89.

145. *See* Leonard F. Amari, *Call For 2-Year Statute of Limitation on Attorney Malpractice*, 78 ILL. B.J. 8 (Jan. 1990).

146. A potential danger of statutes of repose involves legal malpractice in the drafting of a last will and testament. Since these actions are almost never discoverable until the death of the client, such claims should be exempt from the statute of repose.

(1) All actions for professional liability against a person or persons whose occupation or trade requires certification by the state of Alaska,[147] whether based upon negligence or breach of contract, express or implied, shall be commenced within two years after the act, omission, breach or failure giving rise to the claim; provided, that if the facts essential to the cause of action are not discovered and could not reasonably have been discovered in the exercise of due and reasonable diligence at the time of the act, omission, breach or failure giving rise to the claim, the action may be commenced within two years of the time that the facts essential to the cause of action are discovered, or should have been discovered in the exercise of due and reasonable diligence.

(2) In no event shall a professional liability action against a person or persons whose occupation or trade requires certification by the state of Alaska, whether based upon negligence or breach of contract, express or implied, be commenced more than ten years after the act, omission, breach or failure giving rise to the claim; except that a legal service liability action against a legal service provider alleging negligence or breach of contract, express or implied, in the drafting of a last will and testament, may in all cases be commenced within two years of:

(a) the time that the facts essential to the cause of action are discovered, or should have been discovered in the exercise of due and reasonable care; or

(b) the death of the testator, whichever is earlier.[148]

147. This statute encompasses actions for professional malpractice generally. Several states have enacted statutes applicable only to claims of legal malpractice. *See, e.g.*, ALA. CODE § 6-5-574 (1991) (covering "[a]ll legal service liability actions against a legal service provider").

Without attempting an in-depth analysis of legislative intent, several possible rationales may be suggested for such periods of limitations. First, the provision of legal service is (at least in some contexts) considered more fundamental in our society than the provision of other professional services. *See, e.g.*, U.S. CONST. amend. VI. A related concern involves the societal value of *pro bono* work, which might be discouraged in the absence of a short limitations period. Finally, a cynic might suggest that such statutes are merely the product of attorneys in the legislature protecting their own.

148. *See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 753-A (West 1991) (exempting claims arising from "drafting of a last will and testament" from statute); TENN. CODE ANN. § 28-3-104 (1991) (covering actions "whether . . . grounded or based in contract or tort").

VIII. CONCLUSION

The Alaska Supreme Court erred in holding that actions for professional malpractice are subject to the six-year limitations period applicable to actions for breach of contract. A professional malpractice action is essentially one for the tort of negligence, and the two-year limitations period applicable to actions for tortious negligence should apply. In response to the supreme court's holding, it is incumbent upon the Alaska Legislature to enact a statute of limitations explicitly governing malpractice actions. Such a statute should return such actions to the shorter limitations period applicable to negligence actions. A carefully drawn statute would provide the benefits of predictability and uniformity, and in conjunction with Alaska's discovery rule, would strike an appropriate balance between the competing fairness considerations due professionals and prospective claimants.

Scott Lawrence Altes