Legal Malpractice--Is the Discovery Rule the Final Solution

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LEGAL MALPRACTICE—IS THE DISCOVERY RULE THE FINAL SOLUTION?

California finally has joined a minority of state and federal jurisdictions\(^1\) in instituting a much needed reform in the area of legal malpractice. The supreme court in the cases of *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*\(^2\) and *Nixen v. Budd*\(^3\) abandoned the majority rule which provides that the negligent act is the time at which a cause of action for legal malpractice accrues for statute of limitations purposes. Under the newly adopted rule, the cause of action accrues at the time the client discovers or should have discovered the attorney's negligence and is damaged thereby. When these decisions are taken together, they constitute an attempt to balance the conflict between the policy considerations on which the statute of limitations is based and the purposes behind an action for legal malpractice. Nevertheless, the result, although more equitable for the client, does not achieve the desired balance. This fact was recognized by the court, which invited a legislative solution\(^4\) since no further judicial action is possible.

The decisions in the two cases are related in that they both turn on when the cause of action accrues, but they have different results due to their facts. In *Neel*, the court had to decide “whether the client's claim should be outlawed before he knew of it or should have known of it”\(^5\) or, in other words, “whether members of the legal profession should enjoy a preference as to the date when they may successfully bar adverse claims under the statute of limitations.”\(^6\) The court concluded that

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2. 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).


5. Id. at 183, 491 P.2d at 424, 98 Cal. Rptr. at 840 (1971).

6. In earlier legal malpractice cases, the courts held the action accrued on the date of the attorney's negligence or omission. *E.g.*, Griffith v. Zavlaris, 215 Cal. App. 2d 826, 30 Cal. Rptr. 517 (1963). For other professions the courts had set the date of accrual at the time of the client's or patient's discovery of the professional's negligence or omission. *E.g.*, Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936). See text accompanying notes 117-123 infra.

7. 6 Cal. 3d at 182-83, 491 P.2d at 424, 98 Cal. Rptr. at 840 (1971).
legal malpractice actions are similar to all other malpractice actions and accrue for statute of limitations purposes only when the client discovers or should have discovered his cause of action. On the other hand, the issue in Budd was whether "the client, who knows or should have known of the attorney's negligence, must be damaged before the statutory limitations period starts to run." In resolving this issue the court held that in legal malpractice the cause of action does not accrue until the client suffers damage and that the determination of when he was damaged is an issue of fact.

This note will discuss both the historical and policy reasons for the court's decisions and will focus briefly on the basis of its authority to make such a change. The apparent dilemma created by the conflict of policy considerations of the statute of limitations with the purposes of a legal malpractice action will be more fully and analytically discussed. Finally, a statutory solution for this dilemma will be proposed.

The Neel Case

Neel arose out of a wrongful death action brought by the Neels against San Bernadino County. The defendants, a partnership practicing under the name of Magana, Olney, Levy, Cathcart & Gelfand, properly filed the action for wrongful death on behalf of the Neels on May 25, 1962. Nonetheless, the action was dismissed on December 10, 1965 for the attorneys' failure to serve summons within three years of filing the complaint. Plaintiffs, however, did not know of this dismissal until they consulted independent counsel on December 21, 1967. They commenced the malpractice action on August 13, 1968. The defendant partnership asserted that the plaintiffs' cause of action had accrued on May 25, 1965, the last day for service of the summons in the wrongful death action. The trial court accepted this assertion and granted defendants' motion for summary judgment on the grounds that the action was barred by the two year statute of limitations applicable to legal malpractice.

8. Id. at 179, 491 P.2d at 422, 98 Cal. Rptr. at 838.
9. Id. at 183, 491 P.2d at 424, 98 Cal. Rptr. at 840.
11. See text accompanying notes 24-86 infra.
12. See text accompanying notes 104-15 infra.
13. See text accompanying notes 141-42 infra.
15. Brief for Appellants at 5.
16. 6 Cal. 3d at 179, 491 P.2d at 422, 98 Cal. Rptr. at 838.
17. Id. at 180, 491 P.2d at 422, 98 Cal. Rptr. at 838.
The court of appeal reversed, relying on the inequity of applying the negligent act rule to plaintiffs who did not discover their cause of action until after it was barred by the statute of limitations. In doing so, the appellate court cited the California Supreme Court's dictum in Heyer v. Flaig as an invitation to adopt the discovery rule in determining when a cause of action for legal malpractice accrues. Judge Kaus, writing the unanimous opinion of the court, found it inconsistent to hold that an attorney is a fiduciary with a duty of full disclosure and then to reward his silence by permitting the statute of limitations to run from the time of the negligent act. Thus the majority rule effectively allowed an attorney to avoid liability for professional malpractice by breaching his fiduciary duty of prompt and complete disclosure. On appeal, the supreme court also rejected the defendants' contention that the proper statutory construction of Code of Civil Procedure section 339 had been settled by eighty years of precedent and that the two year statute of limitations commences to run from the date of the negligent act of the attorney and not from the date of the discovery by the client.

Historical Support For The Discovery Rule

The generally accepted rule throughout the United States is that a cause of action for legal malpractice accrues and the statute of limitations commences to run at the time of the negligent act of the attorney. The United States Supreme Court established the basis for this rule in an early decision by holding that, "[w]hen the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately." Thus the negligent act rule has a deep seated history in United States jurisdictions.

Nonetheless, in Neel the California Supreme Court pointed out that a close scrutiny of the cases involved in the development of the negligent act rule reveals that the court never really adopted the rule in attorney malpractice cases. Rather, California's "adoption" of the negligent act rule was due to an "unwarranted headnote" in the official record.

19. Id. at 827, 92 Cal. Rptr. at 824.
20. In Heyer the court stated as follows: "We note that the very theories which led to the rule in medical malpractice cases that the statute runs only from the date of discovery of the negligence could be applied to the instant situation . . . ." Heyer v. Flaig, 70 Cal. 2d 223, 233 n.7, 449 P.2d 161, 168 n.7, 74 Cal. Rptr. 225, 232 n.7 (1969).
22. Id. at 827, 92 Cal. Rptr. at 824.
cial reporter accompanying the 1886 case of *Hays v. Ewing.* In that case, the defendant attorney had been retained to institute proceedings for the collection of a debt. Due to his negligent failure to plead a defense to the statute of limitations, the proceedings were dismissed. The plaintiff, although aware of the dismissal, did not bring a malpractice action against the defendant until two and one-half years had passed. According to the headnote accompanying the case, the California Supreme Court had felt constrained to hold that the plaintiff was barred from basing his action on the defendant attorney's neglect prior to the dismissal of the collection suit, since under the Code of Civil Procedure section 339 the statutory time had run. Yet, in *Neel* the court searched "in vain within the body of the opinion or within the facts of the case for any justification for this publisher's note."

Although the *Neel* court was thus able to reject the *Hays* case, prior California decisions did not reflect such a careful examination. For example, soon after *Hays,* the district court of appeal in *Lattin v. Gillette* considered and directly rejected the contention that the accrual of a cause of action for professional malpractice could be delayed thus tolling the statute of limitations under section 339 of the Code of Civil Procedure. The court applied the negligent act rule. Nevertheless, the *Neel* court found that *Lattin* was not authoritative because it had been effectively overruled by legislative amendment to Code of Civil Procedure section 339 in 1913. The negligent act rule as de-

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27. 70 Cal. 127 (headnote) (1886).
29. *Id.*
31. 95 Cal. 317, 30 P. 545 (1892).
32. *Id.* at 320, 30 P. at 546.
33. 6 Cal. 3d at 184. The amendment statute provided in part that "an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guarantee of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guarantee of title of real property, or policy of title insurance shall not be deemed to have accrued until discovery of the loss or damage suffered by the aggrieved party thereunder." Cal. Stat. 1913, ch. 187, § 1, at 332. By this amendment, subdivision 1 was extended to cover an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guarantee of title of real property, or by a policy of title insurance, and a proviso was added specifying when such a cause of action shall be deemed to have accrued. The current law reads in pertinent part: "[A]n action founded upon contract, obligation or liability, evidenced by a certifi-
lineated in the "ubiquitous headnote" of *Hays* was not directly followed again by the courts until *DeGarmo v. Luther T. Mayo, Inc.*, some forty-nine years later. The court of appeal in that case quoted the erroneous headnote of *Hays* as authority for the proposition that a cause of action in legal malpractice accrued at the time of the negligent act and that any action must be brought within two years thereafter. This application of *Hays* was followed by another lengthy period during which no appellate cases concerning the accrual of a cause of action in legal malpractice were reported. The silence, however, was broken by the court of appeal in *Griffith v. Zavlaris*, a 1963 case. In that case, the court clearly expressed its ambivalence toward the "time honored" negligent act rule but felt compelled to wait for a legislative change in the rule.

In its review of the cases developing the negligent act rule, the *Neel* court stated that prior to *Griffith* "no case had rejected by decision or express dictum a date of discovery rule for attorney's malpractice . . . ." The court also found that in two court of appeal cases it had been "assumed that justifiable nondiscovery would extend the period of limitation." In one case the court had ignored *Hays* entirely, and in the other it had fashioned a possible exception to the harsh result of the negligent act rule. In addition to these court of

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34. 4 Cal. App. 2d 604, 41 P.2d 366 (1935).
36. Twenty-nine years. 6 Cal. 3d 176, 185, 491 P.2d 421, 426, 98 Cal. Rptr. 837, 842 (1971).
38. "Although the application of the rules of legal malpractice actions may seem harsh, nevertheless it would appear that if the time-honored rules as to the commencement of the limitation provided in section 339, subdivision 1, is to be changed, it should be changed by the Legislature with appropriate conditions, so that the liability of an attorney would not exist indefinitely." *Id.* at 830-31, 30 Cal. Rptr. at 520.
39. *Id.*
41. 6 Cal. 3d at 185, 491 P.2d at 426, 98 Cal. Rptr. at 842.
42. *Id.*
44. In *Jensen v. Sprigg*, 84 Cal. App. 519, 258 P. 683 (1927), the court of appeal clearly stated in dictum that justifiable nondiscovery could extend the limitations period. "Unquestionably where confidential relationship, such as the relationship between attorney and client, exists, failure to discover the facts constituting fraud or misrepresentation may be excused . . . ." *Id.* at 526, 258 P. at 686.
appeal decisions, the supreme court found further authority for its departure from Hays in its own decision of Lally v. Kuster. In that case, the court apparently disregarded the Hays decision by delaying the accrual of a cause of action for legal malpractice until injury resulted from the negligence. The attorney's negligence was his failure to follow the client's instructions and proceed immediately with the action. The result was a dismissal for failure to prosecute diligently. Because no earlier holding specifically rejected delaying the accrual of a cause of action until the client's discovery, this case was crucial to the Neel court. In Lally the court delayed accrual until the dismissal of the action. This was sufficient to place the action within the limitations period.

The Policy Reasons Favoring the Discovery Rule

Thus finding no historical basis for applying the negligent act rule to legal malpractice actions, the Neel court turned its attention to the policy considerations relevant to determining the proper time for accrual of the cause of action. Weighed with the policy factors was the fact that the legal profession was the sole profession to which the discovery rule did not apply and that the fiduciary nature of the attorney-client relationship seemed to call for its application. For many years, the California courts have applied the discovery rule in the area of medical malpractice where the physician-patient relationship is similar to that of attorney and client. In fact, the negligent act rule was abandoned in 1936, when the supreme court concluded that a physician's negligence continued until the time he attempted to correct it. This attempt coincided with the time of the patient's discovery. Furthermore, the discovery rule has been applied to other professions, and in each case leading to its application the courts rejected the contention that the rule of legal malpractice should be applied to bar the action. They reasoned that where a fiduciary obligation was involved,
postponement of the cause of action was necessary until the bene-

ficiary knew or should have known of the breach of fidelity.\(^5\) The
courts also noted that the negligent act rule had been applied solely to
legal malpractice situations.\(^6\)

Thus the legal profession was the lone exception to the "general
rule that in actions for professional or fiduciary malpractice, the cause
of action does not accrue until the plaintiff discovers, or should dis-
cover the negligence . .. ."\(^7\) It has been argued that there are
sound social policies favoring this status. The arguments include the
usual vulnerability of attorneys to malpractice actions and the
thwarting of innovation and progress in the profession.\(^8\) Other pro-
fessions, especially medicine, suffer under these same disabilities with
little apparent effect. Such reasons seem even more inadequate when
compared with the potential hardships resulting from the application
of the negligent act rule faced by the client-plaintiff.

The second policy consideration supporting the discovery rule in
professional malpractice cases is the special relationship between pro-
ofessional and client. The Neel court felt that this relationship justi-
fied a departure from the ordinary rule in tort and contract actions.\(^9\)
The court gave three reasons for the existence of this special relation-
ship. The first is the duty of skill and care commonly exercised by
members of a profession and which an attorney or any other profes-
sional owes the client or patient.\(^10\) Included in this reason is the lay-
man's inability to detect a misapplication of professional principles or
theories even though the professional makes no attempt to hide his
efforts. Hand in hand with this is the ability of the professional to
hide his negligence from the client's view.\(^11\) Attorneys can be particu-
larly skillful in this endeavor through the use of bewildering terminol-
ogy. Finally, a fiduciary relationship exists between attorney and cli-
ent.\(^12\) Such a relationship requires that the attorney fairly and accu-
rately disclose all facts to the client. Failure to do so is a breach of this

\(^{54}\) E.g., United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 597,

\(^{55}\) Id. at 596, 463 P.2d at 776, 83 Cal. Rptr. at 424.

\(^{56}\) Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 187, 491

\(^{57}\) Note, The Commencement of the Statute of Limitations in Legal Malpractice
(1967) [hereinafter cited as Note, Commencement of Statute of Limitations].

\(^{58}\) "In ordinary tort and contract actions, the statute of limitations . .. begins
to run upon the occurrence of the last element essential to the cause of action." 6
Cal. 3d at 187, 491 P.2d at 428, 98 Cal. Rptr. at 844 (1971).

\(^{59}\) Id. at 188, 491 P.2d at 428, 98 Cal. Rptr. at 844.

\(^{60}\) Id.

\(^{61}\) Id. at 188, 491 P.2d at 428-29, 98 Cal. Rptr. at 844-45.
duty. The court held that the discovery rule "prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure." 62

The Court's Authority To Establish The Rule

Despite these policy reasons for adopting the discovery rule, the court had to justify its power to do so. This was necessitated by several challenges presented by the defendants. Each challenge was fully discussed by the court as to its validity and then rejected as to the Neel case in particular. 63

The defendants initially contended that, even though a change in the existing rule may be desirable, such a change should come from the legislature. 64 Conceding that no statute specified when a cause of action accrues in legal malpractice and that the negligent act rule was court made, the defendants argued that the judicial rule was never changed by the legislature which therefore accepted and adopted it. 65 In making this contention, the defendants erroneously relied on Alter v. Michael 66 in which the trial court granted a motion for summary judgment on the basis of the affirmative defense that the one year statute of limitations 67 applied to legal as well as medical malpractice. The supreme court reversed, 68 holding that different statutes of limitation always had been applied to legal and medical malpractice by the courts. Furthermore, the legislature had amended the statute of limitations that applies to each profession without changing the severability of application of each statutory period. 69 The Alter court reasoned that the legislative intent must have been to leave the judicial treatment unchanged. 70 Therefore the Alter case "involved the construction of a statute, a matter on which the legislative intent is of major importance . . . ." 71 The difference between Alter and Neel was that in Alter the trial court followed legislative intent in prescribing the length of the statutory period; in Neel, the court merely decided when that period commenced. The rule regarding the commencement of the

62. Id. at 189, 491 P.2d at 429, 98 Cal. Rptr. at 845.
63. Id. at 190-93, 491 P.2d 430-32, 98 Cal. Rptr. at 846-48.
64. Id.
65. Id.
66. 64 Cal. 2d 480, 413 P.2d 153, 50 Cal. Rptr. 553 (1966).
70. 64 Cal. 2d at 483, 413 P.2d at 155, 50 Cal. Rptr. 555 (1966).
statutory period was judicially created and one upon which the legislature never had expressed its intent.

In the alternative, the defendants argued that legislative inaction could be construed as passive approval.\textsuperscript{72} The \textit{Neel} court, however, was of the opinion that mere legislative silence was not sufficient to bar the court from re-examining its own premises.\textsuperscript{73} The passive approval argument could not stand since the rule in question dated only from \textit{Griffith v. Zavlaris},\textsuperscript{74} a 1963 case, and never had been the subject of an express holding by the supreme court. The court interpreted the legislature's silence as possible deference to court action in this area due to the superior experience and expertise of the judiciary.\textsuperscript{75}

The defendants' second contention was phrased by the court as a syllogism: "If a date of discovery rule should be accompanied by an absolute limitation, but courts cannot enact such limitation, then the courts should not adopt the discovery rule."\textsuperscript{76} The defendants objected to the undue burden placed on the legal profession by changing the rule to discovery by the client, thus exposing the attorney to liability indefinitely. The court, aware of the need for an outside limitation, invited the legislature to take appropriate action.\textsuperscript{77} Nonetheless, it found that the potential burden placed on the legal profession was outweighed by the injustice done to the client and the impugning of the integrity of the entire profession when the negligent act rule was used to bar a client's suit before he could have discovered it.\textsuperscript{78} Despite its awareness of the need for an outside limitation, the court rejected this second contention as not applicable to the Neels since they brought their action within three years and two months of the negligent act which is well within the medical malpractice statute of limitations\textsuperscript{79} and within "any reasonable limitation period likely to be enacted."\textsuperscript{80}

The defendants' last contention was that the discovery rule should be applied prospectively rather than retrospectively.\textsuperscript{81} The court stated that the general rule was for full retroactivity where the court of

\textsuperscript{72} Id. at 191, 491 P.2d at 431, 98 Cal. Rptr. at 847.
\textsuperscript{73} Id.
\textsuperscript{74} 215 Cal. App. 2d 826, 30 Cal. Rptr. 517 (1963).
\textsuperscript{75} 6 Cal. 3d at 192, 491 P.2d at 431, 98 Cal. Rptr. at 847.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 192-93, 491 P.2d at 432, 98 Cal. Rptr. at 848.
\textsuperscript{78} Id. at 192, 491 P.2d at 431, 98 Cal. Rptr. at 847.
\textsuperscript{79} CAL. CODE CIV. PROC. § 340.5 (West Supp. 1972), which reads in pertinent part: "In an action for injury or death against a physician [or other medically related person] . . . based upon such person's alleged professional negligence . . . four years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever first occurs."
\textsuperscript{80} 6 Cal. 3d at 193, 491 P.2d at 432, 98 Cal. Rptr. at 848 (1971).
\textsuperscript{81} Id.
supreme jurisdiction overruled a former decision. Exceptions have been made in circumstances where “fairness and public policy preclude full retroactivity.” Resolution of the issue turned on reliance on the old rule and the ability of the litigants to foresee the coming change in the rule. Neither factor worked in favor of the defendants because few attorneys commit malpractice in reliance on the statute of limitations and the change in the law was foreseeable due to the continuous criticism heaped on the prior rule by both the courts and commentators. Thus the discovery rule was held to apply retroactively.

The Budd Case

An important supplement to the Neel rule was established in Budd v. Nixen. That case involved Budd, the president and a stockholder of Hawarden Hills, Incorporated, his attorney Nixen, and a real estate broker named Milburn. Hawarden, through Budd, entered into a written agreement with Milburn on November 8, 1962. A disagreement ensued, and Milburn filed an action on February 5, 1963 for breach of contract against Hawarden, Budd, and the other corporate officers. Hawarden retained Nixen, who filed an answer on behalf of the corporation only, admitting the contract, but denying any breach or liability. Nixen was retained by Budd on July 31, 1963 and subsequently filed an answer to Milburn’s complaint on behalf of Budd in his individual capacity. The answer filed by Nixen lacked the affirmative defense that Budd had signed the contract with Milburn only in his capacity as president of Hawarden and therefore bore no personal responsibility for its breach. The case proceeded to trial on September 15, 1964, and while it was under submission, Budd dismissed Nixen and retained another attorney, whereupon he discovered Nixen’s negligence. On November 4, 1965, judgment was entered against both the corporation and Budd in the sum of $75,000. After remittitur

82. Id.
83. Id.
84. Id.
86. See, e.g., Sacks, Statutes of Limitations and Undiscovered Malpractice, 16 CLEV.-MAR. L. REV. 65 (1967); Baxter, Statutes of Limitations in Legal Malpractice, 18 CLEV. ST. L. REV. 82 (1969) [hereinafter cited as Baxter]; Wallach & Kelly, supra note 50, at 257; Note, Attorney Malpractice, 63 COLUM. L. REV. 1292 (1963); Note, Commencement of Statute of Limitations, supra note 57.
87. 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971).
88. Id. at 198, 491 P.2d at 434-35, 98 Cal. Rptr. at 850-51.
89. “Remittitur” is the power of a trial court to grant a motion for a new trial, in cases of excessive verdicts, conditioned upon the refusal of the plaintiff to accept a
issued Budd was compelled to pay Milburn $38,450.61.

On September 11, 1967 Budd filed the malpractice action against Nixen to recover damages which resulted from the adverse judgment. The trial court granted Nixen’s motion for summary judgment on the ground that the statute of limitations barred Budd’s cause of action, because the two year period governing legal malpractice actions runs from the time of the negligent act. The decision of the trial court was affirmed on appeal, and Budd appealed to the supreme court alleging that a “cause of action for attorney malpractice is a tort and does not accrue unless and until it causes actual damage.” Budd further contended that the court should grant this petition due to the conflicting decision by the court of appeal in the Neel case, “in order to secure uniformity of decision and settle this most important question of law.”

The Neel decision called for a review of the trial court’s decision in Budd. The California Supreme Court seized the opportunity presented by Budd to clarify the application of the new discovery rule to tort actions for legal malpractice. The facts in Budd presented the rare situation in which the client discovered his attorney’s negligence prior to suffering any consequential damage. Unfortunately little guidance from the legislature was found to resolve the issue thus presented. In its determination of when the cause of action accrued, the Budd court examined elements of a cause of action in tort for professional negligence. It concluded that an attorney’s negligent conduct which does not cause damage or merely causes nominal damage, speculative harm or the threat of future harm creates no cause of action in tort. A cause of action is not generated “until the client suffers appreciable harm as a consequence of his attorney’s negligence.


90. 6 Cal. 3d at 199, 491 P.2d at 435, 98 Cal. Rptr. at 851.
92. Appellant’s Brief for Hearing in Supreme Court at 3.
93. See text accompanying notes 5-8 supra.
94. Appellant’s Brief for Hearing in Supreme Court at 3.
95. See text accompanying notes 5-8 supra.
96. CAL. CODE CIV. PROC. § 312 (West 1954) reads in pertinent part: “Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued . . . .”
97. “(1) [T]he duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (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.” 6 Cal. 3d at 200, 491 P.2d at 436, 98 Cal. Rptr. at 852.
98. Id.
The court in *Budd* did not specify what constituted "appreciable harm," except to state that a client's cause of action could arise prior to his sustaining all or even the majority of the damage proximately caused by his attorney's negligence. Once the client discovers his attorney's negligence and has suffered some damage, the statutory period commences and he must institute his action within the prescribed period.

Even though the court established this rule, it did not make a final determination. Budd may have suffered damage when he was forced to pay attorney's fees and legal costs to Nixen, in which case, if these fees were paid more than two years prior to the filing of the malpractice action, it is barred by the statute of limitations. If, as Budd contends, sufficient damage was not incurred until the judgment was entered against him in the action brought by Milburn, then Budd's action against Nixen may have been filed within the statutory period. The question of when Budd actually sustained damage was not answered in the *Budd* decision. In reversing the trial court, the supreme court noted that the proper answer to the factual issue would have to await "either a trial of the cause or a motion for summary judgment with declarations and points and authorities directed to that issue."

**The Discovery Rule Does Not Provide the Final Solution**

The policy considerations or justifications for the statute of limitations are not per se in conflict with the purposes behind a cause of action for legal malpractice. The main impetus of the statute of limitations, as applied to legal malpractice, is to protect the attorney from unfair client action. The cause of action for legal malpractice is designed to protect the client and the legal profession from substandard performance by attorneys. The problem is finding a date for the time of accrual of a cause of action which balances the policy considerations of the statute of limitations and the purposes behind an action for legal malpractice without favoring attorneys at the expense of their clients or vice versa. The California Supreme Court in *Neel*, while adopting the discovery rule, recognized that it alone would not provide such a proper balance.

Using the negligent act of the attorney as the time for commencement of the statute of limitations may appear to have harsh effects in

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99. *Id.*
100. *Id.* at 201, 491 P.2d at 436, 98 Cal. Rptr. at 852.
101. *Id.* at 201, 491 P.2d at 437, 98 Cal. Rptr. at 853.
103. 6 Cal. 3d at 203-04, 491 P.2d at 438, 98 Cal. Rptr. at 854 (1971).
105. 6 Cal. 3d at 192, 491 P.2d at 431, 98 Cal. Rptr. at 847.
some circumstances, but there are several policy considerations militating in its favor. The overriding consideration behind the statute of limitations is putting to rest stale claims which clients had intentionally or inadvertently failed to prosecute, thus allowing an attorney to pursue his career without fear of surprise attack later.\textsuperscript{106} Having a statutory period encourages diligence on the part of a client in prosecuting an action under the assumption that a valid claim would not be neglected.\textsuperscript{107} Additionally it acts as a safeguard against the thwarting of innovation and progress within the legal profession by limiting the potential liability of the attorney.\textsuperscript{108}

On the other hand, legal malpractice actions help to maintain the competence and dignity peculiarly necessary to a profession which is intimately involved in shaping the standards to which our society is held. Such actions present deterrents to substandard professional conduct which are in addition to those provided by various state legislatures\textsuperscript{109} and bar associations.\textsuperscript{110} An action for legal malpractice also provides the client with an opportunity to be compensated for his injuries.

The time at which a cause of action for legal malpractice accrues necessitates the balancing of the interests sought to be protected by the statute of limitations and by an action for legal malpractice. Setting the accrual time at the negligent act or omission of the attorney establishes a definite outside limit in which an action must be brought, but such a limit raises many problems of its own. The most serious of these problems is the preclusion of the effectuation of the purposes behind an action for malpractice.\textsuperscript{111} The \textit{Neel} case is an example of one fact situation which could arise as a result of this problem. Commencing the prescribed period at the time of the attorney's negligent act allowed the period to run before the client was even aware of the negligence. Another problem is the subordination of the client's rights to the actions of a third party.\textsuperscript{112} Such a situation occurs when the client is made aware of the negligence only after an action is brought against him by a third party. If the third party does not file the action against the client during the statutory period within which the client must bring his action against the attorney, the client may be barred from any redress. Under the negligent act rule, a client must immediately bring an action, assuming he becomes aware of its existence, even

\begin{itemize}
\item \textsuperscript{106} Baxter, supra note 86.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Note, \textit{Commencement of Statute of Limitations, supra} note 57, at 236-37.
\item \textsuperscript{109} See Annot., 96 A.L.R.2d 823, 831 (1964).
\item \textsuperscript{110} Id. at 829.
\item \textsuperscript{111} Note, \textit{Commencement of Statute of Limitations, supra} note 57, at 235.
\item \textsuperscript{112} Id. at 233-34.
\end{itemize}
though resultant future injury is only a possibility. Thus the negligent act rule may stimulate speculative litigation. Finally, the circumspect client, aware of the negligent act rule, would be forced to hire a second attorney to check on the first during the statutory period, discouraging a close, continuous attorney-client relationship.

The California Supreme Court in Neel and Budd changed the time of accrual of a cause of action from the occurrence of the negligent act to the discovery thereof in the hope of alleviating some of these problems. The court found it necessary in today's complex and interdependent society to broaden and deepen the responsibility of the legal profession to its clients. The discovery rule more accurately effectuates the purposes behind an action for legal malpractice, but at the same time it drastically reduces the protection provided the legal profession by the statute of limitations. No outside time limit is established by this new rule that would bar a stale claim freshly discovered.

A Statutory Amendment Would Resolve This Problem

The supreme court in Neel took note of the fact that a solution to the problem created by the discovery rule must come from the legislature. In determining a viable legislative solution, it is helpful to look at the other California professions to which the discovery rule is applied and at other jurisdictions which apply that rule to the legal profession.

The rule of the Neel case has previously been applied to a trustee, an insurance agent, an escrow agent, an accountant, a stockbroker, and a title company by case law. The discovery rule has also been statutorily applied to contract obligations involving real property title guaranties or title insurance policies. In the early

113. Id.
114. Id. at 235.
116. Id. at 192-93, 491 P.2d at 431, 98 Cal. Rptr. at 847.
123. "[A]n action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance . . . shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder." CAL. CODE CIV. PROC. § 339(1) (West Supp. 1972).
cases involving medical malpractice, the California courts uniformly held that the original injury was the sole cause of action and subsequent complications or lack of discovery by the patient did not toll the statute of limitations. The California Supreme Court re-evaluated its position on this issue in *Huysman v. Kirsch*. There the defendant, a physician and surgeon, had been hired by the plaintiffs to remove the cancerous uterus of the plaintiff-wife. The defendant negligently left a rubber tube in her abdomen. This tube was not removed until nearly two years later. The court established a new rule which delayed the time of accrual from the negligent act of the physician until the patient discovered or with reasonable diligence could have discovered the physician's negligence. The *Huysman* decision placed the medical profession in approximately the same position in which *Neel* and *Budd* now place the legal profession.

The legislature has only acted to set an outside time limit after which no action can be brought for professional malpractice in the area of medical malpractice. The legislative solution regarding the medical profession was not adopted until 1970, some thirty-four years after *Huysman*. While the legislation maintained the rule of the *Huysman* decision that a cause of action is barred one year after the discovery of the negligence, it limited the time in which the client could discover to four years. Such limitation on the discovery rule seems reasonable and may afford the proper balance between the policy considerations of the statute of limitations and the purposes behind an action for legal malpractice.

In a majority of American jurisdictions, the statute of limitations commences to run only after the right to prosecute such a cause of action has accrued. California is in agreement with this rule. The time at which a cause of action for legal malpractice accrues is a matter normally left to court construction by most jurisdictions. While courts of most states continue to recognize the negligent act or omission of the attorney as the time of accrual, the trend in the recent decisions dealing with this issue appears to be in accord with *Neel* and *Budd* in a movement away from the negligent act rule and toward

125. 6 Cal. 2d 302, 57 P.2d 908 (1936).
the discovery rule.\textsuperscript{134} For example, a recent New York decision\textsuperscript{135} has moved that jurisdiction in the direction of adopting the discovery rule for legal malpractice. There the court held that the "continuous treatment" rule\textsuperscript{136} followed in medical malpractice cases should be followed in legal malpractice.\textsuperscript{137} Such a rule would toll the statute of limitations until the attorney-client relationship was terminated. That court was of the opinion that:

In both instances [medicine and law] the relationship between the parties is marked by trust and confidence; in both there is presented an aspect of the relationship not sporadic but developing; and in both the recipient of the service is necessarily at a disadvantage to question the reason for the tactics employed or the manner in which the tactics are executed.\textsuperscript{138}

Both Maryland\textsuperscript{139} and the District of Columbia\textsuperscript{140} have recently held that in an action for breach of duty in performing services or for negligence the time of accrual is the date of discovery by the client or the date the damage occurs following discovery.

This trend toward the acceptance of the discovery rule has not been followed by legislative limitations on the time in which a client can discover his attorney's negligent act or omission and still successfully bring an action. The California legislature could resolve the conflict between the policy considerations of the statute of limitations and the purposes behind an action for malpractice by amending section 339 of the Code of Civil Procedure as follows:

4. An action against an attorney, accountant, escrow agent, insurance agent or company, trustee, stockbroker, ... based upon such person's alleged professional negligence, or for rendering professional service without consent, or for error or omission in such person's practice, must be commenced:

(a) within six years\textsuperscript{141} after the malpractice occurs or two


\textsuperscript{136} Under the "continuous treatment" doctrine the statute of limitations does not commence to run until the physician-patient or attorney-client relationship is terminated as to the matter in question. Note, \textit{Commencement of Statute of Limitations}, supra note 57 at 240; accord, Note Attorney Malpractice, 63 COLUM. L. REV. 1292, 1308 (1963). See also Lillich, \textit{The Malpractice Statute of Limitations in New York & Other Jurisdictions}, 47 CORNELL L.Q. 339, 345 (1962) [hereinafter cited as Lillich].


\textsuperscript{138} Id.

\textsuperscript{139} Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359 (1968).

\textsuperscript{140} Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967).

\textsuperscript{141} In a medical malpractice situation the injury is physical and therefore should
years after the plaintiff discovers, or through use of reasonable diligence should have discovered the negligence or misconduct, whichever first occurs; or

(b) if the relationship continues for more than four years, then within two years after the termination of such relationship; provided, however, that the transaction from which the cause of action arises must be the subject of the continuing relationship or a part thereof.

(c) This time limitation should be tolled for any period during which such person has failed to disclose any act, error or omission upon which such action is based and which is known or through the use of reasonable diligence should have been known to him.142

In addition to establishing an outside limit on a professional’s liability, this proposed statute defines professional malpractice and sets the date of accrual of a cause of action at the date of discovery. Section (c) of the proposed statute would indefinitely extend the discovery period in those cases where the attorney can be charged with failing to disclose his negligence. Nevertheless, this certainly is justifiable because active concealment is a clear breach of the professional’s fiduciary duty.

Conclusion

The Neel and Budd decisions place California in the forefront of the states which have adopted the date of discovery as the time of accrual for a cause of action for legal malpractice. Thus, the legal profession now is subject to the same standards that have been imposed on other professions.143 To balance the considerations of the statute of limitations with the purposes behind an action for legal malpractice more is needed. The judiciary has gone as far as it can with the Neel and Budd decisions. The entire area of professional malpractice is in need of definition and clarification. It remains for the legislature to forge the courtmade rules into a clear, concise statute applicable to professional malpractice.

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become apparent to the plaintiff-patient within the prescribed four year period. Malpractice by a professional described in the proposed statute is of an esoteric nature and therefore more difficult to ascertain. Thus a professional should be subject to a longer period of liability.

142. Note, Commencement of Statute of Limitations, supra note 57, at 243. See also Note, 45 Ore. L. Rev. 73, 80 (1965) both of which have proposed statutes. See Lillich, supra note 136, for a collection of malpractice statutes from other jurisdictions.

143. See text accompanying notes 117-23 supra.

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