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Forty-Eight States Are Probably Not Wrong: An Argument for Modernizing Georgia's Legal Malpractice Statute Of Limitations

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FORTY-EIGHT STATES ARE PROBABLY NOT WRONG: AN ARGUMENT FOR MODERNIZING GEORGIA'S LEGAL MALPRACTICE STATUTE OF LIMITATIONS

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INTRODUCTION

In 1979, a Texas couple hired Chilton Maverick, a family friend, to draft their divorce settlement agreement.[1] At the husband's request, Mr. Maverick convinced the wife, Ms. Willis, to delete a provision allowing her to live in their marital home until their child turned eighteen by misinforming her that she would still have to consent if the husband ever tried to sell the home.[2] Ms. Willis sued Mr. Maverick for legal malpractice in 1981 after her ex-husband sold the home without her consent.[3] A Texas jury found Mr. Maverick's behavior reprehensible enough to award her $26,568.44 in compensatory damages and $610,000 in punitive damages.[4] Mr. Maverick successfully moved for a judgment notwithstanding the verdict by persuading the trial court that the statute of limitations had run.[5] The Texas Supreme Court found the facts of the case compelling enough, in conjunction with the "relationship of trust and confidence"[6] between attorney and client, to reverse the trial court

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1. Willis v. Maverick, 760 S.W.2d 642, 643 (Tex. 1988).
2. *Id.*
3. *Id.* at 643–44.
4. *Id.* at 643.
5. *Id.* At the time, Texas had a two-year statute of limitations for "injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (1985).
6. McClung v. Johnson, 620 S.W.2d 644, 647 (Tex. Civ. App. 1981). In this case, the Texas Court of Civil Appeals held that in legal malpractice, like any action in tort, "a cause of action . . . accrues

and adopt the discovery rule for legal malpractice actions in Texas.[7] As the Texas Supreme Court defined the discovery rule in this case, the statute of limitations runs from the date the plaintiff discovers or should have discovered "the nature of the injury."[8]

In *Willis*, the Texas Supreme Court also noted that "an ever increasing majority of states have recognized the inherent unfairness of commencing the statute of limitations in legal malpractice causes of action on the date of the occurrence of the negligent act or omission . . . ."[9] Georgia and Arkansas are the last two states that have declined to join the vast majority of states in modifying their statutes of limitations for legal malpractice.[10] Both states still adhere to the occurrence rule, where the statute of limitations begins to

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when the tort is completed, that is, the act committed and damage suffered." *Id.* at 646 (citing Atkins v. Crosland, 417 S.W.2d 150 (Tex. 1967)). Although the Court of Civil Appeals declared legal malpractice a tort similar to medical malpractice, it declined to adopt the discovery doctrine in that case. *Id.* at 646–47.

7. *Willis*, 760 SW.2d at 645 (justifying adoption, in part, by noting "[t]he policy reasons relied upon by Texas courts in adopting the discovery rule in actions for fraud, credit libel, and medical malpractice are no less compelling in legal malpractice actions"). Part II, *infra*, discusses the definition and implications of the discovery rule in greater depth.

The discovery rule first surfaced for medical malpractice actions. Ohio, for example, addressed the statute of limitations for medical malpractice in a 1919 case, in which it held "that in an action for breach of contract [based on medical malpractice] the statute of limitations does not begin to run until the contract relation has been terminated." Bowers v. Santee, 124 N.E. 238, 240 (Ohio 1919). Four years later, the Ohio Court of Appeals applied *Bowers* to a legal malpractice case, discussed the discovery rule, and held that *Bowers* applied to legal malpractice in addition to medical malpractice. McWilliams v. Hackett, 19 Ohio App. 416, 418–20 (1923).

8. *Willis*, 760 S.W.2d at 644.

9. *Id.* at 646.

10. O.C.G.A § 9-3-25 (1962); ARK. CODE ANN. § 16-56-105(3) (1947) (granting a three-year statute of limitations for "[a]ll actions founded on any contract or liability, express or implied"). In *Goldsby v. Fairley*, the Arkansas Supreme Court noted that almost every other state had moved away from the occurrence rule. 831 S.W.2d 142, 143 (Ark. 1992). The court also seemed to invite and encourage legislative action by stating:

> While this court has noted that other jurisdictions use different approaches in determining when the cause of action accrues, we have stated that if such a marked change is to be made in the interpretation of statutes that have long been the law, it should be done prospectively by the legislature and not retrospectively by the courts.

Id. The Arkansas Court of Appeals reiterated the three-year statute of limitations from the date of the negligent act with language from a 1991 Arkansas Supreme Court decision claiming that the occurrence rule has a "countervailing fairness to it," as the discovery rule could make professionals liable "25 to 30 years after the [negligent act]." Rice v. Ragsdale, 292 S.W.3d 856, 861 (Ark. Ct. App. 2009) (quoting Chapman v. Alexander, 817 S.W.2d 425, 426 (Ark. 1991)). In *Rice*, the Arkansas Court of Appeals also noted that Arkansas's history of rejecting the discovery rule dates back to at least 1877. *Id.*; *see also* White v. Reagan, 32 Ark. 281, 291 (1877).

accrue on the date the negligent act or omission occurs.[11] Most states have recognized the inherent pitfalls of a legal malpractice statute of limitations similar to Georgia's and have adjusted their laws accordingly.[12] The vast majority of attorneys do not resort to trickery like Chilton Maverick, but one case like that is one too many. Cases like *Willis* portray the profession in a negative light, even if they are rare. If and when a case like *Willis* surfaces in Georgia, the courts should be ready to protect the interests of the clients and the legal profession with a fair statute of limitations.

Georgia has not had the kind of incendiary legal malpractice case that compels legislative or judicial action regarding the legal malpractice statute of limitations. The Georgia courts have, however, addressed inequities in the state's medical malpractice statute of limitations in a series of cases in the 1980s.[13] In one of the most important cases of that series, *Clark v. Singer*, the Georgia Supreme Court criticized statutes of limitation that expire before the plaintiff

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11. Antone v. Mirviss, 720 N.W.2d 331, 335 (Minn. 2006) ("[Under] the traditional 'occurrence' rule, . . . the statute of limitations begins to run simultaneously with the performance of the negligent or wrongful act. . . . Most jurisdictions have moved away from the occurrence rule.") The Minnesota Supreme Court went on to reject the occurrence rule because of the potential to encourage "wasteful economic behavior" by attorneys and clients. *Id.*

12. *See generally* FIFTY-STATE SURVEY OF LEGAL MALPRACTICE: THE LAW OF LAWYERS' LIABILITY (Merri A. Baldwin, Scott F. Bertschi & Dylan C. Black eds., 2012) [hereinafter FIFTY-STATE SURVEY]. This book gives a state-by-state survey of legal malpractice: Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming have all adopted some form of the discovery rule. *Id.* The District of Columbia, Idaho, Minnesota, and Missouri adhere to the damage rule. *Id.* Connecticut, Nebraska, New York, and South Dakota use the occurrence rule modified by the continuous representation rule. *Id.* Arkansas and Georgia cling to the occurrence rule. *Id.* Kansas has declined to choose a rule. *Id.*

> The Kansas Supreme Court has recognized four possible theories for determining when a legal malpractice action accrues and the statute of limitations begins to run: (1) The occurrence rule . . . (2) The damage rule . . . (3) The discovery rule . . . (4) The continuous representation rule . . . . In *Dearborn Animal Clinic*, the Kansas Supreme Court affirmatively declined to adopt any one of these theories to the exclusion of the others.

W. Perry Brandt, *State of Kansas*, *in* FIFTY-STATE SURVEY, *supra*, at 178–79; *see also* Dearborn Animal Clinic, P.A. v. Wilson, 806 P.2d 997, 1003 (Kan. 1991). For a discussion of the continuing representation rule, *see* Part II.B, *infra*. For a discussion of the damage rule, *see* Part II.C, *infra*.

13. *See, e.g.*, Allrid v. Emory Univ., 285 S.E.2d 521, 524 (Ga. 1982); Clark v. Singer, 298 S.E.2d 484, 486 (Ga. 1983); *see also* C. Frederick Overby, Jason Crawford & Teresa T. Abell, *Trial Practice and Procedure*, 50 MERCER L. REV. 359, 369 (1998) [hereinafter *Trial Practice and Procedure*].

even knows of the malpractice.[14] That series of cases recognized the special relationship of trust between doctor and patient, and sought to strike a balance between the interests of the negligent doctor and the wronged patient.[15] Although legal malpractice does not have life-or-death consequences like medical malpractice, the economic and emotional harm many legal malpractice victims suffer is life-altering.[16] Clients may not place their physical health and safety in their attorneys' hands, but they hire attorneys to advocate for their rights, redress wrongs against them, and protect their pecuniary interests.[17]

Clients lose time, money, and peace of mind, when they suffer from attorney negligence because the person they hired to protect their rights violated them.[18] The legal profession is largely self-regulated, and each state has a bar association charged with creating and enforcing basic standards of professionalism and competence for attorneys.[19] Unfortunately, attorneys do not always adhere to these standards.[20] In Georgia, the State Bar can address attorney

14. *Clark*, 298 S.E.2d at 486 ("To impose a limitation period which may be exhausted before the cause of action accrues (i.e., before the patient dies), arbitrarily distinguishes between wrongful death, medical malpractice plaintiffs.").

15. *Trial Practice and Procedure*, *supra* note 13, at 369–70.

16. *See, e.g.*, Willis v. Maverick, 760 S.W.2d 642, 642 (Tex. 1988). In that case, Chilton Maverick's negligent act left Ms. Willis without a home. *Id.*; *see also* Sherry L. Talton, *$100 Million Legal Malpractice Verdict Provides Lessons for Litigators*, AM. BAR ASS'N: LITIG. NEWS (March 10, 2011), https://apps.americanbar.org/litigation/litigationnews/top_stories/031011-ethics-malpractice-multiple-clients.html (discussing a Mississippi jury's award of $100 million in damages against a law firm that represented both parties in a dispute); *Verdicts and Settlements*, BLAND RICHTER, http://www.blandrichter.com/verdicts-and-settlements2.html (last visited Oct. 25, 2016) [hereinafter BLAND RICHTER] (describing how an incorrect patent opinion led to the assessment of $5,508,000 against a negligent attorney).

17. GA. RULES OF PROF'L CONDUCT pmbl. (2001).

18. *See Willis*, 760 S.W.2d at 642.

19. *See, e.g.*, GA. RULES OF PROF'L CONDUCT R. 4-102 (2001). In Georgia, for example, the State Bar promulgates the Rules of Professional Conduct. *Id.* It enforces these rules through an administrative process where the Bar has powers up to and including disbarment. *Id.*

20. *See, e.g.*, *In re* Minsk, 765 S.E.2d 361, 362 (Ga. 2014) (disbarring a bankruptcy attorney for filing a bankruptcy petition on behalf of a client without consent and with forged signatures, making false statements to the client, and making errors in judgment that led to the client being held in contempt); *In re* Green, 622 S.E.2d 332, 333–34 (Ga. 2005) (disbarring an attorney for accepting retainers from clients and then abandoning them); *In re* Kendall, 585 S.E.2d 882, 882–83 (Ga. 2003) (disbarring a criminal defense attorney for giving his client notice of impending search and seizure warrants); *In re* Barrett, 577 S.E.2d 771, 771–72 (Ga. 2003) (disbarring an attorney who was convicted of three counts of grand theft and one charge of carrying a concealed firearm in Florida); *In re*

misconduct through remedial measures up to and including disbarment.[21] The State Bar cannot, however, compensate wronged clients through monetary damages.[22] Thus, some wronged clients must resort to a lawsuit for legal malpractice where a financial recovery is necessary to make the client whole again.

The common law in Georgia provides a cause of action for malpractice against the negligent attorney. To prevail, a plaintiff must prove: (1) he employed an attorney; (2) the attorney failed to exercise ordinary care, skill, and diligence; and (3) the attorney's negligence proximately caused damage to the client.[23] Additionally, the plaintiff must prove that the underlying case would have been successful, but for the attorney's negligence.[24] To win a legal malpractice lawsuit, the plaintiff must win two cases: the primary case that the attorney should have won, and the secondary negligence case against the alleged mal-practitioner.[25] By setting the time frame in which the plaintiff must bring a claim or face having it barred, the statute of limitations is one of the most basic procedural hurdles that a plaintiff must clear when bringing a legal malpractice suit.[26]

McFarland, 573 S.E.2d 56, 58 (Ga. 2002) (disbarring an attorney for converting a client's property); *In re* Threlkeld, 539 S.E.2d 823, 824 (Ga. 2001) (disbarring a criminal defense attorney for massaging his 17-year-old client's genitals during a consultation in a juvenile detention facility); *In re* Tante, 453 S.E.2d 688, 689–90 (Ga. 1994) (suspending a male attorney for representing a married woman whose medical records indicated emotional and mental vulnerability and using that information to induce the client into an affair with him); *In re* Osborne, 442 S.E.2d 743, 744 (Ga. 1994) (disbarring an attorney for accepting retainers from three clients then doing no work at all on their cases).

21. GA. RULES OF PROF'L CONDUCT R. 4-102 (2001).

22. *Id.*

23. Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 453 S.E.2d 719, 720 (Ga. 1995).

24. Ross v. Edwards, 560 S.E.2d 343, 344 (Ga. Ct. App. 2002) ("[The plaintiff] must show that, but for [the attorney's] negligence, he would have won a plaintiff's verdict on the nuisance claim and would have received an award of damages."). The concept of the "case within the case" is well articulated by the Wisconsin Supreme Court:

> To establish causation and injury in a legal malpractice action, the plaintiff is often compelled to prove the equivalent of two cases in a single proceeding or what has been referred to as a "suit within a suit." This entails establishing that, "but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action."

Cook v. Cont'l Cas. Co., 509 N.W.2d 100, 104–5 (Wis. Ct. App. 1993) (quoting Glamann v. St. Paul Fire & Marine Ins., 424 N.W.2d 924, 926 (Wis. 1988)).

25. *Cont'l Cas. Co.*, 509 N.W.2d at 104–5.

26. *See Statute of Limitations*, BLACK'S LAW DICTIONARY (10th ed. 2014). Statutes of limitations provide predictability and certainty as to the life-span of a cause of action. Gebhardt v. O'Rourke, 510 N.W.2d 900, 905 (Mich. 1994) ("The statute of limitations affords the opposing party a fair opportunity

The statute of limitations that Georgia has adopted for legal malpractice actions is fraught with pitfalls.[27] Usually, the negligent attorney discovers the error or omission before the client does.[28] Most attorneys will fulfill the duty imposed by the Rules of Professional Conduct to inform clients of errors or omissions, but this does not always happen.[29] The attorney may hope to fix the mistake before the client suffers any harm.[30] The attorney also has a better understanding of the statute of limitations for legal malpractice and knows that damages do not accrue until the underlying case is finally adjudicated.[31] Attorneys also know that without damages, no claim exists.[32] Thus, attorneys in this position have an incentive to drag cases out beyond the four-year statute of limitations so that no

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to defend, relieves the court system from dealing with 'stale' claims, and protects potential defendants from protracted fear of litigation."). When the statute of limitations has run, "the plaintiff's cause of action [is] dead. It [can]not be revived . . . ." Varricchio v. Johnson, 372 S.E.2d 455, 457 (Ga. Ct. App. 1988). In general, and subject to exceptions discussed in Part II, *infra*, Georgia courts set the statute of limitations for medical malpractice actions arising under contractual obligations imposed by incomplete written and oral agreements at four years, as governed by O.C.G.A. § 9-3-25, and running from the date of the alleged negligence. Hunter, Maclean, Exley & Dunn, P.C. v. Frame, 507 S.E.2d 411, 412 (Ga. 1998) ("Under normal circumstances, the statute of limitations for legal malpractice actions runs from the date of the alleged incident of malpractice."); Duke Galish, L.L.C. v. Arnall Golden Gregory, L.L.P., 653 S.E.2d 791, 793 (Ga. Ct. App. 2007) ("The cause of action 'arises immediately upon the wrongful act having been committed.'" (quoting Jones, Day, Reavis & Pogue v. Am. Envirecycle, Inc., 456 S.E.2d 264, 266 (Ga. Ct. App. 1995))).

27. For a discussion of the negative consequences of the Occurrence Rule, see *infra* Part II.A.

28. *See* Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 428 (Cal. 1971) ("[T]he client may not recognize the negligence of the professional when he sees it. He cannot be expected to know the relative medical merits of alternative anesthetics, nor the various legal exceptions to the hearsay rule. If he must ascertain malpractice at the moment of its incidence, the client must hire a second professional to observe the work of the first . . . .").

29. GA. RULES OF PROF'L CONDUCT R. 1.4 (2001) (imposing a duty to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required" and to "keep the client reasonably informed about the status of the matter"); GA. RULES OF PROF'L CONDUCT R. 1.7 ("A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests . . . will materially and adversely affect the representation of the client" unless the client gives informed consent to continued representation.).

30. *See* DOLORES DORSAINVIL, DOUGLAS R. RICHMOND & JOHN C. BONNIE, MY BAD: CREATING A CULTURE OF OWNING UP TO LAWYER MISSTEPS AND RESISTING THE TEMPTATION TO BURY PROFESSIONAL ERROR 8 (2016).

31. Mauldin v. Weinstock, 411 S.E.2d 370, 373 (Ga. Ct. App. 1991).

32. Szurovy v. Olderman, 530 S.E.2d 783, 786 (Ga. Ct. App. 2000) ("Because [plaintiff in a legal malpractice action] failed to show that she could have negotiated a better agreement or that she would have obtained better results at trial, she has failed to establish damages and proximate cause.").

damages have actually arisen or at least become apparent until the cause of action has expired.[33]

The statute of limitations for legal malpractice claims should not be so restrictive that good claims are tossed out with the bad ones.[34] Nor should it facilitate dishonest, self-protective strategies by attorneys after they make a mistake.[35] Part I of this Note explains Georgia's legal malpractice statute of limitations, the occurrence rule.[36] Part II analyzes the potential pitfalls of Georgia's continued use of an unaltered occurrence rule,[37] and examines the statutes of limitations that other states have adopted to address those pitfalls.[38] Part III proposes a new legal malpractice statute of limitations for Georgia, designed to better protect clients from attorney malfeasance without contravening general principles of Georgia jurisprudence.[39]

I. BACKGROUND

Georgia and Arkansas are the last states clinging to an unaltered occurrence rule for legal malpractice claims.[40] In Georgia and Arkansas, the statute of limitations runs from the attorney's negligent act—in Georgia it runs four years from the date of the negligent act.[41] Most states that use the occurrence rule have also adopted the "continuous representation rule."[42] The continuous representation

33. *See* Jones, Day, Reavis & Pogue v. Am. Envirecycle, Inc., 456 S.E.2d 264, 266 (Ga. Ct. App. 1995) (discussing the role of damages in a legal malpractice claim); Barnes v. Turner, 593 S.E.2d 9, 10 (Ga. Ct. App. 2003), *rev'd on other grounds*, 606 S.E.2d 849 (Ga. 2004) (analyzing and rejecting plaintiff's contention that he could not have sued within the statute of limitations, because he did not suffer damage until after the statute of limitations has ran).

34. *See* Wendy Cox Dvorak, Casenote and Comment, *Idaho's Statute of Limitations and Accrual of Legal Malpractice Causes of Action: Sorry, but Your Case Was over Before It Began* 31 IDAHO L. REV. 231, 231–32 (1994).

35. *See* Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 428 (Cal. 1971).

36. *See infra* Part I.

37. *See infra* Part II.A.

38. *See infra* Part II.B–D.

39. *See infra* Part III.

40. For a discussion of Arkansas' adherence to the occurrence rule, see *supra* note 10.

41. Hunter, Maclean, Exley & Dunn, P.C. v. Frame, 507 S.E.2d 411, 412 (Ga. 1998).

42. Rosenfield v. Rogin, Nassau, Caplan, Lassman & Hirtle, L.L.C., 795 A.2d 572, 581 (Conn. App. Ct. 2002) (expressly adopting the continuous representation rule in Connecticut after a period of uncertainty as to whether or not the state had adopted it); Shumsky v. Eisenstein, 750 N.E.2d 67, 72–73 (N.Y. 2001) (applying the continuous representation rule to toll the statute of limitations in a legal malpractice case); *see also* Larochelle v. Hodsdon, 690 A.2d 986, 988 (Me. 1997); Greene v. Morgan,

rule protects clients in an ongoing relationship with the negligent attorney by tolling the statute of limitations while the attorney and client are in a "continuous and ongoing relationship."[43] In contrast, many states use some form of the "discovery rule."[44] Under the discovery rule, the statute of limitations begins accruing from the time the client knew or reasonably should have known of the negligent act.[45] Other states toll the statute of limitations until actual damages accrue.[46] Even outside of these rules and their modifications, some states have adopted different time frames for statutes of limitation and statutes of repose.[47]

Theeler, Cogley & Petersen, 575 N.W.2d 457, 460 (S.D. 1998); Shipman v. Kruck, 593 S.E.2d 319, 324 (Va. 2004).

43. Barnes v. Turner, 606 S.E.2d 849, 852 (Ga. 2004) (both defining and rejecting the rule); *cf. Shipman*, 593 S.E.2d at 324–25 (contending that the continuous representation rule takes into account "the special trust and confidence inherent in the attorney-client relationship," and determining that, under the rule, "[t]he date the alleged negligent attorney's representation of the client terminates is the relevant date which commences the running of the statute of limitations").

44. *See generally* FIFTY-STATE SURVEY, *supra* note 12. For a discussion of each state's rule for legal malpractice statutes of limitations, see *supra* note 12.

45. Epstein v. Brown, 610 S.E.2d 816, 818 (S.C. 2005). *Epstein* provides a good example in a neighboring jurisdiction. The South Carolina Supreme Court explained the policy reasons behind South Carolina's three-year statute of limitations that begins to run when the plaintiff knew or should have known of the negligent act. *Id*. That decision also expressly rejected the continuous representation rule in South Carolina. *Id*.

46. Mental Health Assocs., Inc. v. Carlson, 835 S.W.2d 551, 553 (Mo. Ct. App. 1992). Missouri's statute of limitations is five years and does not begin to run until damage is sustained. *Id.* In this case, the client did not sustain damage from the attorney's malpractice until a judgment was rendered against her and she had to sell her property. *Id.*; *see also* Antone v. Mirviss, 720 N.W.2d 331, 335–36 (Minn. 2006) ("Minnesota has taken the middle ground [between the occurrence rule and discovery rule] by adopting the 'damage' rule of accrual, under which the cause of action accrues and the statute of limitations begins to run when 'some' damage has occurred as a result of the alleged malpractice. . . . [T]he rule that is the most logical and consistent with our precedent is that a cause of action accrues, and the statute of limitations begins to run, on the occurrence of any compensable damage, whether specifically identified in the complaint or not.").

47. *See, e.g.*, Hooper v. Lewis, 477 N.W.2d 114, 115 (Mich. Ct. App. 1991) ("A legal malpractice claim must be brought within two years of the date the attorney discontinues serving the client or within six months after the client discovers or should have discovered the claim, whichever is later."). Michigan's legal malpractice statute of limitations appears to be either the continuous representation rule or the discovery rule. Joseph H. Koffler, *Legal Malpractice Statutes of Limitations: A Critical Analysis of a Burgeoning Crisis*, 20 AKRON L. REV. 209, 231 (1986). Alabama's statute of limitations also appears to be a hybrid. ALA. CODE. § 6-5-574 (1988). The statute is specific to legal malpractice. *Id.* The statute requires the plaintiff to bring suit "within two years after the act or omission or failure giving rise to the claim," but qualifies that requirement for "cause[s] of action . . . not discovered and could not reasonably have been discovered within such period," granting the discovery rule in those cases. *Id.* Finally, the statute imposes an absolute four-year statute of repose. *Id.*

The elements of legal malpractice in Georgia are well-settled.[48] Before considering the merits of each element of the claim, the plaintiff must find an expert willing to testify as to how the defendant attorney fell below the standard of care.[49] For over a century, Georgia observed an unqualified, unaltered occurrence rule with a four-year statute of limitations accruing from the time of the negligent act.[50] Georgia treats legal malpractice as an action arising from a contract—albeit an incomplete contract—as opposed to other states, which treat it as an action in tort.[51]

One dispute in particular, *Newell Recycling v. Jordan Jones & Goulding*, arising from a contract between an engineering firm and a recycling company, illustrates the difficulties in determining the applicable statute of limitations in professional liability actions.[52] Newell Recycling, Inc. (Newell) hired Jordan Jones & Goulding, Inc. (JJ&G) to provide professional engineering assistance for

48. Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 453 S.E.2d 719, 720 (Ga. 1995).

49. O.C.G.A. § 9-11-9.1 (2007). The plaintiff has to "file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each claim." *Id.* There is, however, an exception for "clear and palpable" negligence that a jury does not need an expert to understand. Hopkinson v. Labovitz, 499 S.E.2d 338, 339 (Ga. Ct. App. 1998). The stated policy behind the affidavit requirement is to reduce the number of frivolous lawsuits. Hous. Auth. of Savannah v. Greene, 383 S.E.2d 867, 870 (Ga. 1989). In 2010, legal malpractice plaintiffs challenged the constitutionality of § 9-11-9.1, contending that it "prohibits indigent plaintiffs from pursuing their actions for professional negligence due to the costs of procuring an expert affidavit." Walker v. Cromartie, 696 S.E.2d 654, 656 (Ga. 2010). The Georgia Supreme Court rejected the plaintiffs' constitutional argument, reasoning that nothing in § 9-11-9.1 requires defendants to pay for affidavits. *Id.* The cost of the affidavit is imposed by private parties, not the government. *Id*. As the due process clauses of the federal and state constitutions control the state's actions, not individuals' actions, the Georgia Supreme Court upheld the constitutionality of § 9-11-9.1. *Id.*

50. *See* Hamilton v. Powell, Goldstein, Frazer & Murphy, 306 S.E.2d 340, 343 (Ga. Ct. App. 1983) (citing Patterson v. Augusta & Savannah R. Co., 21 S.E. 283 (Ga. 1894)).

51. Royal v. Harrington, 390 S.E.2d 668, 668 (Ga. Ct. App. 1990) ("It has long been the law in this state that a cause of action for legal malpractice, alleging negligence or unskillfulness, sounds in contract (agency), and, in the case of an oral agreement, is subject to the four-year statute of limitation . . . ." (quoting Ballard v. Frey, 346 S.E.2d 893, 896 (Ga. Ct. App. 1984))). Other states, including Texas, have declared legal malpractice a tort and treated it accordingly. Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988).

52. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 703 S.E.2d 323 (Ga. 2010); *see also* J. RANDOLPH EVANS & SHERI KLEVENS, GEORGIA LEGAL MALPRACTICE LAW § 2-4:2.2 (2017) (noting that the holdings that "written documents like an engagement letter or title opinion do not constitute written contracts for statute of limitations purposes . . . are now unsettled in light of the Supreme Court of Georgia's decision in *Newell Recycling, Inc. v. Jordan Jones and Goulding, Inc.*").

construction of a car recycling plant in 1997.[53] The parties memorialized their agreement with a "scope of work."[54] In May 2000, the concrete foundation that Newell paid JJ&G to design started cracking, and in August 2004, Newell sued JJ&G for breach of contract and professional malpractice.[55] *Newell Recycling* went to the Superior Court twice, the Court of Appeals three times, and the Supreme Court once.[56] The alleged professional malpractice occurred in 2000, and the statute of limitations ran in either 2004 or 2006.[57] The courts could not determine whether O.C.G.A. §§ 9-3-24 or 9-3-25 applied until 2012.[58] The case purportedly established a six-year statute of limitations in professional liability actions if the parties reduced their complete agreement to writing.[59] This holding is unapplied and untested in the context of legal malpractice.[60]

Prior to *Newell Recycling*, the Court of Appeals held that an engagement letter was too indefinite to constitute a written contract, disqualifying the claim from section 9-3-24's six-year statute of limitations.[61] Medical malpractice is the only form of professional liability addressed by the Georgia legislature, in which the legislature and the courts have combined to implement a discovery rule.[62] The lack of a dedicated statute, combined with murky case law, virtually

53. *Newell Recycling*, 703 S.E.2d at 324.

54. *Id.*

55. *Id.*

56. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 731 S.E.2d 361, 363 (Ga. Ct. App. 2012).

57. *Id.*

58. *Id.* at 364.

59. *Newell Recycling*, 703 S.E.2d at 325.

60. EVANS & KLEVENS, *supra* note 52, § 2-4:2.3.

61. Frates v. Sutherland, Asbill & Brennan, 296 S.E.2d 788, 791 (Ga. Ct. App. 1982) ("[T]he [engagement] letter merely confirms representation in broad terms and outlines in detail only the fee arrangement between the parties. It clearly does not constitute the entire agreement for legal services between the parties.").

62. O.C.G.A. § 9-3-71 (1976) (imposing a two-year statute of limitations and a five-year statute of repose from "the date on which an injury or death arising from a negligent or wrongful act or omission occurred" for medical malpractice actions); O.C.G.A. § 9-3-72 (1976) (adopting the discovery rule when a medical provider leaves foreign objects in the patient's body); O.C.G.A. § 9-3-73 (1976) (carving out exceptions to the two-year statute of limitations and five-year statute of repose for minors and mentally incompetent persons). The Georgia legislature did not codify the discovery rule for medical malpractice until 1976. 1976 Ga. Laws 1363, § 1. Georgia lagged behind many of its neighbors in adopting the discovery rule for medical malpractice, including South Carolina, which adopted it in 1962. S.C. CODE ANN. § 15-3-545 (1962).

guarantee a court-adjudicated inquisition at the outset of most professional liability actions.

II. ANALYSIS

Effective statutes of limitations "relieve[] the court system from dealing with 'stale' claims, and protect potential defendants from protracted fear of litigation."[63] Without a clearly defined statute of limitations, a cause of action has an unlimited life span.[64] Effective statutes of limitations should protect the interests of all parties involved, without favoring one party over the other.[65] Statutes of limitations can be particularly problematic in this regard because they dispose of a claim based on time, instead of the merits of the case.[66] Even meritorious claims can fall on the statute of limitations without ever getting a day in court.[67] Safeguarding against this potential problem is especially important in the context of legal malpractice.[68] Clients begin disputes at a distinct disadvantage because of attorneys' superior knowledge of the law.[69] Many states attempt to even the playing field in a number of ways.[70]

Aside from Georgia and Arkansas, every state attempts to mitigate the inherent inequality of the occurrence rule by modifying their legal malpractice statutes of limitations.[71] Most states adopted the discovery rule for legal malpractice, and in those states the statute of

63. Gebhardt v. O'Rourke, 510 N.W.2d 900, 905 (Mich. 1994). For a discussion of statutes of limitation in general, see *supra* note 26.

64. *See* Joseph H. Koffler, *Legal Malpractice Statutes of Limitations: A Critical Analysis of a Burgeoning Crisis*, 20 AKRON L. REV. 209, 211 (1986).

65. *See id.* at 212.

66. *See id.* at 216.

67. *See id.*

68. *See id.*

69. Larson & Larson, P.A. v. TSE Indus., Inc., 22 So. 3d 36, 45 (Fla. 2009) (explaining and later rejecting the continuous representation rule for Florida (citing Alagia, Day, Trautwein & Smith v. Broadbent, 882 S.W.2d 121, 125 (Ky. 1994))); *see also* Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 428 (Cal. 1971).

70. *See infra* Parts II.B–D.

71. *See* Antone v. Mirviss, 720 N.W.2d 331, 335 (Minn. 2006) ("[Under] the traditional 'occurrence' rule . . . the statute of limitations begins to run simultaneously with the performance of the negligent or wrongful act. . . . Most jurisdictions have moved away from the occurrence rule."). The Minnesota Supreme Court went on to reject the occurrence rule, because of the potential to encourage "wasteful economic behavior" by attorneys and clients. *Id.* at 335–36.

limitations does not begin to run until the plaintiff-client knew or should have known of the attorney's negligence.[72] Other states have also moved to the damage rule, which does not start the statute of limitations until the plaintiff-client suffers actual damage.[73] Other states have modified these rules with the continuous representation rule, which tolls the statute of limitations while the prospective plaintiff and defendant remain in an attorney-client relationship.[74]

If the states are the laboratories of democracy[75] in the ongoing experiment on legal malpractice, then Georgia and Arkansas are the control group. Georgia often takes the pragmatic approach of letting other states experiment with new legal concepts before adopting them.[76] In the case of legal malpractice statutes of limitations, forty-eight states have experimented with different approaches for decades.[77] Their experiences aide in evaluating the relative merits of each approach. Aside from the two relatively minor exceptions discussed in Part IIA, *infra*, Georgia still rigorously adheres to the occurrence rule.[78] As such, Georgia serves as an excellent base to compare and contrast the benefits and pitfalls of other states' statutes of limitations.[79]

A. Georgia's Application of the Occurrence Rule

Georgia's unaltered occurrence rule strongly favors defendants, especially unscrupulous defendants.[80] Essentially, the attorney has a

72. *See generally* FIFTY-STATE SURVEY, *supra* note 12.

73. Mental Health Assocs., Inc. v. Carlson, 835 S.W.2d 551, 553 (Mo. Ct. App. 1992).

74. Barnes v. Turner, 606 S.E.2d 849, 852 (Ga. 2004).

75. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

76. *See, e.g.*, Paul S. Milich, *Georgia's New Evidence Code—An Overview*, 28 GA. ST. U. L. REV. 379, 380–82 (2011) (discussing the slow evolution of Georgia's Evidence Code); *see generally* Erwin C. Surrency, *The Georgia Code of 1863 and its Place in the Codification Movement*, 11 J. S. LEGAL HIST. 81 (2003). The current version of the Official Code of Georgia still contains a significant number of vestiges from the 1863 Code, also known as the "Cobb Code" after its primary author. *Id.*

77. *See generally* FIFTY-STATE SURVEY, *supra* note 12.

78. Hunter, Maclean, Exley & Dunn, P.C. v. Frame, 507 S.E.2d 411, 412 (Ga. 1998).

79. *See* FIFTY-STATE SURVEY, *supra* note 12.

80. Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1689–90 (1994) (discussing how suits are often barred under the occurrence rule).

"head start" in crafting a statute of limitations defense.[81] Attorneys are experts on the law and know—or at least should know—when their representation fell below the standard of care. Attorneys who know that they committed a negligent act or omission have a duty to disclose that fact to a client.[82] If they do not make that disclosure, many clients remain blissfully unaware of the attorney's negligent act until it is too late. That stark realization often does not come until a client loses a case.[83] If a case runs for four years past the attorney's negligent act, the client is highly unlikely to discover the attorney's negligence until the statute of limitations has run.

Under the framework put forth in *Newell Recycling*, most fee agreements are too vague to constitute a complete contract, precluding a six-year statute of limitations.[84] Defendant-attorneys can circumvent section 9-3-96, the statute that tolls the statute of limitations for fraud, by avoiding writing or saying anything incriminating to their—usually former—clients.[85] The attorney may also take any number of measures that could be interpreted as normal representation of the client but are really intended to protect the attorney.[86] These actions are usually justifiable should the client ever

81. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 424–25 (Cal. 1971); *see also* Dvorak, *supra* note 34, at 255–59.

82. GA. RULES OF PROF'L CONDUCT R. 1.4 (2001) (imposing a duty to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required" and to "keep the client reasonably informed about the status of the matter"); GA. RULES OF PROF'L CONDUCT R. 1.7 ("A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests . . . will materially and adversely affect the representation of the client" unless the client gives informed consent to continued representation.).

83. Antone v. Mirviss, 720 N.W.2d 331, 335–36 (Minn. 2006) (adopting the damage rule and explaining that "the cause of action accrues and the statute of limitations begins to run when 'some' damage has occurred" (citing Herrmann v. McMenomy & Severson, 590 N.W.2d 641, 643 (Minn. 1999))).

84. Frates v. Sutherland, Asbill & Brennan, 296 S.E.2d 788, 791 (Ga. Ct. App. 1982) ("[T]he [engagement] letter merely confirms representation in broad terms and outlines in detail only the fee arrangement between the parties. It clearly does not constitute the entire agreement for legal services between the parties.").

85. Shores v. Troglin, 580 S.E.2d 659, 660–61 (Ga. Ct. App. 2003) (denying the appeal of an appellant who lost in summary judgment on a statute of limitations defense, because the appellant was not able to produce any evidence of "an independent act of fraud" (citing Hunter, Maclean, Exley & Dunn v. Frame, 507 S.E.2d 411, 413–14 (Ga. 1998))); *see* Richard C. Ruskell, *Fraud of the Defendant*, *in* DAVIS AND SHULMAN'S GEORGIA PRACTICE AND PROCEDURE, § 30:14 (2015–2016 ed.).

86. *See* Ruskell, *supra* note 85, at § 30:14.

try to toll the statute for fraud.[87] When the time comes to answer questions about why it took the client so long to find out about the alleged negligent act, an attorney merely has to "play dumb" so that it appears simple negligence, not fraud, was the reason the client never found out about the malpractice.[88] Georgia's narrow allowance to toll the statute of limitations for fraud presents unscrupulous attorneys ample opportunity to escape liability for negligence.[89]

Tolling the statute of limitations for fraud is one of two small concessions that Georgia has afforded to legal malpractice plaintiffs.[90] "[T]he fraud which will relieve the bar of the statute of limitation must be of that character which involves moral turpitude, and must have the effect of debarring and deterring the plaintiff from his action."[91] Fraud of the nature and magnitude required by Georgia courts to toll the statute is very difficult to prove, especially when the proof of fraud lies in the hands of an attorney fighting to protect his career and professional reputation.[92] Additionally, when interpreting O.C.G.A. § 9-3-96, courts have unequivocally held that gross negligence that leads to passive concealment of malpractice will not toll the statute of limitations.[93]

87. O.C.G.A. § 9-3-96 (2016) (allowing a plaintiff to toll the statute of limitations for fraud, with the statute beginning to run when the plaintiff discovers the fraud).

88. Godwin v. Mizpah Farms, L.L.L.P., 766 S.E.2d 497, 506 (Ga. Ct. App. 2014) (finding no actual evidence of fraud that would toll the statute of limitations, and noting that "under Georgia law, fraud that gives rise to a cause of action does not necessarily establish the fraud necessary to toll the statute of limitation" (quoting Hendry v. Wells, 650 S.E.2d 338, 344 (Ga. Ct. App. 2007))).

89. *See, e.g.*, Barnes v. Turner, 606 S.E.2d 849, 852 (Ga. 2004); *Hunter*, 507 S.E.2d at 412; *Shores*, 580 S.E.2d at 660–61.

90. O.C.G.A. § 9-3-96 (2016). While this exception is small, it is essential in a jurisdiction that uses the occurrence rule without the continuous representation rule. George L. Blum, *Attorney Malpractice—Tolling or Other Exceptions to Running of Statute of Limitations*, 87 A.L.R.5th 473, § 2[b] (2001).

91. Riddle v. Driebe, 265 S.E.2d 92, 95 (Ga. Ct. App. 1980) (holding that statements by the attorney to the client that documents he prepared were legally sufficient was not "actionable as actual fraud nor designed to deter or debar Riddle from bringing suit"); Wood v. Noland Credit Co., 149 S.E.2d 720, 721 (Ga. Ct. App. 1966) (explaining that broken promises do not equate to fraud); *see also Shores*, 580 S.E.2d at 661 (declining to toll the statute because the plaintiff failed to present any "evidence of an independent act of fraud that prevented him from discovering the alleged malpractice or filing suit").

92. Hyman v. Jordan, 412 S.E.2d 615, 617 (Ga. Ct. App. 1991) (declining to toll the statute because the plaintiff "did not show that [he] was prevented or deterred by any act of [the defendants] from discovering [their] alleged negligence" (citing Kilby v. Shepherd, 339 S.E.2d 742, 744 (Ga. Ct. App. 1986))).

93. *Hunter*, 507 S.E.2d at 413 ("[I]t must be shown that the defendant concealed information by an intentional act—something more than a 'mere failure, with fraudulent intent, to disclose such

Georgia's second concession to legal malpractice plaintiffs is the so-called "springing statute of limitations."[94] In *Barnes v. Turner*, the defendant attorney failed to inform a client that the U.C.C. liens the attorney filed on his behalf needed to be renewed in five years.[95] That failure occurred in 1996, but the plaintiff did not discover the attorney's failure until 2002—six years after the negligent act.[96] The court, aware of the fact that the lien had to be renewed in five years and that the legal malpractice statute of limitations is four years, recognized the inherent incompatibility between the statute of limitations and the cause of action.[97] Rather than find that the negligent act took place in 1996 with the attorney's failure to inform the client of the renewal requirement, the Court held that the attorney had an ongoing duty to "safeguard [the client's] security interest."[98] After *Barnes*, the springing statute of limitations applies when attorneys assume an obligation to safeguard a client's long-term interests, even after the four-year statute of limitations has run.[99] Although the Court carved out a small accommodation to legal malpractice plaintiffs in *Barnes*, it also took the opportunity to expressly reject the continuous representation rule.[100]

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conduct . . . .'" (quoting Shipman v. Horizon Corp., 267 S.E.2d 244 (Ga. Ct. App. 1980))); Farmers State Bank v. Huguenin, 469 S.E.2d 34, 36 (Ga. Ct. App. 1996) ("Negligence, even gross negligence, does not generally constitute fraud involving moral turpitude.").

94. EVANS & KLEVENS, *supra* note 52, § 2-4:4.4.

95. Barnes v. Turner, 606 S.E.2d 849, 850 (Ga. 2004).

96. *Id.*

97. *Id.* at 851–52.

98. *Id.* at 852.

99. Hamburger v. PFM Capital Mgmt., 649 S.E.2d 779, 785–86 (Ga. Ct. App. 2007) (explaining the springing statute of limitations established in *Barnes v. Turner* but declining to apply it, holding that it only applies to legal malpractice).

100. *Barnes*, 606 S.E.2d at 852 (rejecting the continuous representation rule without explanation). In his dissenting opinion, Justice Benham accused the majority of adopting the continuous representation rule along with the springing statute of limitations. *Id.* at 853–55 (Benham, J. dissenting). The springing statute of limitations keeps the attorney–client relationship alive for long-term obligations that last beyond the four-year statute of limitations by holding that the attorney owes the client a long-term duty absent a contractual provision or other writing expressly terminating the relationship. *Id.* at 851–52. What the majority was essentially saying, according to Justice Benham, was that the long-term duty created a long-term attorney–client relationship, and that relationship tolls the statute of limitations. *Id.* at 852–55 (Benham, J., dissenting). In *Barnes*, both the majority and dissent rejected the continuing representation rule. *Id.*

The South Carolina Supreme Court expanded upon its rejection of the continuous representation rule in *Epstein*. Epstein v. Brown, 610 S.E.2d 816 (S.C. 2005). The continuous representation rule evolved out

B. The Continuous Representation Rule

The continuous representation rule tolls the statute of limitations while the prospective plaintiff and defendant remain in an attorney–client relationship.[101] The Georgia Supreme Court flatly rejected the continuous representation rule in *Hunter, Maclean, Exley & Dunn, P.C. v. Frame* and *Barnes v. Turner*.[102] In *Hunter,* the Court expressed concern that tolling the statute of limitations while the attorney and client are in an ongoing relationship would give the client the ability to toll the statute indefinitely.[103] The Court reasoned that under such a rule, a client could continue the confidential relationship indefinitely, "even if the plaintiff was fully aware of the facts underlying his allegation of malpractice, but merely slept on his right to bring suit."[104] By contrast, the defendant attorney in such a situation could only stop the statute from tolling by severing the confidential relationship and exposing himself to a malpractice suit.[105]

Georgia courts are not alone in their rejection of the continuous representation rule, although they are more vociferous than other states. In Florida, some appellate courts adopted the continuous representation rule until the Florida Supreme Court expressly rejected it in 2009.[106] Florida uses the discovery rule for professional malpractice and enumerates instances that toll the statute of limitations.[107] The Florida Supreme Court held that the omission of

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of the continuous treatment rule from medical malpractice. Hipple v. McFadden, 255 P.3d 730, 737 (Wash. Ct. App. 2011). In *Preer v. Mims*, the South Carolina rejected the continuous treatment doctrine. Preer v. Mims, 476 S.E.2d 472, 473–74 (S.C. 1996). Because of the similarity between the two rules, the South Carolina Supreme Court declined to adopt the continuous representation rule. *Epstein*, 610 S.E.2d at 818–19.

101. *Barnes*, 606 S.E.2d at 852.

102. Hunter, Maclean, Exley & Dunn v. Frame, 507 S.E.2d 411, 415 (Ga. 1998); *Barnes*, 606 S.E.2d at 852.

103. *Hunter*, 507 S.E.2d at 415.

104. *Id.*

105. *Id.*

106. Larson & Larson, P.A. v. TSE Industries, Inc., 22 So. 3d 36, 46 (Fla. 2009).

107. FLA. STAT. § 95.11 (2016). The relevant code provision states:

> An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run [for two years] from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions

an ongoing attorney–client relationship from the enumerated acts was sufficient evidence of the legislature's intent to adopt the discovery rule without the continuous representation rule and declined to adopt the rule in the absence of statutory authority.[108] South Carolina, another neighboring state that uses the discovery rule, has also declined to adopt the continuous representation rule in the absence of statutory authority.[109]

Other states have taken a contrary position on the continuous representation rule. Indiana, for example, adopted the continuous representation rule primarily to "avoid disrupting the attorney–client relationship."[110] Indiana and many other states are concerned that under the occurrence rule, a client may be forced to terminate an attorney's representation during ongoing litigation to sue the attorney for malpractice, disrupting the underlying lawsuit to create a new one.[111] In New York, the statute of limitations is three years, running from the date of the negligent act.[112] The New York Court of Appeals found the continuous representation rule appropriate in light of the special relationship of trust and confidence between attorney and client.[113]

> herein for professional malpractice shall be limited to persons in privity with the professional.

Id. Section 95.051 lists nine acts or events that toll the statute of limitations in Florida. FLA. STAT. § 95.051 (2016).

108. *Larson & Larson, P.A.*, 22 So. 3d at 46 ("In sum, the position urged by TSE and the analysis employed by the Second District are wholly detached from the governing statute, which ties the running of the limitations period for lawyer malpractice claims to 'the time the cause of action is discovered or should have been discovered.'").

109. Epstein v. Brown, 610 S.E.2d 816, 820 (S.C. 2005) ("[I]n light of the Legislature's declaration that an action 'must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known he had a cause of action,' we decline to adopt the continuous representation rule.").

110. Biomet, Inc. v. Barnes & Thornburg, 791 N.E.2d 760, 765 (Ind. Ct. App. 2003) (citing RONALD E. MALLEN & JEFFERY M. SMITH, 3 LEGAL MALPRACTICE § 22.13, at 430–31 (5th ed. 2000)).

111. *Biomet*, 791 N.E.2d at 765–66.

112. N.Y.C.P.L.R. 214 (McKinney 2015); Citibank, N.A. v. Suthers, 68 A.D.2d 790, 795 (N.Y. App. Div. 1979).

113. Glamm v. Allen, 439 N.E.2d 390, 393 (N.Y. 1982) (applying the continuous representation rule, reasoning that "since it is impossible not to envision a situation where commencing a malpractice suit would not affect the professional relationship, the rule of continuous representation tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed"). The special relationship of trust and confidence is an often-cited justification for the continuous representation rule. *See, e.g.*, Keaton Co. v. Kolby, 271 N.E.2d 772, 774 (Ohio 1971). Ohio's Supreme

Changing attorneys during the course of ongoing litigation can be fatal to both the underlying dispute and the subsequent legal malpractice action.[114] Under the occurrence rule, clients may be forced into a choice of suing their attorney before the underlying suit has ended or filing suit against their attorney during the course of ongoing litigation to preserve the claim before the statute of limitations expires.[115] Should the client choose to file the malpractice claim during representation, the client will likely have to find a new attorney for the remainder of the underlying dispute.[116] In the subsequent legal malpractice action, the negligent attorney's defense counsel can attack causation by contending that the client's rash decision to fire the defendant attorney, not the defendant attorney's negligence, was the proximate cause of damage in the underlying case.[117]

Some states have argued that the continuous representation rule is good for both attorney and client.[118] Unlike the occurrence rule, the continuous representation rule does not force a client in an ongoing confidential relationship with an attorney to file suit quickly in fear of the statute of limitations expiring.[119] Under this theory, tolling the statute of limitations during an ongoing confidential relationship buys the attorney time to correct the problem that led to the client's dissatisfaction before the client is compelled to file suit to preserve

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Court held that the attorney–client relationship requires the same degree of trust and confidence as the doctor–patient relationship. *Id.* The Ohio Supreme Court reasoned that in light of the similar level of trust and confidence, it was appropriate to apply the continuous treatment rule from medical malpractice to legal malpractice actions as the continuing treatment rule. *Id.*

114. *Glamm*, 439 N.E.2d at 393 ("Neither is a person expected to jeopardize his pending case or his relationship with the attorney handling that case during the period that the attorney continues to represent the person.").

115. *Id.*

116. *Id.*

117. *See* Rosenfield v. Rogin, Nassau, Caplan, Lassman & Hirtle, L.L.C., 795 A.2d 572, 580 (Conn. App. Ct. 2002) (discussing the policy reasons underpinning the continuous representation rule); *see also* Ronald E. Mallen, *Limitations and the Need for "Damages" in Legal Malpractice Actions*, 60 DEF. COUNS. J. 234, 247 (1993).

118. Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C., 37 P.3d 309, 314 (Wash. Ct. App. 2001).

119. Epstein v. Brown, 610 S.E.2d 816, 818–19 (S.C. 2005) (discussing the policy reasons behind rejection of the continuous representation rule).

the statute of limitations.[120] In *Janicki Logging v. Schwabe*, the Washington Court of Appeals adopted the continuous representation rule using this rationale in a state where "the decision of when to toll the statute of limitations [is] a 'matter of judicial policy.'"[121]

Another persuasive argument for the continuous representation rule is that it eliminates an element of subjectivity from the determination of when the statute of limitations begins to accrue.[122] Parties are either in an attorney–client relationship or they are not.[123] The continuous representation rule eliminates the inherent harshness of the occurrence rule but does not require the same sort of analysis of the attendant facts required under either the damage rule or the discovery rule.[124] Regardless, *Hunter, Maclean, Exley & Dunn, P.C. v. Frame* strongly suggests that the Georgia Supreme Court will not unilaterally change a statute of limitations, and any action would need to come through the General Assembly.[125]

C. The Damage Rule

Damages are usually the last element of a legal malpractice claim to materialize.[126] The damage rule recognizes this fundamental proposition and pegs the accrual of the statute of limitations to the plaintiff sustaining damage.[127] Unlike the discovery rule, the existence of damage, not the plaintiff's knowledge of damage, starts

120. Jennifer Thornton, Comment, *Louisiana Revised Statute Section 9:5605: A Louisiana Lawyer's Best Friend*, 74 TUL. L. REV. 659, 667–68 (1999).

121. *Janicki*, 37 P.3d at 315 (citing Peters v. Simmons, 552 P.2d 1053 (Wash. 1976)).

122. James L. Floyd, III, *South Carolina Tort Law: For Whom The Statute of Limitations Tolls—The Epstein Court's Rejection of the Continuous Representation Rule*, 57 S.C. L. REV. 643, 662 (discussing South Carolina Supreme Court Chief Justice Toal's dissent and her desire to create a "bright line rule" to create certainty as to when the statute of limitations actually begins accruing).

123. DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE, 4–8 (1980).

124. *Id.* at 75.

125. Hunter, Maclean, Exley & Dunn v. Frame, 507 S.E.2d 411, 413 (Ga. 1998) ("[P]rescribing periods of limitation is a legislative, not a judicial, function . . . .").

126. MEISELMAN, *supra* note 123, at 55–59; *see also* Dalton v. Dow Chem. Co., 158 N.W.2d 580, 585 (Minn. 1968) ("Until there is *some* damage, there is no claim . . . ." (citing Brush Beryllium Co. v. Meckley, 284 F.2d 797, 800 (6th Cir. 1960))).

127. Antone v. Mirviss, 720 N.W.2d 331, 335–36 (Minn. 2006) (adopting the damage rule and explaining that "the cause of action accrues and the statute of limitations begins to run when 'some' damage has occurred" (quoting Herrmann v. McMenomy & Severson, 590 N.W.2d 641, 643 (Minn. 1999))).

the accrual of the statute of limitations.[128] Litigation regarding statutes of limitations under the damage rule generally centers around how much damage suffices to begin accrual of the statute of limitations.[129] Some states, like Minnesota, have required "compensable damage" before the statute begins accruing.[130]

Idaho uses the damage rule for legal malpractice actions, despite using a statute of limitations that looks like the occurrence rule.[131] The courts in Idaho have adopted a somewhat flexible definition of damages.[132] In rejecting Minnesota's compensable damage requirement, Idaho courts have allowed the statute of limitations to begin running for damages other than an adverse judgment in the underlying case.[133] Idaho's broad interpretation of damages allows the courts some flexibility in determining when damages began to accrue, which in turn gives them flexibility to make rulings on the statute of limitations that make sense in each individual case.[134]

It is hard to argue against the simplicity of the damage rule. The rule keeps with generally accepted principles of tort law, namely the principle that there can be no cause of action without damages.[135] Even though the cause of action can hardly be described as anything other than negligence, many jurisdictions cling to the notion that professional liability is either a breach of contract or a strange hybrid of negligence and breach of contract.[136] Georgia is one of those

128. Jay A. Summerville, *State of Missouri*, *in* FIFTY-STATE SURVEY, *supra* note 12, at 276 (discussing Missouri's application of the damage rule).

129. Fairway Dev. Co. v. Petersen, Moss, Olsen, Meacham & Carr, 865 P.2d 957, 959–60 (Idaho 1993) (providing a history of how Idaho courts have interpreted "some damage" since adaptation of the damage rule).

130. *Antone*, 720 N.W.2d at 336.

131. IDAHO CODE § 5-219(4) (2015). The Idaho Supreme Court explained the statute of limitations as follows: "Idaho law provides that the statute of limitations on a professional malpractice claim will expire two years following the occurrence, act or omission complained of, barring fraudulent or knowing concealment of the injury, and will not be extended due to any continuing consequences, damages, or continuing professional relationship." *Fairway Dev. Co.*, 865 P.2d at 959.

132. Keely E. Duke, *State of Idaho*, *in* FIFTY-STATE SURVEY, *supra* note 12, at 131.

133. McColm-Traska v. Baker, 88 P.3d 767, 772 (Idaho 2004) (holding that Idaho does not require an adverse ruling prior to pursuing a professional liability action).

134. *Fairway Dev. Co.*, 865 P.2d at 959–60 (providing a history of how Idaho courts have interpreted "some damage" since adaptation of the damage rule and illustrate how Idaho judges have the leeway to make the statute of limitations accrue at a point that is appropriate in each individual case).

135. WILLIAM J. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971).

136. MEISELMAN, *supra* note 123, at 18–19.

jurisdictions, considering professional liability a breach of an incomplete written or oral agreement.[137]

In Georgia, nominal damages are available for legal malpractice.[138] Although "nominal damages" is a relative term, it may be no more than a "trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained."[139] Given this definition of nominal damages, defendants could and likely would argue that plaintiffs suffered not even a "trifling sum" of damages at the time the negligent act occurred.[140] If the General Assembly or the courts were to adopt the damage rule without readdressing the availability of nominal damages in legal malpractice actions, it would be nothing more than a repackaged occurrence rule.[141]

D. The Discovery Rule

The discovery rule traces its lineage to principles first established to address medical malpractice.[142] Most jurisdictions, including

137. Jones, Day, Reavis & Pogue v. Am. Envirecycle, Inc., 456 S.E.2d 264, 266 (Ga. Ct. App. 1995) (applying section 9-3-25 of Georgia's code, the statute of limitations for breach of an incomplete written or oral agreement).

138. Jankowski v. Taylor, Bishop & Lee, 273 S.E.2d 16, 18 (Ga. 1980*)*; *see also* Kirby v. Chester, 331 S.E.2d 915, 917 (Ga. Ct. App. 1985). "Nominal damages have been held not to be recoverable where the theory of liability sounds in tort rather than contract. The rationale is that an attorney should be liable only for causing actual harm." RONALD E. MALLEN & ALLISON MARTIN RHODES, 3 LEGAL MALPRACtice § 21:5 (2016).

139. Sellers v. Mann, 39 S.E. 11, 11 (Ga. 1901) (quoting 2 BOUVIER'S LAW DICTIONARY 504).

140. O.C.G.A. § 51-12-4. "If an injury is small or the mitigating circumstances are strong, nominal damages only are given." *Id.* "Damages compensate from injury and may be inferred from invasion of a property right. Where no actual damage flows from the injury, nominal damages may be awarded. Yet, some injury—even if small or nominal—is necessary." Conner v. Hart, 555 S.E.2d 783, 786 (Ga. Ct. App. 2001) (discussing when nominal damages are appropriate). Nominal damages may be awarded even for minor injuries, such as those that usually happen at the time of the defendant attorney's negligent act. *Id.*

141. MALLEN & RHODES, *supra* note 138, at § 21:5. According to Mallen and Rhodes:

The concept of nominal damages, however, does serve a necessary function in those jurisdictions that purport to follow the rule that a statute of limitations commences to run when the negligence occurs. If suit must be brought within a specified period from the wrongful act or omission, and before any actual damages occur, nominal damages are indispensable to a cause of action. As the use of the occurrence rule declines, so should the need to sue for nominal damages. Both are anachronisms in legal malpractice litigation. Ironically, very few decisions discussing the right to recover nominal damages have affirmed or awarded such a judgment.

Id.

142. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 426 (Cal. 1971).

Georgia, believe that it is inherently unfair to allow the statute of limitations to begin accruing before the plaintiff-patient even knows that he should be filing a lawsuit.[143] In recognition of that potential for injustice, thirty-eight states do not begin to run the statute of limitations until the plaintiff knows or should have known with due diligence the existence of the cause of action.[144]

California was an early adopter of the discovery rule.[145] California adhered to the occurrence rule until 1970.[146] In 1971, the California Supreme Court found the policy behind the discovery rule compelling enough to adopt it outright.[147] Like the continuous representation rule, the discovery rule recognizes the special trust and confidence that the client places in the attorney.[148] The California Supreme Court found it problematic that attorneys were shielded from liability that applied to other professions where the relationship between professional and client is not as interdependent.[149] It also

143. Clark v. Singer, 298 S.E.2d 484, 486 (Ga. 1983) ("To impose a limitation period which may be exhausted before the cause of action accrues (i.e., before the patient dies), arbitrarily distinguishes between wrongful death, medical malpractice plaintiffs.").

144. Antone v. Mirviss, 720 N.W.2d 331, 335 (Minn. 2006) ("At the other end of the spectrum is the 'discovery' rule, under which the cause of action accrues and the statute of limitations begins to run only when the plaintiff knows or should know of the injury.").

145. MEISELMAN, *supra* note 123, at 74.

146. U.S. Liab. Ins. Co. v. Haidinger-Hayes, Inc., 463 P.2d 770, 776 (Cal. 1970) (explaining precedent in California for statutes of limitations and finding that "[t]he rule that the cause of action accrues when the negligent act occurs has been strictly applied in *attorney* malpractice situations").

147. *Neel*, 491 P.2d at 432–33. In *Neel*, the California Supreme Court noted that while appellate court opinions in California had characterized the occurrence rule as harsh, unfair, and discriminatory in the past and carved out individual exceptions to the rule, none were willing to adopt the discovery rule outright until this case. *Id.* at 426–27.

148. *Id.* at 428.

149. *Id.* at 429. ("The relation between attorney and client is a fiduciary relation of the highest character." (quoting Cox v. Delmas, 33 P. 836, 839 (Cal. 1893))). The Court summarized its view on how the discovery rule protects the integrity of the profession at the end of the case:

> [I]n our complex and inter-dependent society, human relations are ever being further fit into a framework of legal rights and responsibilities, and, this process must broaden and deepen. Today, then, is no time to perpetuate an anachronistic interpretation of the statute of limitations that permits the attorney to escape obligations which other professionals must bear. The legal calling can ill afford the preservation of a privileged protection against responsibility, a privilege born of error, subject to almost universal condemnation, and, in present-day society, anomalous.

Id. at 433–34.

recognized the occurrence rule's potential abuse by defendant-attorneys:

> [W]hen an attorney raises the statute of limitations to occlude a client's action before that client has had a reasonable opportunity to bring suit, the resulting ban of the action not only starkly works an injustice upon the client but partially impugns the very integrity of the legal profession.[150]

All of Georgia's neighbors have adopted some variation of the discovery rule.[151] Like most states, South Carolina and California chose to adopt the discovery rule for similar reasons.[152] South Carolina did, however, explicitly state that "reasonable diligence" requires "some promptness" by the plaintiff after discovery of the cause of action.[153] Additionally, discovery triggers accrual of the statute.[154] This does not require a "full blown theory of recovery" but must be more than a mere conversation with the attorney.[155] Tennessee's discovery rule evaluation places weight on the significance of damage to the plaintiff.[156] Like South Carolina, Tennessee does not require the plaintiff to fully develop a legal theory to satisfy the knowledge requirement of the discovery rule; the state requires only that he knows the existence of the cause of action in general.[157]

Alabama may be one of the few states more judicially conservative than Georgia.[158] It is one of the four remaining states that still uses

150. *Id.* at 431.

151. ALA. CODE § 6-5-574 (1975); FLA. STAT. § 95.11(4)(a) (2016); N.C. GEN STAT. § 1-15(C) (2015); S.C. CODE ANN. §§ 15-3-530, -535 (2016); John Kohl & Co. v. Dearborn & Ewing, 977 S.W.2d 528, 532 (Tenn. 1998).

152. Santee Portland Cement Co. v. Daniel Int'l Corp., 384 S.E.2d 693, 694–95 (S.C. 1989) (discussing the policy reasons behind South Carolina's adoption of the discovery rule for professional liability actions).

153. Epstein v. Brown, 610 S.E.2d 816, 818 (S.C. 2005).

154. *Id.*

155. *Id.*

156. *John Kohl & Co.*, 977 S.W.2d at 532.

157. *Id.* at 533.

158. *See Political Outlook of State Supreme Court Justices*, BALLOTPEDIA,

the archaic and harsh rule of contributory negligence as a complete bar to recovery in negligence actions.[159] For all intents and purposes, Alabama's basic legal malpractice statute of limitations is a fairly restrictive version of the damage rule.[160] In Alabama, a legal malpractice suit must be filed within two years accrual of the cause of action, with a four-year statute of repose.[161] Even under this restrictive regime, the Alabama legislature does allow a plaintiff to bring an action "within six months of the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery."[162] Alabama's discovery rule is draconian and limited, but it still protects a wronged plaintiff better than the occurrence rule.[163] The wronged client must move quickly, but potentially meritorious claims are not dead merely because the statute of limitations ran before the client had any chance to find out about the cause of action.[164]

North Carolina, another one of Georgia's neighbors that has chosen to remain in the minority of states that still adhere to contributory negligence as an absolute bar to recovery, has taken a less draconian approach to legal malpractice.[165] North Carolina has a

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ballotpedia.org/Political_outlook_of_state_supreme_court_justices (last visited Oct. 30, 2016).

159. Williams v. Deltan Int'l Mach. Corp., 619 So.2d 1330, 1333 (Ala. 1993). It appears that by the end of the twentieth century, the Alabama Supreme Court was upholding the doctrine of contributory negligence out of inertia:

> We have heard hours of oral argument; we have read numerous briefs; we have studied cases from other jurisdictions and law review articles; and in numerous conferences we have discussed in depth the issue and all of the ramifications surrounding such a change. After this exhaustive study and these lengthy deliberations, the majority of this Court, for various reasons, has decided that we should not abandon the doctrine of contributory negligence, which has been the law in Alabama for approximately 162 years.

Id. (citing Bethea v. Taylor, 3 Stew. 482 (Ala. 1831)). There have, however, been strong urgings to change the harsh contributory negligence rule in the past. *E.g.*, General Motors Corp. v. Saint, 646 So.2d 564, 568–69 (Ala. 1994) (Hornsby, C.J., dissenting). In *General Motors Corp. v. Saint*, Chief Justice Hornsby described the rule as archaic and overly harsh. *Id.*; *see also* Campbell v. Ala. Power Co., 567 So.2d 1222, 1227–31 (Ala. 1990) (Hornsby, C.J., dissenting).

160. Aaron G. McLeod & Stephen A. Rowe, *State of Alabama*, *in* FIFTY-STATE SURVEY, *supra* note 12, at 5–6.

161. ALA. CODE § 6-5-574 (1988); *see also* Michael v. Beasley, 583 So.2d. 245, 246 (Ala. 1991).

162. ALA. CODE § 6-5-574.

163. *See supra* Part II.A.

164. *See supra* Part II.A.

165. Hummer v. Pulley, Watson, King & Lischer, P.A., 536 S.E.2d 349, 354 (N.C. Ct. App. 2000);

three-year statute of limitations and a four-year statute of repose for legal malpractice.[166] North Carolina has statutorily modified its basic rule, adding the discovery rule and giving plaintiffs one year after discovery of the cause of action to file suit.[167]

Delaware's tangled mess of case law regarding the discovery rule illustrates what happens when the courts and the legislature do not speak with one voice on something as basic and important as a statute of limitations.[168] The Delaware legislature has imposed a three-year statute of limitations on legal malpractice.[169] Generally, Delaware courts have rigidly adhered to the statute of limitations.[170] At times, however, Delaware courts used the discovery rule to toll the statute of limitations.[171] This sort of inconsistency defeats one of the primary purposes of a statute of limitations: predictability.[172]

Hawaii, New Jersey, and Wisconsin all use the discovery rule and have a six-year statute of limitations.[173] A lengthy statute of limitations would violate two important policy drivers of the statute of limitations in Georgia.[174] A statute of limitations that does not begin to run until the plaintiff discovers the cause of action may extend well past six years after the occurrence of the negligent act.[175] The extreme gap between the negligent act and litigation greatly increases the likelihood that key evidence will not be available by the time the plaintiff actually files suit.[176] Additionally, the cause of

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see also Molly L. McIntosh, *State of North Carolina*, *in* FIFTY STATE SURVEY, *supra* note 12, at 365–67.

166. Molly L. McIntosh, *State of North Carolina*, *in* FIFTY STATE SURVEY, *supra* note 12, at 365–66.

167. *Id.* (citing N.C. GEN. STAT. § 1-15(c)).

168. Tanya E. Pino, *State of Delaware*, *in* FIFTY STATE SURVEY, *supra* note 12, at 81–83.

169. *Id.*

170. *Id.*

171. *Id.*

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

173. N.J. STAT. ANN. § 2A:14-1 (1963); WIS. STAT. ANN. § 893.53 (2006); Blair v. Ing, 21 P.3d 452, 472 n.17 (Haw. 2001).

174. Clark v. Singer, 298 S.E.2d 484, 486 (Ga. 1983).

175. *Id.* ("Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.").

176. *Id.*

action needs an expiration date so the negligent attorney does not live in the shadow of potentially pending litigation.[177]

Some states have adopted the discovery rule through judicial action and others have statutorily adopted it.[178] The Supreme Court of Georgia rejects the notion that it can adopt a statute of limitations in the absence of legislative action.[179] As such, they have never addressed the discovery rule in the context of professional liability.[180] Other states have criticized the discovery rule as providing "open-ended liability."[181] Some states do not believe that controls like those imposed by Georgia's neighbors go far enough to "defend stale claims, to preserve evidence, and to treat all plaintiffs equally."[182] Some courts prefer the more objective standard of the damage rule to the discovery rule's evaluation of the plaintiff's knowledge.[183] Thirty-eight states have rejected this rationale and adopted some variation of the discovery rule.[184]

III. PROPOSAL

The facts and experiences of other states strongly suggest that the discovery rule is the most effective statute of limitations for legal

177. *Id.* ("The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to peril over the right to prosecute.").

178. Larson & Larson, P.A. v. TSE Indus., Inc., 22 So. 3d 36, 46 (Fla. 2009) (overruling a lower court's unilateral adaptation of the continuous representation rule in Florida); Antone v. Mirviss, 720 N.W.2d 331, 336 (Minn. 2006) (judicially adopting the damage rule in Minnesota); Epstein v. Brown, 610 S.E.2d 816, 818–21 (S.C. 2005) (judicially adopting the discovery rule but declining to adopt the continuous representation rule because the South Carolina legislature had not adopted such a rule with its medical malpractice statute of limitations); Willis v. Maverick, 760 S.W.2d 642, 646 (Tex. 1988) (judicially adopting the discovery rule for Texas); Janicki Logging & Constr. Co., 37 P.3d. 309, 315 (Wash. Ct. App. 2001) (judicially adopting the damage rule for Washington). *But see* Hunter, Maclean, Exley & Dunn, P.C., v. Frame, 507 S.E.2d 411, 413 (Ga. 1998) (declining to judicially modify a statute of limitations).

179. *Hunter*, 507 S.E.2d at 413.

180. *See* Stafford-Fox v. Jenkins, 639 S.E.2d 610, 615–23 (Ga. Ct. App. 2006) (Andrews, J. concurring).

181. *Antone*, 720 N.W.2d at 335 (citing RONALD E. MALLEN & JEFFREY M. SMITH, 3 LEGAL MALPRACTICE § 22.15, at 420 (2006)).

182. Ragar v. Brown, 964 S.W.2d 372, 375 (Ark. 1998) (rationalizing Arkansas's continued adherence to the occurrence rule, even though the Court "recognize[d] the harshness of this rule").

183. Stephens v. Stearns, 678 P.2d 41, 46 (Idaho 1984).

184. *See generally* FIFTY-STATE SURVEY, *supra* note 12.

malpractice. The discovery rule protects clients by tolling the statute of limitations until the plaintiff discovers or reasonably should have discovered the attorney's negligence.[185] It eliminates the occurrence rule's "head start" for negligent attorneys to craft a statute of limitations defense by not accruing the statute of limitations until both the attorney and the client are aware of the cause of action.[186] It protects clients in all cases, not just the limited set of facts covered by the continuous representation rule.[187] Unlike the damage rule, there is no potential for the discovery rule to be eviscerated by Georgia's allowance of nominal damages for legal malpractice.[188] A discovery rule statute of limitations that balances the interests of all interested parties—the plaintiff-client, defendant-attorney, the legal profession, and the legislature—may look something like this:

a) An action for professional negligence against an attorney shall be brought within two years after the date on which the plaintiff discovered, or should have discovered, through the exercise of due diligence, all of the elements of the cause of action;
b) When an attorney undertakes to safeguard a client's security interest for longer than five years, or when the claim of negligence is based on wills or trusts where all of the elements of the cause of action could not reasonably be discovered within five years of the date on which the negligent act occurred, the action shall be brought within one year after the negligent or wrongful act or omission is discovered;
c) Except under the conditions outlined in subsection (b) and notwithstanding subsection (a), in no event may an action for professional negligence against an attorney be brought more than five years after

185. Epstein v. Brown, 610 S.E.2d 816, 818–21 (S.C. 2005).
186. *Id.* at 415.
187. *See supra* Part II.B.
188. *See supra* Part II.C.

> the date on which the negligent or wrongful act or omission occurred.

The discovery rule is not a one-size-fits-all rule. For example, states with as diverse priorities and political motivations as Utah and California have adopted the discovery rule for legal malpractice. Each of the thirty-eight states that have adopted some form of the discovery rule have adopted a version reflecting that state's priorities and interests.[189] Even states such as Texas, a state with an active tort reform movement, recognize the sense in adopting the discovery rule for legal malpractice.[190] Georgia's neighbors all have robust and active tort reform movements, yet they all have adopted some form of the discovery rule.[191] Thus, the adoption of the discovery rule for legal malpractice in Georgia would not be a novel development, provided that its version of the discovery rule reflects the state's values.

A. Practical Considerations for a Discovery Rule in Georgia

For Georgia to move past the occurrence rule, any version of the discovery rule must match Georgia's political and legislative priorities. Neither the Georgia courts nor the General Assembly have engaged in a serious discussion about adopting the discovery rule for legal malpractice, but it is not impossible to infer some important guiding principles. Many of the principles and considerations that led Georgia courts to shape the medical malpractice statute of limitations

189. *See generally* FIFTY-STATE SURVEY, *supra* note 12, at 495–96.

190. McClung v. Johnson, 620 S.W.2d 644, 646 (Tex. Civ. App. 1981); *see also Tort Reform in Texas: "Rove's Genius at Work*," PBS, http://www.pbs.org/wgbh/pages/frontline/shows/architect/texas/tort.html (Apr. 12, 2005). For a discussion of Texas's adaptation of the discovery rule for legal malpractice actions, see *supra* notes 1–9 and accompanying text.

191. Dan Berexa, *Three Years of Tennessee Tort Reform–The Essentials*, TENN. LAW BLOG (Aug. 5, 2013), http://www.tennlawblog.com/dan_berexas_tennessee_law/2013/08/recap-of-three-years-of-tennessee-tort-reform.html; Brian A. Comer, *South Carolina Tort Reform Statewide Becomes Effective January 1, 2012*, S.C. PROD. LIAB. LAW (Feb. 9, 2012, 8:59 AM), http://scproductsliabilitylaw.blogspot.com/2012/02/south-carolinas-tort-reform-statute.html; Carin Dorman Brock & George A. McMullin, *Tort Reform Legislation in Alabama*, BUTLER WEIHMULLER KATZ CRAIG (Apr. 1, 2012), http://www.butler.legal/tort-reform-legislation-in-alabama; *North Carolina Tort Reform and How it Affects You*, WILSON LAW (Jan. 17, 2014), http://www.wilsonlawpa.com/blog/north-carolina-tort-reform-and-how-it-affects-you.

into a fair, effective statute are no less applicable for legal malpractice.

In *Clark v. Singer*, the Supreme Court of Georgia analyzed the constitutionality of medical malpractice that results in death.[192] In that case, the plaintiff's husband died of carcinoma of the lung on June 11, 1979, and the plaintiff filed suit on June 8, 1981.[193] The plaintiff contended that the defendant doctors would have discovered the condition prior to June 3, 1978, had they exercised reasonable care.[194] In 1979, medical malpractice actions had a two-year statute of limitations running from the date of the negligent act.[195] The court held that "[t]o impose a limitation period which may be exhausted before the cause of action accrues (i.e., before the patient dies), arbitrarily distinguishes between wrongful death, medical malpractice plaintiffs" and that the statute of limitations did not begin to run until the plaintiff's husband actually died.[196]

Clark v. Singer and subsequent cases regarding the constitutionality of medical malpractice statutes of limitations are illustrative of Georgia's priorities. The *Clark* Court acknowledged that statutes of limitations are a means of guarding against stale claims and the prospect of endless litigation.[197] However, the Court criticized the prospect of a statute of limitations that allowed a claim to expire before it had fully formed to the point of being a cognizable claim.[198] The ultimate result of *Clark v. Singer* and its progeny was that, for medical malpractice cases, using the statute of limitations runs afoul of equal protection when barring a claim before the plaintiff discovers the injury.[199]

The Georgia courts and legislature have already determined that a two-year statute of limitations strikes an optimum balance between all of the different interests involved in a statute of limitations for

192. Clark v. Singer, 298 S.E.2d 484, 485 (1983).
193. *Id*.
194. *Id.*
195. *Id.*
196. *Id*. at 486.
197. *Id.*
198. *Clark*, 298 S.E.2d at 486.
199. *Trial Practice and Procedure*, *supra* note 13, at 369.

medical malpractice actions.[200] A two-year statute of limitations that runs from the date that the plaintiff discovers, or reasonably should have discovered all elements of the cause of action, including compensable damages, provides attorneys and clients with the same playing field that doctors and patients have for medical malpractice actions in Georgia.[201] For legal malpractice, most states that use the discovery rule have either a two- or three-year statute of limitations.[202] Georgia's policy determination regarding medical malpractice falls in line with most states' policy determinations for legal malpractice.

Statutes of repose are less common in states that use the discovery rule for legal malpractice, but a statute of repose is appropriate in Georgia. The General Assembly is not inclined to pass laws that make it easier to bring a lawsuit in the state.[203] A five-year statute of repose forecloses the prospect of endless litigation in the majority of cases.[204] The statute of repose may be problematic in some legal malpractice cases because the cause of action may not be discoverable for many years after a statute of repose has run.[205] Georgia has already addressed that problem judicially by implementing the springing statute of limitations.[206] It addressed a similarly problematic subset of medical malpractice—foreign objects left in the body after a medical procedure—by statutorily creating a special exception for such cases.[207] O.C.G.A. § 9-3-72 allows plaintiffs to bring an action within one year after discovery of the negligent act for foreign objects left in the body.[208] Thus, statutorily

200. *Clark*, 298 S.E.2d at 486.
201. O.C.G.A. § 9-3-71 (1976).
202. *See* FIFTY-STATE SURVEY, *supra* note 12, at 81, 130, 179.
203. *See, e.g.*, Walter C. Jones, *Pennington Says Tort Reform Will Help Him Cut Spending*, COLUMBIA CTY. NEWS-TIMES (Jan. 8, 2014, 12:10 AM), http://newstimes.augusta.com/news/2014-01-08/pennington-says-tort-reform-will-help-him-cut-spending. In the last gubernatorial primary election, Republican challenger David Pennington attacked Nathan Deal for "cozying up" with plaintiff's lawyers, and claiming that his further tort reform proposals would save the state and its businesses money. *Id.*
204. *Clark*, 298 S.E.2d at 486.
205. *See supra* notes 94–99 and accompanying text.
206. *See supra* notes 94–99 and accompanying text.
207. O.C.G.A. § 9-3-72.
208. *Id.*

adopting the springing statute of limitations for actions when attorneys assume an obligation to safeguard a client's long-term interests would not be so novel that it is impractical.[209]

B. Steps to Implementation

Public policy, precedence from the evolution of the medical malpractice statute of limitations, and the experiences of other states strongly indicate that the discovery rule is the fairest rule to apply for legal malpractice. However, the courts should not judicially adopt the rule.[210] A legislatively adopted statute of limitations eliminates confusing and, at times, contradictory case law.[211] The medical malpractice statute of limitations slowly evolved from the occurrence rule to the discovery rule through a series of constitutional challenges based on equal protection.[212] Ultimately though, the legislature codified the common law because "prescribing periods of limitation is a legislative, not a judicial, function."[213]

Even in light of its potential for abuse, Georgia's political environment is not ripe for a change to the legal malpractice statute of limitations. Various tort reform measures over the years have made it increasingly difficult to bring professional liability actions.[214] One of many examples of legislation the General Assembly has adopted to make most negligence actions more difficult is the

209. Hamburger v. PFM Capital Mgmt., Inc., 649 S.E.2d 779, 785–86 (Ga. Ct. App. 2007) (explaining the springing statute of limitations established in *Barnes v. Turner* but declining to apply it, holding that it only applies to legal malpractice).

210. Hunter, Maclean, Exley & Dunn, P.C. v. Frame, 507 S.E.2d 411, 413 (Ga. 1998) ("[P]rescribing periods of limitation is a legislative, not a judicial, function . . . .").

211. *See supra* notes 52–62 and accompanying text.

212. Peter Zablotsky, *From a Whimper to a Bang: The Trend Toward Finding Occurrence Based Statutes of Limitations Governing Negligent Misdiagnosis of Diseases with Long Latency Periods Unconstitutional*, 103 DICK. L. REV. 455, 456–70 (1998).

213. *Hunter*, 507 S.E.2d at 413.

214. Emily Ruth Boness, Note, *The Effect (or Noneffect) of the 2005 Amendments to O.C.G.A. Sections 51-12-31 and 51-12-33 on Joint Liability in Georgia*, 44 GA. L. REV. 215, 221–24 (2009) (discussing the history of the "tort reform" movement in Georgia); Laurin Elizabeth Nutt, Note, *Where Do We Go from Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia*, 28 GA. ST. U. L. REV. 1341, 1344–45 (2011).

requirement that plaintiffs file an affidavit from an expert explaining how the defendant's conduct fell below the standard of care.[215]

Statutes of limitations rarely receive the kind of attention that would compel legislative action. Public outcry can be a powerful way to induce decisive legislative action.[216] Most cases that would generate attention in the media and the kind of outcry that lead to positive change settle prior to issuance of a judicial opinion.[217] Lawyers, probably more than any other professionals, know the inherent value in certainty and confidentiality, especially when their professional reputation is on the line.[218] Cases with bad facts for defendant attorneys generally settle quickly and quietly.

The "perfect case" to effect positive change may not come along.[219] That is not an inherently bad thing for the profession because, overall, public attention on attorney malfeasance does more harm than good to the profession.[220] However, the lack of publicity on an uncertain and important issue imposes a greater burden on the profession to be self-regulating.[221] If and when the "perfect case" comes along and generates negative publicity on attorney malfeasance, and procedures are not in place to ensure that the victims of that malfeasance are protected in a fair manner, the public outcry will be directed against the profession for what the public will perceive as self-serving "technicalities" designed to keep suits against lawyers out of court.[222] If that is how the public perceives the "perfect case" to effect legislative change on the legal malpractice statute of limitations, the results will likely not be satisfying for the

215. O.C.G.A. § 9-11-9.1 (2007); *see also* Steve Cohen, *On Tort Reform, It's Time to Declare Victory and Withdraw*, FORBES (Mar. 2, 2015, 9:59 AM), http://www.forbes.com/sites/stevecohen/2015/03/02/on-tort-reform-its-time-to-declare-victory-and-withdraw/.

216. Ramos, *supra* note 80, at 1725.

217. *Id.* at 1659 (citing AM. BAR ASS'N, STANDING COMM. ON LAWYERS PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE: A STATISTICAL STUDY OF DETERMINATIVE CHARACTERISTICS OF CLAIMS ASSERTED AGAINST LAWYERS (1986)). "A full sixty-seven percent of claimants or plaintiffs receive no compensation, seventy percent of those who do settle receive less than $1,000, and only one percent go on to win at trial." *Id.* at 1660.

218. *Id.* at 1690.

219. *See supra* notes 216–218 and accompanying text.

220. Ramos, *supra* note 80, at 1725.

221. *Id.*

222. *Id.*

profession. It is better for the profession to be the drivers of change based on an analysis of all available facts and the experiences of the other states.

Although Georgia, like many states, is hesitant to "open the floodgates of litigation," legal malpractice actions are exceptional. Attorneys have an ethical duty to protect their clients' interests.[223] Unlike medical malpractice, legal malpractice does not have the potential to end lives, but the consequences of legal malpractice are often life-altering for plaintiff-clients, and the legislature and the profession should protect them accordingly.[224] The State Bar of Georgia should continue to use its influence with the legislature to push for any legislative clarity to legal malpractice and other professional liability statutes of limitations, even if that clarity does not directly lead to implementing the discovery rule. It must discuss the strengths and weaknesses of Georgia's current state and analyze how other states confront those strengths and weaknesses. It must make and propose changes to the legislature to make sure procedural safeguards are in place that clearly advance the policy concerns of all interested parties.

CONCLUSION

The occurrence rule is ill-suited to protect wronged clients who have a cause of action for legal malpractice. Georgia's rigid adherence to the strict rule results in good cases getting thrown out with bad ones, because clients often do not even know that they have a cause of action before the statute of limitations runs.[225] Forty-eight states have recognized the pitfalls of the occurrence rule and adapted or replaced it.[226] Georgia should follow their lead and adopt the discovery rule. The discovery rule does precisely what an effective statute of limitations is supposed to do: ensure that a cause of action does not have an unlimited life span while protecting the rights and

223. GA. RULES OF PROF'L CONDUCT pmbl. (2001).
224. *See* Talton, *supra* note 16; BLAND RICHTER, *supra* note 16.
225. *See supra* Part II.A.
226. *See supra* note 12 and accompanying text.

interests of the plaintiff.[227] One case like *Willis v. Maverick* should be enough to embarrass the profession and force quick changes.[228] It is in the best interest of the legal profession to advocate for adaptation of the discovery rule to protect the clients that the profession serves and the integrity of the profession itself.

227. *See supra* note 26 and accompanying text.
228. *See supra* notes 1–8 and accompanying text.