The Assembly Judiciary Committee has before it A-1254 (Prieto), a bill that will reduce the current six-year statute of limitations for professional malpractice claims to two years, which will more closely align New Jersey with neighboring states. The legislation would also overrule Saffer v. Willoughby, 143 N.J. 256 (1996), a case in which the state Supreme Court held that an attorney found liable for malpractice is obligated to pay his aggrieved former client’s counsel fees. The New Jersey State Bar Association urges the committee to release A-1254. We believe this important legislation:

- Is fair and reasonable and will level the litigation playing field for the many professionals in New Jersey that are impacted by malpractice claims and will bring New Jersey law in line with neighboring states, and
- Is not anti-consumer and in no way lessens the ability of injured parties to pursue meritorious claims, and
- Is not a “lawyer’s bill” because it is supported by many organizations representing a wide cross-section of professionals, and
- Will have a favorable impact on litigation and insurance premiums, and
- Contains no constitutional infirmity,

A detailed explanation of the NJSBA position is set forth below.

**STATUTES OF LIMITATION IN PROFESSIONAL MALPRACTICE MATTERS**

Currently there is no state statute directly setting forth the period for legal or professional malpractice. Rather, the six-year time frame was established long ago through court decisions. See *McGrogan v. Till*, 167 N.J. 414, 419 (2001). A six-year statute of limitations for professional malpractice was not offensive in the 70s because, at that time, the common law “discovery rule” was in its infancy.

The rule was originally designed for and limited to medical malpractice cases, *Fernandi v. Strully*, 35 N.J. 434 (1961); *Lopez v. Swyer*, 62 N.J. 267 (1973). It was not 1993 that the Supreme Court held that an attorney who is found liable for malpractice must pay his aggrieved former client’s counsel fees.

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1 In New York, the statute of limitations for professional malpractice claims is three (3) years. See McKinney’s CPLR § 214[6]. In Delaware, the statute of limitations on such actions is three (3) years, 10 Del. C. § 8106. It is two (2) years in Pennsylvania, see *O’Kelly v. Dawson*, 62 A.3d 414, 420 (Pa. Super. 2013), and Connecticut has a three (3) year statute of limitations. See Connecticut General Statutes, 52-577. A complete list of statutes of limitation in all states is attached.
Court concluded “the discovery rule applies in legal malpractice actions.” *Grunwald v. Bronkesh*, 131 N.J. 483, 494 (1993). Under the discovery rule the statute of limitations does not begin to run until a person suffers actual damage and also discovers, or through the use of reasonable diligence should discover, the facts necessary to initiate a claim. Since *Grunwald*, therefore, the discovery rule strongly mitigates the harsh and unjust result that follows shutting the courthouse door to a blameless client unaware that he has been harmed by a professional she has hired. This is a critical safeguard, which applies to all professional malpractice, thus making it illogical for the statute of limitations for most professionals to be three times that of physicians. Thus, in addition to the benefits that will be discussed below, there is an element of fairness concomitant with reducing the time allowed to initiate a negligence action against a New Jersey lawyer or other professional to the point where it is in reasonable accord with the time allowed to sue a negligent New York or Connecticut professional, or a New Jersey doctor.

**THIS BILL IS NOT ANTI-CONSUMER**

A-1254 will not prevent professional malpractice lawsuits from being filed, despite the protestations of opponents. As explained above, the New Jersey Supreme Court decided in 1993 that the common law “discovery rule” applies in malpractice actions. Under this rule, a statute of limitations does not begin to run until a party becomes aware of an injury caused by professional malpractice. Clearly, the courthouse doors will not shut if A-1254 is enacted, and to claim otherwise is patently false and misleading. The enactment of A-1254 will not prevent any party with a meritorious claim from seeking a resolution of a lawsuit in Superior Court.

Still another argument has been leveled that the language of A-1254 eliminating the obligation of a losing defendant attorney to pay attorneys fees will dilute the availability of attorneys fees under the Consumer Fraud Act. The Office of Legislative Services – which drafted the legislation – has rejected such an interpretation.

**THIS IS A PROFESSIONALS BILL, NOT A LAWYER’S BILL**

Even though A-1254 is favored by the NJSBA and some other lawyer organizations, in fact, the bill is supported by a wide variety of professional organizations, all desirous of introducing fairness into the process by which professional malpractice claims are considered in our court system.

Numerous professional organizations support A-1254, including those representing engineers, accountants, retail merchants, physicians, nurses, dentists, hospitals, lawyers, architects, physical therapists, landscape architects, CPAs and dentists. A complete list of organizations that support A-1254 is attached.

**A-1254’s IMPACT ON LITIGATION AND INSURANCE PREMIUMS**

Surprisingly, some opponents of the bill have taken the curious position that reducing the professional malpractice statute of limitations will not decrease the amount of litigation or lower insurance premiums in New Jersey.
Yet, even Seton Hall University School of Law Professor Michael Ambrosio -- a staunch opponent of the proposed reduction -- freely acknowledges that, if enacted, the legislation will “reduce the number of legal malpractice claims and thereby reduce the costs of malpractice insurers, lower malpractice insurance rates for New Jersey Lawyers and reduce malpractice exposure for some lawyers.” Proposed changes in Malpractice Law: Wrong Message to a Skeptical Public, 194 New Jersey Law Journal 567 (Nov. 10, 2008). Professor Ambrosio is correct.

Other opponents, most notably Bennett Wasserman, encourage the Legislature to overlook the obvious by highlighting a statistic showing that legal malpractice actions in neighboring states have resulted in more verdicts and higher awards. Wasserman then takes these questionable, and limited, statistics and presumes a direct causal relationship between more cases and a shorter statute of limitations.

There is no basis for such a conclusion. In fact, statistics for 2011 and 2012 obtained from the New Jersey and Pennsylvania courts show that New Jersey Superior Court has more professional malpractice claims pending than does Pennsylvania, despite the latter’s shorter statute of limitations. It is irrational to believe, therefore, that New Jersey has fewer legal malpractice verdicts and lower awards because of its exponentially longer statute of limitations.

Right now, the fact that New Jersey professionals are subject to disparate statutes of limitations has negative implications for liability insurance coverage. New Jersey ranks among the costliest states to write certain professional liability policies.

**NO CONSTITUTIONAL INFIRMITIES**

Opponents have argued that the proposed legislation’s purpose of overruling Saffer runs afoul of the state constitution’s separation of powers doctrine. This argument completely misses the mark. *N.J. Const. art. VI, §2 ¶ 3* provides that “the Supreme Court shall make rules governing the administration of all courts in the state and, subject to law, the practice and procedure in all such courts.” A frivolous litigation statute providing for counsel fees, for example, does not unconstitutionally supplant the Court’s rule-making authority. *Fagas v. Scott*, 251 N.J. Super. 169 (Law. Div. 1991). Neither does a statute prohibiting the award of counsel fees and lowering the statute of limitations.

**Limitation on Actions Generally**

Legislation creating the time frame within which a cause of action must be filed or limiting recoverable damages is not only permitted under the state constitution but is relatively common. Allowable time periods for various causes of action are not called “statutes” of limitation for nothing. It is, after all, statutes, that primarily set these limits. See, e.g. *N.J.S.A. 2A:14-2* (establishing a two-year statute of limitation years for personal injury actions); *N.J.S.A. 2A:14-2.1* (setting a two-year statute of limitations for an action brought by a parent for injury to minor child); *N.J.S.A. 2A:14-3* (providing one-year period within which any libel or slander suit must be initiated); *N.J.S.A. 2A:15-3* (executors and administrators must bring any action for trespass on behalf of decedent within two years).
Under the arguments advanced by certain opponents, none of these statutes could be modified as they pertain to lawyers without interfering with the Supreme Court’s authority to regulate the practice of law. There is simply no support for that position.

**Limiting Damages and Attorney Fees**

Likewise, the Legislature is well within its powers to limit damages, such as prohibiting the recovery of attorney fees as damages in a professional malpractice matter. It has indeed limited damages on numerous occasions. See e.g. *N.J.S.A. 2A:15-5.14* (placing a cap on the amount of punitive damages); *N.J.S.A. 12A:2-719* (allowing for contractual limits to be placed on the recoverability of consequential damages under the Uniform Commercial Code), and *N.J.S.A. 2A:31-5* (limiting the scope of recovery in wrongful death actions to “pecuniary” losses).

**Regulation of the Bar**

Neither setting the applicable statute of limitations nor limiting damages will infringe upon the Supreme Court’s exclusive authority to grant “discipline” to persons admitted in New Jersey. While the Court in *Saffer* did address permissible damages in a malpractice suit, that decision did not in any way broach the subject of attorney discipline or ethical standards. In fact, there is nothing in *Saffer* that even mentions a lawyers professional responsibility obligations or discusses attorney behavior in the context of the Rules of Professional Conduct. Therefore, to assert that *Saffer* creates an identifiable and articulable ethical standard promulgated by the Supreme Court (and thus immune from legislative intrusion) stretches logic beyond its bounds of elasticity.

**FEE SHIFTING BY ANY OTHER NAME**

As a general principle, under the American Rule, a litigant is not obligated to pay an adversary’s legal fees. As our Supreme Court stated in *Gerhardt v. Continental Ins. Cos.*, 48 N.J. 291, 301 (1966) “sound judicial administration will best be advanced by having each litigant bear his own counsel fee except in those few situations specially designated.” In *Saffer*, the Court deviated from tradition by holding that a successful plaintiff in a legal malpractice action is entitled to recover fees. The decision was based on the Court’s classification of a legal malpractice plaintiff’s attorney fees as “consequential damages.”

Certainly, the Court in *Saffer* did not intend to decimate the American Rule by requiring all parties found negligent to reimburse the injured party’s legal expenses. Rather, the Court created an exception for legal malpractice plaintiffs. This can only be interpreted as classic “loser pays” fee shifting, and the Court’s use of the words “consequential damages” does not change that result. Second, and even more interestingly, the fee shifting endorsed in *Saffer* is a one-sided shift. It is not an even-handed rendition of the English Rule. Only a prevailing plaintiff is allowed to benefit. The blameless, hardworking attorney forced to expend time, resources or even hire his own attorney is not allowed to take advantage of the fee shift even though hiring an attorney was an unfortunate “consequence” of a baseless lawsuit. It is time that the Legislature
correct this inherent unfairness and both overrule *Saffer* and reduce the six-year statute of limitations for professional malpractice to bring it in line with neighboring states.

Opponents of the legislation have argued that *Saffer* actually places attorneys on par with other professionals, rather than singling them out for disparate treatment. Oft-given examples compare the need for a second attorney to prosecute a legal malpractice case to the need for a second surgeon to repair damages caused by a negligent doctor. The argument is that if the cost of a second surgeon to repair damages caused by a negligent doctor. The argument is that if the cost of a second surgeon is “consequential damages” in a medical malpractice case, then the cost of a plaintiff’s attorney in a legal malpractice case should also be considered “consequential damages.”

The argument bears some superficial plausibility except that it overlooks the reality that unlike the second surgeon, civil litigation and trial attorneys exist mainly as a “consequence” of a defendant’s alleged wrongful conduct. Not only in legal malpractice cases, but in all cases, attorneys fees incurred in litigation could almost always be considered “consequential damages.” If party X breaches a contract, thereby forcing party Y to hire an attorney to recover damages, is not party X’s attorney a “consequence” of the contract breach? Are not the fees compiled by a plaintiff’s personal injury attorney a “consequence” of the negligence giving rise to the claim?

**LITIGATION IMPACT**

Some opponents have suggested that a six-year statute of limitations is necessary to determine the viability of a legal malpractice claim. However, this ignores the reality that discovery under New Jersey’s court rules for a professional malpractice action does not begin until the cause of action is filed after which the plaintiff can compel the disclosure of all relevant documents to such a proceeding. Until then, the attorney for the plaintiff cannot be certain that a claim for professional malpractice is truly viable.

**CONCLUSION**

New Jersey is long overdue for standardizing its approach to the resolution of professional malpractice claims. The case for extending this standardization to accountants, dentists, engineers, nurses, physical therapists and others is equally compelling for these professionals as it is for lawyers.

It is time for the Legislature to step forward and advance this process by enacting A-1254. The reforms advanced by this legislation are fair and reasonable and worthy of you support.