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Legal Malpractice: The Profession's Dirty Little Secret

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Legal Malpractice: The Profession's Dirty Little Secret

*Manuel R. Ramos**

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I. PERCEPTIONS OF LEGAL MALPRACTICE

Legal malpractice is a taboo subject. It has been ignored by the legal profession,¹ law schools,² mandatory continuing legal education ("CLE") programs,³ and even by scholarly⁴ and lay

1. Legal Resource Index ("LRI"), database on Westlaw, Nov. 8, 1994:

Year	Total U.S. Legal Articles	Total Legal Malpractice	% To Total	Law Rev. & Journal Articles	% To Total	Legal Publication Articles	% To Total	Lay Publication Articles	% To Total
1994	15,696	60	.38%	19	.12%	35	.22%	6	.04%
1993	25,048	74	.29%	15	.06%	55	.22%	4	.02%
1992	23,377	65	.28%	12	.05%	46	.20%	7	.03%
1991	24,580	72	.29%	22	.09%	40	.16%	10	.10%
1990	23,892	53	.22%	11	.05%	42	.18%	0	0%
1989	24,599	50	.20%	4	.02%	45	.18%	1	.01%
1988	24,159	63	.26%	22	.09%	35	.15%	6	.03%

LRI is derived from the Information Access Co., and is based on the print publication, *Current Law Index*. Only U.S. publications were used for this analysis.

2. The Author teaches a legal malpractice course at Stetson University College of Law. It is the only legal malpractice course currently offered at an ABA approved law school. See Michael Braunstein, et al., *Law Line Database of American Law School Curriculum* 9 (Law Line, 2d ed. 1990). Only one of the then 171 ABA accredited law schools, The University of Toledo, offered an elective course on legal malpractice, and it is no longer offered. See Telephone Interview with Helen Hatcher, Registrar, U. of Toledo Law School (Oct. 31, 1994). See also A. Craig Fleishman, *Teaching Avoidance and Understanding In the Law Schools*, in ABA Standing Committee on Lawyers' Professional Liability, *Lawyers' Professional Liability Update* 3.1, 3.2 (ABA, 1992) (describing the legal malpractice course he taught as an adjunct of the U. of Denver Law School). That course has also been discontinued. Telephone Interview with Registrar's Office, U. of Denver Law School (Oct. 31, 1994).

3. ABA Section on Legal Education and Admissions to the Bar and the National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 1993-1994* 54-55 (1993) ("ABA-CLE") (stating that forty states have mandatory CLE programs but only one, Arizona, requires a legal malpractice prevention component).

4. See note 1. An LRI search found that out of 437 articles published in 1991 by the A.B.A. Journal, not one was on legal malpractice. See also *1993 Editorial Index*, 13 Cal. Law. 83, 83-87 (Dec. 1993). Of the 334 articles published in California's State Bar Journal for 1993,

publications.⁵ Unfortunately, our perception of legal malpractice, up until now, has been highly distorted by secretive insurance companies,⁶ confidential settlement agreements,⁷ and a questionable American Bar Association ("ABA") Study.⁸ Nonetheless, sharply contrasting portraits of legal malpractice have emerged: either it is just a minor problem of "weeding out" a few "bad apples,"⁹ or it is the tip of an "iceberg," ready to overwhelm the legal profession.¹⁰

The ABA Study has fostered the "minor problem" portrait of legal malpractice. Various books,¹¹ scholarly journals,¹² bar

only one related to legal malpractice. See *My Lawyer Went to Negotiations and All I Got Was This Lousy Mug*, 13 Cal. Law. 19 (April 1993) (describing a seven-figure jury award in a San Diego legal malpractice case).

5. See note 1. *LRI* surveys legal-related articles taken from general newspapers and magazines.

6. Telephone Interview with Robert E. O'Malley, Esq., vice-chairman and prevention counsel of the Attorneys Liability Assurance Society, Ltd. ("ALAS") (Jan. 3, 1994). ALAS, with \$220 million a year in premiums and 49,000 lawyer insureds, insures only law firms with over 40 lawyers. It is the largest legal malpractice insurance carrier in the country based on premium dollars. O'Malley, citing "proprietary information," refused to give the Author any data. However, see Appendix D for previously published ALAS data. See also Telephone Interview with Wendy Wangberg, professional liability administrator, The Home Insurance Co. ("HOME") (Feb. 22, 1993). HOME, with 60,000 lawyer insureds, writes insurance in 37 states and is the largest legal malpractice insurance carrier in the country based on the number of lawyer insureds. Wangberg said that due to its "fear that competing insurance companies may gain an advantage in underwriting," HOME does not publish claims information. However, see Tables 1 and 3 for previously published HOME data.

7. Lloyd Doggett and Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 Tex. L. Rev. 643, 659 nn.71-72 (1991) (noting that Texas, the most "open" state on confidentially, prohibits confidential settlement agreements, but still allows for keeping the settlement amount secret). The Author, having handled over 900 legal malpractice defense cases, does not recall any settlement agreement without a confidentiality provision which prohibited anyone from discussing the fact, terms, or, most importantly, the amount of the settlement.

8. The American Bar Association Standing Committee On Lawyers Professional Liability, *Profile Of Legal Malpractice: A Statistical Study of Determinative Characteristics of Claims Asserted Against Attorneys* (1986) ("ABA Study"). The ABA Study examined 29,227 legal malpractice claims reported to the National Legal Malpractice Data Center of the American Bar Association between 1980 and 1985 by the participating insurers of lawyers' professional liability.

9. Harry H. Schneider, Jr., *At Issue: Mandatory Malpractice Insurance, Not An Invitation to Frivolous Suits*, 79 A.B.A. J. 45 (Nov. 1993). The author, chairman of the ABA Standing Committee on Lawyers' Professional Liability states: "There is no reliable data documenting that [legal malpractice] is a widespread phenomenon." *Id.*

10. Linda Himelstein and David Newdorf, *Insurers Cutting Ties to Counsel In the S&L Fiasco; Changes in Malpractice Policies Ok'd by 6 States*, *The Recorder* 1 (May 1, 1991) (citing a statement made by the president of a legal malpractice carrier: "We're looking at the tip of the iceberg, and its going to get bigger and bigger").

11. See, for example, Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* (West, 3d ed. 1989). *Legal Malpractice* is the leading legal malpractice text. The authors, insurance defense lawyers and members of the ABA committee overseeing the *ABA Study*, use only the *ABA Study* statistics throughout. See, for example, *id.* at vol. 1, 19-29, 288-89, and vol. 2, 175-76, 237-39, 286-88, 330-31, 360-64, 449-54, 549-52, 590-93. See also American Bar Association Commission on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling*

publications,¹³ the lay media¹⁴ and even the anti-lawyer consumer group, Help Abolish Legal Tyranny ("HALT"),¹⁵ have uncritically accepted the ABA Study. As noted by HALT, the overwhelming consensus is that, even though someone may be able to locate an attorney who will sue another attorney, "extremely few clients ever receive compensation over \$1,000,"¹⁶ and "malpractice cases are hard to win."¹⁷ The widely accepted ABA Study has thus become the statistical foundation of the "few bad apples" portrait of legal malpractice. According to the ABA Study, only between 1.0 and 2.6 percent of lawyers each year face a claim or lawsuit for legal malpractice.¹⁸ 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 of those who go to trial win.¹⁹ The ABA Study also reports that almost eighty percent of the claims are against solo practitioners or small law firms of two to five lawyers.²⁰ Personal injury-plaintiff work (25%) and real estate matters (23%) account for most of the malpractice.²¹

of *Lawyer Professionalism*, in Geoffrey C. Hazard, Jr. and Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation* 488 (Foundation, 2d. ed. 1988) (noting that approximately seventy percent of those eligible to recover for lawyer malpractice would have been entitled to less than \$1,000).

12. See, for example, David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 799 (1992). Citing the *ABA Study*, Wilkins writes: "More than two thirds of all malpractice actions ended in no payment to the client [and] only 32.6% result in indemnity payments," and "moreover, litigation against lawyer-defendants is particularly difficult to win." *Id.* at 831 & n.129. See also Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 Yale L. J. 491, 591 n.449 (1985) (noting that "the difficulties of proving malpractice have been frequently noted"); Lisa G. Lerman, *Lying to Clients*, 138 U. Pa. L. Rev. 659, 698 (1990) (stating that "[t]he threat of malpractice may deter some lawyer misconduct, but the remedy is not available to most deceived clients").

13. See, for example, Emily Couric, *The Tangled Web: When Ethical Misconduct Becomes Legal Liability*, 79 A.B.A. J. 64, 66 (April 1993) (citing statistics from the *ABA Study* and the Colorado Bar Association, the author points out that two thirds of all legal malpractice claims are dismissed or plaintiffs win minimal amounts at trial).

14. See, for example, Jeffrey S. Klein, *Legal View: Hints On When To Sue Your Attorney*, L.A. Times § 5 at 8 (July 27, 1989) (reporting that "[y]our chances of winning are not great"). See also Rosalind Rosmick, *What If You Want To Sue Your Attorney*, Miami Herald 1B (April 16, 1988) (stating that "winning a legal malpractice suit isn't easy").

15. See Kay Ostherg and Theresa Meehan Rudy (in association with HALT), *If You Want To Sue a Lawyer . . . A Directory of Legal Malpractice Attorneys* 27 (Random House, 1991). HALT has 150,000 members and is dedicated to changing the legal system to better serve people with legal problems.

16. *Id.*

17. *Id.* at 3.

18. See Table 2.

19. *ABA Study* at 63 (cited in note 8).

20. *Id.* at 21.

21. *Id.* at 8. See also Appendix A.

Since 1970 there has been an unprecedented growth in legal malpractice claims and lawsuits.²² However, under the "few bad apples" perception of malpractice, there is no need for any radical changes in the way law is practiced, in legal education, or in the way lawyers are regulated. The status quo appears to work. Most legal malpractice claims and lawsuits, the ABA Study concludes, turn out to be unfounded, unworthy of compensation, and barely worthy of attention.

However, there exists another, more accurate portrait of legal malpractice. It is a view known to insurance company claim managers, legal malpractice defense attorneys, and a growing number of the plaintiff's bar, who believe that the current trends in legal malpractice reveal just the tip of an "iceberg": Malpractice is becoming increasingly widespread, lawyers hardly ever win in jury trials, and settlement amounts are skyrocketing. An analysis of the 106 legal malpractice jury verdicts in Los Angeles County in 1988 and 1989 showed that lawyers lost ninety-three percent of the time.²³ Similarly, the Author's own analysis of forty-two legal malpractice cases in southern California, thirty-three of which were disposed of between 1991 and 1992, showed that, consistent with his prior experience in over nine-hundred cases, an overwhelming eighty-eight percent of the clients or nonclients suing for legal malpractice were compensated, and the average settlement was a significant \$60,393.²⁴ The Author, a former partner of the California law firm, Lewis, D'Amate, Brisbois and Bisgaard, saw the firm become the fastest

22. Mallen and Smith, 1 *Legal Malpractice* at 18 (cited in note 11). From 1799 to 1969 usually between 2,000 and 10,000 lawyers were sued for legal malpractice annually. The number filed in 1969, for instance, was less than in 1849. However, from 1970 to 1989 the number shot up from 10,000 to 55,000 (projected for 1989) legal malpractice cases per year. *Id.* See also Katherine Bishop, *California Lawyers Must Take Refresher Courses*, N.Y. Times B7 (Aug. 9, 1991) (reporting that in California one in every five lawyers has been named in a malpractice claim or lawsuit).

23. Girardi and Keese, *Legal Malpractice Jury Outcomes* (1989) (unpublished, on file with the Author). The unpublished study was conducted by a leading Los Angeles plaintiffs' firm, Girardi and Keese. The law clerks conducting the study interviewed both plaintiff and insurance defense counsel. They were able to determine that in 75% of the cases the plaintiffs obtained a jury verdict award that was higher than the attorney-defendant's last settlement offer. The results are even more compelling when one considers that usually only a defense counsel's "best" cases, generally only one to three percent of her legal malpractice cases, go to trial rather than settling. Understandably, almost all cases are settled by anxious lawyer defendants and their insurance defense counsel and insurance carriers. See also Linda L. Castle, *Review Claims Legal Malpractice Verdicts Averaged \$43,575*, 71 A.B.A. J. 122, 122 (Sept. 1985) (reporting that in 1984 defendants lost 67% of all legal malpractice cases tried before a jury).

24. ("Author's Study"). See Appendix A for a description and the data. The Author used the same questionnaire used in the ABA Study.

growing law firm in the nation, increasing from seven attorneys to over two hundred attorneys between 1980 and 1990, predominantly due to increased legal malpractice defense work.²⁵

This Article will focus on the Author's Study,²⁶ the ABA Study,²⁷ Oregon's Professional Liability Fund ("PLF") data on 5,928 claims,²⁸ data on 4,704 claims generated under the Florida mandatory legal malpractice reporting law,²⁹ and statistics intermittently published by the nation's two largest legal malpractice insurers, the Attorneys Liability Assurance Society, Ltd. ("ALAS")³⁰ and The Home Insurance Company ("HOME"),³¹ to try to provide a clearer and more accurate picture of legal malpractice. Part II will address the magnitude of the problem: the statistics which suggest the outline of the submerged "iceberg." Part III will examine the reasons for the explosion in the frequency and severity of legal malpractice cases, and, more significantly, will examine how legislators and judges have opened the gates on liability and damages, while eliminating traditional defenses, thereby increasing the likelihood that the defendant lawyer will settle at a high price rather than face a hostile jury. Part IV will consider whether the legal profession or the insurance industry can ever successfully regulate lawyers by focusing only on the individual lawyers, the alleged "few bad apples." Part V will offer an alternative perspective on lawyer malpractice and misconduct by focusing on malignant situational effects on lawyers' psyches and behaviors. Part VI argues for fundamental and radical situational changes in how lawyers practice law, continued public

25. The Author, a co-founder of Lewis, D'Amato, Brisbois and Bisgaard's San Diego branch, saw the two-lawyer and one-secretary office grow to 51 lawyers and 60 staff persons between 1983 and 1989.

26. See Appendix A.

27. See note 8. See also Appendix A (comparing the ABA Study results with the Author's Study).

28. Oregon State Bar Professional Liability Fund, *Annual Report 1* (1993) (unpublished, on file with the Author) ("*1993 Oregon PLF*"). See Appendix B for this data. The Oregon State Bar Professional Liability Fund ("PLF") is the only compulsory legal malpractice insurance in the nation. Thus, Oregon is the only state about which one can be confident that information on all reported legal malpractice claims and lawsuits is available.

29. Florida Department of Insurance, Computer Printouts (May 1993) ("*Florida Data*") (unpublished, on file with the Author). See Appendices C-1-C-5 (providing legal malpractice data for Florida). Florida is the only state with a mandatory legal malpractice reporting law that has generated substantial data. Florida, California, and North Dakota statutorily require all legal malpractice carriers to report information on legal malpractice claims or lawsuits. See Fla. Stat. Ann. § 627.912 (1984 & Supp. 1993) and upcoming Fla. Admin. Code Ann. § 4-171.003 (regarding new penalties for non-complying insurance carriers); Cal. Bus. & Prof. Code § 6086.8(b) (1990); N.D. Cent. Code § 26.1-01-06 (1989 & Supp. 1993).

30. O'Malley interview (cited in note 6). See also Appendix D (providing statistics on ALAS' claims between 1979 and 1990).

31. Wangberg interview (cited in note 6). See also the Colorado data in Tables 1 and 3.

regulation of lawyers, mandatory legal malpractice insurance, effective mandatory legal malpractice reporting laws, and an end to secrecy in settlements. Self-regulation does not work. The proposed changes will benefit consumers and the presently unsuspecting lawyers who believe legal malpractice only happens to others. Perhaps even the lawyers' tarnished image can be improved by making the profession more accountable and "consumer friendly."

II. THE EXTENT OF LEGAL MALPRACTICE

What is the frequency and seriousness of lawyer malpractice? Unfortunately, those who have the information, the insurance companies that handle legal malpractice claims, are reluctant to share it. Individual lawyers who are sued are reluctant to talk. Even plaintiffs and their counsel are bound to secrecy by confidentiality provisions mandated by insurers in virtually all settlement agreements.³² The ABA, organized state bars, and the legal profession in general are eager to put the best "spin" on any available data, and they, along with the insurance industry and insurance defense attorneys, do not want to educate or encourage consumers to sue lawyers.

Nevertheless, the word is filtering out. Legal malpractice lawsuits are being filed at an ever increasing rate.³³ Defendants and their insurers fear that juries will award substantial damages to aggrieved clients or even non-clients.³⁴ Settlements and verdicts increase as more judges allow plaintiffs to have their cases heard by a jury.³⁵ Public recognition of the high frequency and seriousness of legal malpractice claims and lawsuits may be the fatal blow to the legal profession's efforts to continue to self-regulate.

32. See, for example, Doggett and Mucchetti, 69 Tex. L. Rev. at 659 n.71-72 (cited in note 7) (noting that although Texas prohibits confidential settlement agreements, the settlement amount can still be kept secret). The Author worked with over twenty legal malpractice insurance carriers. They all had a confidential settlement agreement policy. Plaintiffs, their attorneys, judges, and defendant attorneys inevitably cooperate in order to resolve the lawsuit or claim.

33. Mallen and Smith, 1 *Legal Malpractice* § 1.6 at 18 (cited in note 11).

34. Girardi and Keese, *Legal Malpractice* (cited in note 23).

35. See, for example, Table 5. See also Appendix C-3 and C-4 for Florida's reported average settlement amounts of legal malpractice lawsuits and claims, respectively.

A. *The Frequency: "A Few Bad Apples" or "The Tip of the Iceberg"?*

The exact frequency of either legal malpractice lawsuits or insurance claims can be determined only in Oregon, the only state with compulsory legal malpractice insurance. And even in Oregon, as in other states, a substantial number of the actual legal malpractice incidents go unreported. The Oregon PLF records each claim and lawsuit against any Oregon lawyer in private practice.³⁶ Since 1988 the Oregon PLF's annual frequency of claims and lawsuits³⁷ per lawyer has gradually increased from 8.7 percent to 13.2 percent.³⁸ If the Oregon statistics are representative of nationwide trends, roughly 81,415 legal malpractice claims and lawsuits are filed each year in the United States.³⁹ The actual number is likely to be even higher, as Oregon is one of the least litigious states in the nation.⁴⁰

The true annual nationwide frequency rate of legal malpractice incidents, including unreported incidents, is probably closer to twenty percent or more, but it is impossible to get an exact figure. Estimates of the annual frequency of claims and lawsuits against lawyers range from one⁴¹ to twenty⁴² percent of either "all lawyers," all lawyers in

36. Ore. Rev. Stat. § 9.080 (1988 & Supp. 1994).

37. Although most legal malpractice insurance claims against insured lawyers never mature into actual lawsuits, many authors unfortunately continue to ignore this distinction. Claims are made by insured lawyers who must immediately report any potential legal malpractice "claim" or fear losing coverage.

38. See 1993 Oregon PLF at 1 (cited in note 28). See also Oregon State Bar Professional Liability Fund, *Annual Report* (1989), (1990), (1991), and (1992) (unpublished, on file with the Author); Lester L. Rawls, *Exploding the Myth of the Oregon "Bombshell,"* Nat'l L. J. 12 (April 13, 1987). Rawls, the then chief executive officer of Oregon's PLF, angrily responded to a prior article, Gail Cox, *Oregon Lawyers Face High Rate of Claims,* Nat'l L. J. 3 (Feb. 9, 1987), that erroneously quoted him as saying the frequency rate was 20% or twice the 10% national average. Rawls said the correct percentage was 1 in 13, or 7.7%, even better than the national average of 10%. Compare Appendix B (showing that the lowest Oregon frequency rate since 1983 appears to have been 1988's 8.7%. The 1986 rate was actually 10.2%, consistent with the national average cited by Rawls).

39. See, for example, Research for Marketing, *The 1989 Survey of the Economic Condition of the Oregon State Bar* ES-7 (1989) (unpublished, on file with the Author); ABA Membership Department Data (Oct. 1993) (unpublished, on file with the Author) ("*ABA Membership Data*"); Appendix B. According to the *ABA Membership Data*, there are currently 844,905 lawyers in the United States; multiply that by 0.73 (Oregon's percentage of lawyers in private practice) to get 616,781 lawyers in private practice, then multiply that number by 0.132 (Oregon's current annual claims rate), and the 13.2% claims rate translates into 81,415 claims nationally.

40. David Frum and Frank Wolfe, *If You Gotta Get Sued, Get Sued in Utah,* *Forbes* 70 (Jan. 17, 1994). (reporting that there were only 8 states less litigious than Oregon, which ranked 43d of 50 states and D.C. in the *Forbes* study).

41. O'Malley interview (cited in note 6) (estimating the frequency for ALAS insureds).

42. See Letter from Professor Geoffrey C. Hazard, Jr., Yale Law School, to the Author (February 21, 1994) (on file with the Author) (stating that "the incidence of legal malpractice is at least five times and probably 20 times that reflected in data about claims made"). Compare Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing*

private practice,⁴³ or all insured lawyers.⁴⁴ While ALAS's annual frequency rate for its big law firm insureds has consistently remained at approximately one percent,⁴⁵ and HOME's annual national frequency rate between 1985 and 1991 was 3.5 percent,⁴⁶ other estimates are higher. For example, more than fifteen years ago, it was estimated that ten percent of all lawyers in private practice were sued for malpractice each year.⁴⁷ Still another report noted that the rate of claims against insured lawyers nationwide tripled from three to nine percent from 1983 to 1986.⁴⁸ Finally, presumably using a ten percent rate, two prominent legal malpractice experts noted in 1989 that "the new lawyer will be subjected to three [legal malpractice] claims before finishing a legal career."⁴⁹

Profession in a Changing Society, 44 Case W. Res. L. Rev. 345, 389 Table 2 (1994) (reporting that there is only a 1 in 20 chance that a tort victim who suffered property damage will hire and use a lawyer [presumably to file a lawsuit or pursue an insurance claim]); Paul C. Weiler, et al., *A Measure of Malpractice* 139 (Harvard U., 1993) (reporting a six-year study by Harvard researchers of 30,000 New York hospitals which found that "1 malpractice claim was filed by a New York patient for every 7.5 patients who suffered a negligent injury (that is, a real tort)"). Compare Michael J. Saks, Book Review of Paul C. Weiler, et al., *A Measure of Malpractice*, 35 Wm. & Mary L. Rev. 693, 709 n.90 (1994) (stating that, according to Lori Andrews, *Medical Error and Patient Claiming in a Hospital Setting* 10 (May 30, 1993) (unpublished paper presented at annual meeting of the Law and Society Ass'n, on file with the Wm. & Mary L. Rev.), "four times as many [medically] negligent injuries occurred as were reported").

43. Research For Marketing, *1989 Survey* at ES-7 (cited in note 39). In Oregon in 1989, 25% of the lawyers were not in private practice, but were employed: by government (12%), by business (7%), as full-time judges (2%), as referees, administrative judges, and hearing officers (2%), as law clerks (1%), or as consultants or legal secretaries (1%). A significant number of lawyers are not in private practice. It is inaccurate to use "all lawyers" as the denominator to determine the annual percentage rate for legal malpractice claims. By including lawyers who are licensed, but who do not have a private practice, the percentage of lawyers sued or who have claims against them appears much smaller.

44. See Debra Cassens Moss, *Going Bare: Practicing Without Malpractice Insurance*, 73 A.B.A. J. 82, 84 (Dec. 1987) (stating that up to 50% of lawyers are not insured). Insurance carriers can only give us statistics on insured lawyers. The ever increasing numbers of uninsured lawyers do not have "claims" made against them, and rarely are uninsured lawyers sued for legal malpractice. Thus, adding uninsured lawyers to the denominator will also lower the annual percentage rate of claims or lawsuits.

45. O'Malley interview (cited in note 6). However ALAS' minimum deductible is \$250,000 per claim and many large firms have \$1 million deductibles. Thus, the one percent figure does not include unreported cases with maximum exposure less than the ALAS deductible.

46. Amy Lignitz, *State's Legal Malpractice Rate Surges*, Denver Post C2 (Aug. 25, 1992) (noting also that the 5.8% annual frequency for HOME's Colorado insureds is not as high as HOME's insureds in California, Florida, Montana, and Texas).

47. David F. Pike, *Why Everybody Is Suing Everybody*, 85 U.S. News & World Report 50, 51 (Dec. 4, 1978) (citing approximately 15,000 legal malpractice cases each year).

48. Ren Avery, *New Jersey Lawyers Tasting Their Own Medicine? Malpractice Insurance Rises Sharply*, Phila. Daily News Bus. Mag. 25 (Jan. 13, 1986) (citing Duke Nordlinger Stern, a member of the ABA committee that oversaw the *ABA Study*, who is a consultant to over 20 states' lawyer-run legal malpractice insurance companies).

49. Mallen and Smith, 1 *Legal Malpractice* §1.1 at 2 (cited in note 11). Mallen and Smith assume a legal career of thirty years. A 10% rate would mean one legal malpractice claim every

As shown by Table 1, the intermittently published annual frequency rates for certain states and the District of Columbia are just as confusing.

Table 1: Frequency of Malpractice Claims and Lawsuits

State	Annual Percentage Rates
California	20, ⁵⁰ 6, ⁵¹ more than 5.8, ⁵² or 2.4 ⁵³
Colorado	10 ⁵⁴ or 5.8 ⁵⁵
District of Columbia	1.4 ⁵⁶
Florida	more than 5.8 ⁵⁷ or 1.5 ⁵⁸
Montana	more than 5.8 ⁵⁹
New Jersey	9 ⁶⁰
Oregon	8.7 to 13.2 ⁶¹
Texas	more than 5.8 ⁶²

The published information regarding the frequency of legal malpractice is obviously unsatisfactory. Some states like California,⁶³

ten years or three in one career. If the 20% per year rate predicted by the Author is valid, new lawyers today can expect to face six legal malpractice claims in their careers.

50. Bishop, N.Y. Times at B7 (cited in note 22).

51. Michael Dorgan, *Growing Trend—Lawyers Sue Lawyers: Experts Say Greed, Incompetence Get Attorneys In Trouble*, San Jose Mercury News 1A (Dec. 14, 1992) (noting that precise data—even the number of cases filed—is not available, but that Robert Chick, president of Lawyers Mutual Insurance Company in California, estimates that 6 of every 100 lawyers that his company insures gets sued every year).

52. Lignitz, Denver Post at C2 (cited in note 46).

53. California State Bar, *Annual Report* 5 (1992) (unpublished, on file with the Author). Insurers reported 1,473 legal malpractice claims for 1992. Of California's 140,000 attorneys, probably two-thirds are in private practice (92,400) and two-thirds of those are insured (60,984). Thus the best estimate is that 1,473 claims represents 2.4% of all insured California lawyers.

54. Tom Locke, *Colorado Malpractice Claims Rise*, 42 Denv. Bus. J. 1 (May 17, 1991).

55. Lignitz, Denver Post at C2 (cited in note 46).

56. Linda Himelstein, *Tired of 'Rip-offs,' Bar Enters Self Insurance Biz; Most Bar Members See Advantages, But Risks Loom*, 12 Legal Times 10 (June 19, 1989) (noting, however, that these figures, based on the report of only one carrier, are not always reliable).

57. Lignitz, Denver Post at C2 (cited in note 46).

58. In 1992 there were 38,041 in-state members of the Florida Bar. The Florida Bar, *Data Reference Handbook* 43 (1993). See also The Florida Bar, *Results of the 1993 Membership Attitude Survey* 15 (1993). Seventy-six percent of the lawyers in Florida are in private practice. See Moss, 73 A.B.A. J. at 86 (cited in note 44). Twenty-two percent of the Florida lawyers are uninsured. See Appendix C-1. In 1992 there were 338 closed claims reported to the Florida Department of Insurance. Thus, assuming closed claims roughly approximate newly opened claims numbers, the 22,550 insured lawyers in private practice generated 338 claims for an annual frequency rate in 1992 of 1.5%.

59. Lignitz, Denver Post at C2 (cited in note 46).

60. Avery, Phila. Daily News Bus. Mag. at 25 (cited in note 48).

61. *1993 Oregon PLF* (cited in note 28). See also Appendix B.

62. Lignitz, Denver Post at C2 (cited in note 46).

63. Cal. Bus. & Prof. Code § 6086.8(b) (1990).

Florida,⁶⁴ and North Dakota⁶⁵ have mandatory reporting requirements for insurance companies that insure lawyers. However, mandatory reporting laws elsewhere have been repealed,⁶⁶ or, where they exist, ignored and not enforced.⁶⁷ The Oregon statistics suggest that insurers do not comply with the mandatory reporting statutes in two of the largest states, California⁶⁸ and Florida.⁶⁹ For instance, according to figures from the California State Bar, insurers reported 675 claims and lawsuits in 1991 and 1,473 in 1992.⁷⁰ These numbers translate to 1.1 percent and 2.4 percent of insured California attorneys having legal malpractice claims against them in the years studied. These figures are too low to be accurate.⁷¹ Florida has the most comprehensive, and potentially the most useful, mandatory reporting statute. As seen in Table 1 above, the Florida data shows an annual rate of legal malpractice claims and lawsuits of 1.5 percent. However, HOME, one of Florida's major legal malpractice carriers, has revealed that its Florida insureds were sued at a rate of more

64. Fla. Stat. Ann. § 627.912 (Supp. 1994).

65. N.D. Cent. Code § 26.1-01-06 (1989).

66. See, for example, James W. St. Clair, *Those Monstrous Malpractice Premiums*, 13 *Legal Econ.* 24, 26 (Sept. 1987) (reporting that in April 1986, insurance carriers cancelled all liability insurance policies for West Virginia lawyers to protest that state's new mandatory reporting law. The insurers argued that such disclosure would reduce their competitiveness and prevent them from making a profit. The West Virginia law was quickly repealed in a special session and the legal malpractice policies were restored).

67. Dwain E. Fagerlund, Note, *Legal Malpractice: The Locality Rule And Other Limitations Of The Standard Of Care: Should Rural And Metropolitan Lawyers Be Held To The Same Standard Of Care?*, 64 *N.D. L. Rev.* 661, 698-99 n.247 (1989) (stating that "[i]nsurers did submit 15 [substantially incomplete] report forms to the North Dakota Insurance Department. . . . [I]t may be that the state does not strictly enforce the statute because the insurance companies may threaten to pull out of a nominal state such as North Dakota, leaving practitioners with no insurance protection").

68. Cal. Bus. & Prof. Code § 6086.8(b) (1990) (requiring all insurance carriers to notify the California State Bar anytime one of its insured notifies the carrier of a potential claim or lawsuit). See also Telephone Interview with Gloria Zank, California State Bar Legal Education Department (April 12, 1993) (reporting that the only information for public consumption is the number of legal malpractice claims reported by the carriers. No follow-up reports on the claims are required. For instance, no information is collected on whether the initial claim matures into a lawsuit or for how much it settles. The California State Bar will not even reveal the name of the insured lawyer involved in the claim).

69. Fla. Stat. Ann. § 627.912 (Supp. 1994). Within sixty days of closing a legal malpractice claim, all insurance carriers must fill out a survey questionnaire identifying whether it was a claim or a lawsuit, the jurisdiction, the area of law, whether the parties settled, the amount of settlement, the amount of defense costs, and the name of the insured. See also Appendices C-1-C-5 for the Florida data.

70. California State Bar, *Annual Report* at 5 (cited in note 53).

71. See, for example, Zank interview (cited in note 68). Zank conceded that the 1991 figures are not accurate because the new law was just coming into effect and there was not full compliance. She expected that the 1992 figures would be more accurate, and the 1993 figures still more accurate. However, such optimism seems unwarranted given Florida's long, unsuccessful experience with compliance to its mandatory reporting statute.

than 5.8 percent between 1985 and 1991.⁷² Since there is no reason to think that other legal malpractice carriers in Florida have a claims frequency rate three to four times less than HOME's, full compliance with the mandatory reporting laws appears to have been a major problem in Florida.⁷³

The ABA Study, the most ambitious attempt to collect data on legal malpractice, analyzed 29,227 legal malpractice claims asserted against insured attorneys nationwide from January 1980 through September 1985. All legal malpractice insurance carriers initially agreed to give information on each claim to the ABA's National Legal Malpractice Data Center. However, as shown by Table 2 below, the numbers alone suggest that there was significant noncompliance by the nation's insurance carriers.

72. *Lignitz, Denver Post* at C2 (cited in note 46).

73. Telephone Interview with Bill Bodiford, Florida Department of Insurance (Sept. 9, 1993). Bodiford, who is in charge of determining compliance with the legal malpractice mandatory reporting law for the Florida Department of Insurance, conceded that "his gut feeling is that at least 50% of the insurance carriers are not complying." He recommended to the Florida legislature that the reporting law be repealed "since only a few journalists and law professors ever ask for the information." The law has not been repealed. In fact, the Florida Department of Insurance has proposed regulations which provide for fines of up to \$2,500 a day for each claim that is closed but not reported. See Fla. Admin. Code Ann. § 4-171.003 (1992). Whether the regulations will be effectively enforced, given the experience of other states, is unlikely.

Table 2: ABA Study/Frequency of Malpractice

Year	Lawyers in the U.S. ⁷⁴	Lawyers in Private Practice ⁷⁵	Insured Attorneys ⁷⁶	Expected Claims vs. Insured Attorneys ⁷⁷	ABA Study ⁷⁸		ABA Study ⁷⁹ % of Insured Attorneys with Claims	ABA Study ⁸⁰ % of Missed Claims
					# of Claims Open	Closed		
1980	542,205	395,810	263,870	28,656	07	37	0.04%	99.63% ⁸¹
1981	569,000	415,370	276,910	30,072	3276	831	1.18%	89.11%
1982	595,000	434,428	289,615	31,452	5976	1375	2.06%	81.00%
1983	621,000	454,060	302,705	32,873	7176	1615	2.37%	78.17%
1984	649,000	473,770	315,845	34,300	4508	1072	1.42%	86.86%
1985	655,191	478,289	318,827	34,624	2647	607	0.80%	92.36% ⁸²

Using the ABA Study figures for claims, at most 2.37 percent of insured attorneys were targets of legal malpractice claims in any year between 1980 and 1985 (this figure having been reached in

74. Barbara A. Curran, et al., *The Lawyer Statistical Report: A Statistical Profile of the U.S. Legal Profession in the 1980s* 4 (American Bar Foundation, 1985); Barbara A. Curran and Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in 1988* 1 (ABA, 1991 Supp.) (giving 1985 figure).

75. See Research For Marketing, *1989 Survey* at ES-7 (cited in note 39). A 73% figure of all lawyers in the U.S. was used because approximately 73% of licensed attorneys in Oregon are in private practice.

76. Moss, 73 A.B.A. J. at 86 (cited in note 44) (reporting the following percentages of uninsured lawyers for the 1985 to 1987 time period: California (43-50%); Florida (22%); Washington (30%); Alabama (21%); Arizona (11%); Alaska (30%); Kentucky (6%); Montana (23%); Wisconsin (15%); Nevada (24%); and Nebraska (12%)). See also *Public Can Receive Data About Lawyers' Malpractice Standing*, Richmond News Leader 25 (Nov. 30, 1989) (reporting that the Virginia State Bar found in a mandatory study of all lawyers that 13% were uninsured); Craig A. Morgan, *Malpractice Insurance: What You See Isn't Always What You Get*, 8 Tex. Law. 28 (Nov. 30, 1992) (noting that between 30% and 50% of all solo practitioners in question are without insurance); Locke, 42 Den. Bus. J. at 56 (cited in note 54) (reporting that 35% of Colorado lawyers are not insured); Ostberg and Rudy, *If You Want to Sue a Lawyer* at 47 (cited in note 15) (claiming that approximately 40% of lawyers are not insured). Thus, for the "Insured Attorneys" column in Table 2, the "Lawyers in Private Practice" figures were reduced by one-third.

77. See Appendix B. Between 1983 and 1985 Oregon's annual frequency rate averaged 10.86%, so this percentage was used for the expected number of claims against insured private attorneys.

78. ABA Standing Committee On Lawyers' Professional Liability, *Characteristics of Legal Malpractice: Report of the National Legal Malpractice Data Center* vii (ABA, 1989) ("ABA Study Data"). Unlike the previously cited *ABA Study*, see note 8, this publication, published three years later, contains all the raw data compiled from the 29,227 legal malpractice claims reported to the ABA's National Legal Malpractice Data Center between 1980 and 1985.

79. Open claims numbers from 1980 to 1985 in "ABA Study # of Claims" column are divided by the number of "Insured Attorneys" and multiplied by 100 to calculate the percentage.

80. The number of open claims in "ABA Study # of claims" column is subtracted from the number of "Expected Claims vs. Insured Attorneys," divided by the number of "Expected Claims vs. Insured Attorneys" and multiplied by 100.

81. *ABA Study Data* at vii (cited in note 78) (pre-test only, so this percentage is not accurate).

82. *ABA Study* at 3 (cited in note 8). The ABA Study ran through September 1985, so this was an incomplete year.

1983). However, the frequency of malpractice claims nationwide in the early 1980s was probably closer to the Oregon PLF's 10.86 percent per year average between 1983 and 1985.⁸³ If this is true, roughly 30,270 claims were made against insured attorneys nationwide in 1983—not the 7,176 reported in the ABA Study.

The ABA Study's final findings, when first published, left the erroneous impression that all legal malpractice claims from all of the nation's legal malpractice insurance carriers over a five-year period had been analyzed.⁸⁴ As seen in Table 2 above, if the Oregon ten percent figure is correct, over three-fourths of the actual claims made were missed, even in the ABA Study's best year for compliance, 1983. In 1986 an article hinted that the ABA Study was having data collection problems;⁸⁵ however, it was not until 1989 that the seriousness of the problems was detailed.⁸⁶ Three of the nation's largest legal malpractice insurance carriers, and the Oregon PLF, either did not provide data or provided unsatisfactory data.⁸⁷

As shown by Table 2 above, the ABA and the insurance carriers ignored a potentially seventy-eight to eighty-nine percent non-compliance problem with the ABA Study. Possible reasons for noncompliance vary: some might point to overworked insurance claims adjusters, handling between 150 and 400 claim files, whose lowest priority would be to fill out the ABA questionnaire⁸⁸ on each case; others might say there was a conscious effort by the ABA and the insurance carriers, motivated by self-interest, to keep the number of claims as low as possible. If insurance carriers and adjusters ignore Florida's and California's mandatory reporting laws, it should

83. See Appendix B.

84. William H. Gates, *Charting the Shoals of Malpractice*, 73 A.B.A. J. 62, 62 (July 1987) (stating that "[t]he ABA's Standing Committee on Professional Liability has completed its five-year collection of statistics on legal malpractice claims. . . . [T]he data reflects reports from insurance companies that underwrite this kind of coverage. Almost 30,000 claims were analyzed").

85. Duke Nordlinger Stern, *Reducing Your Malpractice Risk*, 72 A.B.A. J. 52, 52 (June 1986) (stating that the "[ABA Study] statistics were incomplete—not all insurers submitted claims reports, and dollars at risk are only tabulated after claims are closed. Still, the data center's statistics can help in understanding the causes of claims and in creating a risk management program").

86. *ABA Study Data* at vii (cited in note 78).

87. *Id.* at vii-viii (stating: "Unfortunately, one major insurer, American Home, notwithstanding its regular financial contributions . . . never supplied more than a small amount of satisfactorily reported data. The Home Insurance Company, a major insurer . . . declined to contribute data. Another major insurer, Shand Morahan, never supplied closed claim information. Prior to the end of this study the Professional Liability Fund in Oregon quit supplying data from its claims").

88. See Appendix A for the ABA Study Questionnaire.

not surprise anyone that they also might fail to comply with the voluntary ABA Study.

B. The Nature and Characteristics of Legal Malpractice: Just the Small Firm Personal Injury Attorney?

Both the Author's Study and the ABA Study considered the nature and characteristics of malpractice claims and lawsuits—such as whether the insured lawyer is in a large or small firm, practices a certain type of law, or has experience—and the data in the two studies appear to be remarkably consistent.⁸⁹ In this respect, the data generated by the ABA Study is not necessarily unreliable. A major

89. See Appendix A. The *Author's Study* does not pretend to be representative of all lawyers. The study includes only the legal malpractice cases against Southern California lawyers insured by one insurance carrier. However, almost ten years after the *ABA Study*, the *Author's Study* found nearly identical percentages for certain characteristics of legal malpractice claims as those found in the earlier ABA Study. For instance, as seen in Appendix A, there were several statistical "matches" between the *ABA Study* and the *Author's Study*: (1) percentage of claims by size of firm, see *ABA Study* at 21 (cited in note 8) and Appendix A (the *ABA Study/Author Study* figures were 38%/35% for solo practitioners and 50%/43.6% for two- to five-lawyer firms); (2) number of years admitted to practice, see *ABA Study* at 20 and Appendix A (the *ABA Study/Author Study* figures were 4%/4.7% for lawyers under four years; 30%/14.3% for lawyers between 4-10 years; and 66%/81% for lawyers over 10 years); (3) missed deadlines, see *ABA Study* at 21 and Appendix A (both the *ABA Study* and the *Author's Study* found that 21.4% of all claims arose from lawyers missing deadlines); (4) the type of lawyer activities, see *ABA Study* at 22 and Appendix A (the *ABA Study/Author Study* figures were: commencement of action 24.8%/38.1%; preparation of documents 21.1%/14.3%; consultation and advice 11.1%/7.1%; pretrial hearing 8.0%/9.5%; settlement and negotiation 7.9%/21.4%; trial or hearing 6.8%/0%; title opinion 4.6%/0%; and other 15.5%/9.6%); and (5) litigation activities, see *ABA Study* at 23 and Appendix A (the *ABA Study* found that 52.8% of all claims arose from litigation activities, while the *Author's Study* of legal malpractice cases found the figure to be 69%). As further seen in the Footnote Table, the types of error that gave rise to the claims in the *ABA Study* were almost identical to the types of error that formed the basis of the legal malpractice lawsuits in the *Author's Study*:

	TYPES OF MISTAKES	
	ABA Study	Author's Study
Substantive Errors	43.9%	45.2%
Administrative	25.9%	26.2%
Client Relations	16.4%	16.7%
Intentional	11.7%	11.9%
All Other	2.7%	0%

See *ABA Study* at 7 and Appendix A. Substantive errors include: a failure to know the correct deadlines, procedure, tax consequences, or applications of law; failure to avoid conflicts of interest; failure to successfully perform a public record search; and mathematical errors. Administrative errors include: failure to calendar or react to the calendar; failure to file documents or follow-up; losing documents or evidence; and clerical errors. Client relations errors include: failure to follow a client's instructions; failure to obtain consent or inform; and improper withdrawal from representation. All other errors include libel, slander, malicious prosecution, fraud, and violation of civil rights. Without accurate demographic data on lawyers' activities in general, however, these findings are interesting but of limited usefulness.

concern, however, is that the ABA and, unfortunately, scholars⁹⁰ have overlooked the ABA Study's shortcomings.⁹¹

If the Oregon figures are accurate and representative of the rest of the nation, at most twenty-three percent of claims against insured lawyers were reported to the ABA.⁹² In addition, between eleven and fifty percent of lawyers in private practice do not even carry malpractice insurance.⁹³ There is no data on how many actual incidents of legal malpractice occur that never result in insurance claims or lawsuits.⁹⁴ The ABA Study, from a statistical perspective, may well be unrepresentative of the actual patterns of legal malpractice, even for the period of the study.

For instance, the ABA Study found that thirty-five percent of all legal malpractice claims are filed against solo practitioners.⁹⁵ However, solo practitioners appear to be *under*-represented. In 1980, forty-nine percent of all lawyers were solo practitioners,⁹⁶ while more recent surveys indicate that forty-six percent of lawyers in private practice are solo practitioners.⁹⁷ Demographic comparisons that include law firms show that the ABA Study findings which report that

90. Mallen and Smith, 1 *Legal Malpractice* at 21 (cited in note 11) (noting that "the overall [ABA Study] data was verified as statistically valid"). The *ABA Study* itself states that "the major findings of this study were validated by examining claims from Oregon." *ABA Study* at 5. However, the *ABA Study Data* mentions Oregon as not being cooperative and pulling out of the *ABA Study*. *ABA Study Data* at viii (cited in note 78). See also Letter from Barbara S. Fishleder, Esq., Director of Loss Prevention, Oregon's PLF, to Author (January 20, 1994) (on file with the Author) (stating that "Oregon was not very involved in the ABA's Study. . . . [T]he ABA consulted with us on claims coding issues and . . . discussed their findings with us. . . . [N]o formal report was sent to the ABA").

91. American Bar Association, Standing Committee on Lawyers' Professional Liability, *The Lawyer's Desk Guide to Legal Malpractice* 16 (1992) ("*ABA Study Desk Guide*"). This is the ABA's latest and third book on the *ABA Study*. It is aimed at practicing attorneys. The ABA itself has noted four general shortcomings: (1) data is only on insured lawyers; (2) in the *ABA Study* 78% of claims were arguably nonmeritorious—claims or lawsuits where there was no payment to the claimant; (3) due to a lack of demographic information on the legal profession, there was no way to determine how the statistics compare to the general practice of law; (4) the data are somewhat dated, but "nevertheless [it] remains, as far as the American Bar Association is aware, the most current source of information on the causes of legal malpractice claims." *Id.* (emphasis added).

92. See Table 2 and text accompanying notes 74-83. See also *ABA Study Data* at 5 (cited in note 78).

93. Moss, 73 A.B.A. J. at 84 (cited in note 44).

94. The Author's former clients, legal malpractice defendants, often noted that it was ironic that a particular client sued for such a minor legal malpractice incident when other more meritorious claims for legal malpractice were never pursued.

95. *ABA Study* at 20 (cited in note 8).

96. Curran, et al., *The Lawyer Statistical Report* at 13 (cited in note 74).

97. Curran and Carson, *The Lawyer Statistical Report* at 6 (cited in note 74) (based on 1988 figures).

97.8% of legal malpractice claims were against lawyers in firms of 30 or fewer attorneys may not be that significant.⁹⁸

Without accurate demographic information it is difficult to suggest, as the ABA Study and scholars initially did, that lawyers in small firms are more vulnerable to legal malpractice than lawyers in big firms.⁹⁹ For instance, William H. Gates, Project Chairman of the ABA Study, initially stated in the ABA Journal: "What information is available suggests that about 50% of lawyers practice in firms of five or less. Accordingly, with some 80% of claims being made against lawyers in this group it appears that their malpractice risks are greater."¹⁰⁰ However, Gates later retracted that statement: "An important limitation on the interpretation of this [ABA Study] data must be mentioned. The Data Center has very little information about overall characteristics or activities of lawyers. . . . Accordingly, the Data Center cannot conclude with certainty that the number of claims associated with such [small/2-5 lawyer] firms and that field of law [25.3% of personal injury/plaintiff] are disproportionate."¹⁰¹ Unfortunately, it is Gates' ABA Journal article, not the later retraction in the Mercer Law Review, that continues to be cited by the leading scholars.¹⁰²

98. See *ABA Study* at 20 (cited in note 8). The 1980 figures suggest that 90% of lawyers practice in firms of 30 or less. See also Leonard Gross, *Ethical Problems Of Law Firm Associates*, 26 Wm. & Mary L. Rev. 259, 311 (1985) (reporting that 84% of associates in Illinois worked in one to ten lawyer firms, 13% worked in firms of between eleven and forty attorneys, and 3% worked in firms of over forty lawyers, as of the 1983 edition of Martindale Hubbell); Susan K. Rebin, *Attorney Malpractice and Preventative Lawyering: Are Attorneys Safer In Large Firms?*, 40 U. Miami L. Rev. 1101, 1102 (1986) (citing another 1984 study done by the Florida Bar which showed that 89.4% of Florida attorneys worked in law firms smaller than 25 lawyers, a Nebraska State Bar Study which showed only 9% of lawyers in 1985 worked in firms of more than thirty attorneys, and a 1984 Tennessee Bar Association Survey which found that only 6% worked in law firms of more than thirty lawyers).

99. *ABA Study* at 20 (noting that "firms of 2-5 lawyers produce a larger proportion of reported claims asserted against attorneys. . ."). See also Rebin, 40 U. Miami L. Rev. at 1102 (citing the *ABA Study* and concluding that, since only 2.2% of claims were against firms with more than 30 lawyers, big firms were "safer").

100. William H. Gates, *The Newest Data on Lawyers' Malpractice Claims*, 70 A.B.A. J. 78, 84 (April 1984).

101. William H. Gates, *Lawyers' Malpractice: Some Recent Data About a Growing Problem*, 37 Mercer L. Rev. 559, 566 (1986).

102. See, for example, Geoffrey C. Hazard, Jr. and Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation* 499-500 (Foundation, 2d. ed. 1988). See also Wilkins, 105 Harv. L. Rev. at 831 n.129 (cited in note 12).

C. *The Severity: Seventy Percent Settle For Less Than \$1000?*

The most glaring difference between the ABA Study and the Author's Study is in the severity of legal malpractice claims. Demographic comparisons are not needed: Either claims and lawsuits are settled or not settled, for either increasingly larger or smaller sums. Because 3,719 claims, or sixty-seven percent of the 5,537 closed claims in the ABA Study, resulted in no monies paid, one might conclude that sixty-seven percent of all legal malpractice claims and lawsuits are not meritorious or are too difficult to prosecute.¹⁰³

Similarly, Colorado,¹⁰⁴ Florida,¹⁰⁵ and Oregon¹⁰⁶ report that approximately two-thirds of all legal malpractice claims and lawsuits are dismissed or abandoned with no indemnity paid to the claimant. But industry practice can inflate this figure: fearing a denial of coverage if any potential claim is not reported before the expiration of the annual "claims made" insurance policies, insured lawyers routinely report any and all *potential* claims, even though a claimant may never discover or pursue the claim. Thus, "no indemnity claims" are not necessarily frivolous claims. Similarly, claims or lawsuits against lawyers are not always made after each incident of legal malpractice.

Only meritorious claims should be studied in developing a legal malpractice prevention program. But studying only meritorious claims can be difficult: a careful analysis of each claim is needed to determine whether it is meritorious. Often triable issues of fact and law stand in the way. Moreover, for every meritorious claim actually filed against an attorney there are several more that were meritorious but were not perceived by the insured attorney, were not reported to the insurer, or were not discovered or pursued by an aggrieved party, either because the potential recovery was low, or because of the prevailing thought that lawyers almost always win.¹⁰⁷ Legal malpractice lawsuits prepared and pursued by an attorney (the basis of the Author's Study) are more likely to be meritorious than mere potential or even actual insurance claims.

103. *ABA Study Data* at 23 (cited in note 78).

104. Locke, 42 Denv. Bus. J. at 1 (cited in note 54) (reporting that HOME's 1,084 claims by Colorado insureds between 1985 and May 1990 resulted in two-thirds being abandoned or dismissed with no indemnity paid to the claimant).

105. See Appendix C-1.

106. Letter from Kirk R. Hall, Chief Executive Officer, Oregon's PLF to Author (March 2, 1994) (on file with the Author) (stating that "for 1993, 40 percent of claim files resulted in an indemnity payment while 60 percent did not").

107. Ostberg and Rudy, *If You Want To Sue a Lawyer* at 7 (cited in note 15) (commenting that "[m]ost lawyers won't take cases unless they have a good chance of winning at least \$50,000").

As seen in Table 3, insurance carriers,¹⁰⁸ and even the Oregon PLF,¹⁰⁹ are eager to say that two-thirds of all claims are disposed of without an indemnity payment, but they generally are not willing to publicize data on the indemnity amounts paid for claims or lawsuits that actually settle or go to judgment.¹¹⁰

Table 3: Disposition of Malpractice Claims and Lawsuits

	ABA Study [U.S.]	Author's Study [Ca.]	California	Florida	Oregon	Colorado	ALAS [Big Firms]
Claims With Payments	29% ¹¹¹	100% ¹¹²	N/A	15% ¹¹³	33% ¹¹⁴	33% ¹¹⁵	N/A ¹¹⁶
Lawsuits With Payments	49% ¹¹⁷	88% ¹¹⁸	N/A	49% ¹¹⁹	N/A	N/A	N/A
Amount Paid For Claims							
a. \$0-25,000	78.9% ¹²⁰	N/A	Average \$90,000 ¹²¹	87% ¹²²	83% ¹²³	82% ¹²⁴	Average between \$5,000 and \$539,000 ¹²⁵

108. Locke, 42 Denv. Bus. J. at 1 (cited in note 54).

109. Hall letter (cited in note 106).

110. See, for example, 1993 Oregon PLF (cited in note 28); 1989-1992 Oregon PLF (cited in note 38). These annual reports give the frequency of claims, but not the severity or settlement amounts. See also O'Malley interview (cited in note 6); Wangberg interview (cited in note 6).

111. ABA Study Data at 40 (cited in note 78). Seventy percent of the insurance carriers' 5,537 closed legal malpractice files consisted of *claims* in which no lawsuit had been filed. The ABA Study Data did not analyze *claims* dispositions separately from actual *lawsuit* dispositions. However, out of the 1,061 legal malpractice *lawsuit* dispositions in the ABA Study, 40% were settled, 57% were dismissed and 3% were cases where payments were made after the plaintiff obtained a judgment. In the ABA Study, the disposition of the *claims* showed that 28.6% of them were settled and 71.4% were abandoned.

112. There were forty-two lawsuits and only one claim..

113. See Appendix C-4.

114. See 1993 Oregon PLF (cited in note 28).

115. Locke, 42 Denv. Bus. J. at 1 (cited in note 54).

116. O'Malley interview (cited in note 6). ALAS would not provide any data other than Appendix D.

117. See ABA Study Data at 40 (cited in note 78).

118. See Appendix A.

119. See Appendix C-3.

120. See Appendix A. Claims included lawsuits, but by reworking the data the Author was able to break out the claims-only dispositions.

121. Dorgan, San Jose Mercury News at 1A (cited in note 51) (reporting figure for 1991).

122. See Appendix C-5.

123. Hall letter at 2 (cited in note 106). Hall also stated that "[w]e attempted to come up with average settlement figures for claims in litigation versus non-litigation status, but found that our claims data was not set up for this. Given the mandatory and ongoing nature of the Fund, this particular figure has not been of much concern to us." *Id.* at 4.

124. There was only one claim. Locke, 42 Denv. Bus. J. at 1 (cited in note 51). HOME's actual data showed that for 82% of the claims on which payments were made, less than \$20,000

Table 3 (cont'd)

	ABA Study [U.S.]	Author's Study [Ca.]	California	Florida	Oregon	Colorado	ALAS [Big Firms]
b. \$25,001-50,000	8.1%	1 ¹²⁶		5%	8%	6.5%	
c. \$50,001-100,000	5.3%	N/A		4%	5%	6.5%	
d. over \$100,000	7.6%	N/A		4% Average \$26,777	4% Average \$25,625	Average \$35,000 ¹²⁷	
Amount Paid For Lawsuits							
a. \$0-25,000	72.1% ¹²⁸	18.0% ¹²⁹	N/A	Average \$65,740 ¹³⁰	N/A	N/A ¹³¹	Securities Lawsuits average settlement \$5,688,886 ¹³²
b. \$25,001-50,000	10.5%	27.3%	N/A				
c. \$50,001-100,000	6.1%	33.3%	N/A				
d. over \$100,000	11.4%	12.1% Average \$60,393					

The ABA and the nation's legal malpractice insurance carriers publish the positive message that most of the legal malpractice claims against lawyers are frivolous or are dismissed without any payment. However, as explained above, the dismissal of a claim or potential claim does not necessarily mean that it was frivolous. Also, while lawsuits tend to be more meritorious than claims, even frivolous lawsuits will often be settled for "nuisance value" or for the anticipated cost of defense, which frequently reaches into the tens of thousands of dollars. Thus, quick generalizations based on the disposition of claims or lawsuits are suspect.

For instance, law firms with over thirty lawyers in 1980 and 1988 employed fewer than ten and eighteen percent, respectively, of all lawyers in private practice.¹³³ ALAS only insures firms with over forty lawyers, and boasts of an annual claims rate of only one per-

was paid; for 13%, indemnity payments between \$20,000 and \$100,000 were paid, and for 5%, over \$100,000 indemnity was paid. *Id.*

125. See Appendix D.

126. There was only one claim.

127. *Lignitz, Denver Post* at C2 (cited in note 46).

128. See Appendix A. Lawsuits were included as claims, but by reworking the data the author was able to break out the lawsuits-only dispositions.

129. See Appendix A.

130. See Appendix C-3.

131. Locke, 42 *Denv. Bus. J.* at 1 (cited in note 54).

132. See Appendix D.

133. Curran, et al., *The Lawyer Statistical Report* at 13 (cited in note 74) (reporting the 1980 figure); Curran and Carson, *The Lawyer Statistical Report* at 12 (cited in note 74) (reporting the 1988 figure).

cent.¹³⁴ However, large firms with over thirty lawyers, which the ABA Study says accounted for fewer than 2.1 percent of all claims,¹³⁵ incur an overwhelming percentage of both the indemnity and defense costs paid for legal malpractice claims.¹³⁶ As shown by Appendix D, the average settlement paid on behalf of ALAS insureds for a securities claim was \$5,668,888. Even before the \$500 billion savings and loan scandal, and the multi-million dollar legal malpractice settlements paid by big law firms to governmental agencies such as the Resolution Trust Corporation ("RTC"),¹³⁷ the Federal Deposit Insurance Corporation ("FDIC"), and the Office of Thrift Supervision ("OTS"),¹³⁸ lawyers in big law firms collectively paid out more in total dollars for legal malpractice settlements than other lawyers.¹³⁹

Since the savings and loan scandal, big firms have been paying significantly more to settle legal malpractice claims¹⁴⁰ in order to avoid having the cases decided by hostile juries. For instance, the \$75 million settlement on behalf of the large Cleveland-based firm, Jones, Day, Reavis & Pogue, insured by ALAS, for the 1989 collapse of Charles Keating's Lincoln Savings and Loan Association in California,¹⁴¹ totaled more than the \$73,695,120 paid in all of Florida's 1,121 reported legal malpractice lawsuits in which indemnity payments were made from 1981 to May 1993.¹⁴²

As seen in Table 3 above, if the analysis is shifted from legal malpractice *claims* to legal malpractice *lawsuits*, a different picture emerges. The ABA Study found that almost seventy percent of claims were disposed of for \$1,000 or less. The Author's Study portrays a much different scenario, based on the fact that eighty-eight percent of

134. O'Malley interview (cited in note 6).

135. ABA Study at 19 (cited in note 8).

136. Edmund B. Spaeth, Jr., Symposium, *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers?*, 61 Temp. L. Rev. 1211, 1216 (1988) (stating that as of 1988 over half of all legal malpractice settlement dollars were paid by firms of over 30 lawyers). Spaeth cites as his source for this information the unpublished *Discussion Draft of Report on the ALI-ABA Conference on Law Practice Quality Evaluation* at 8. Id. at 1216 n.40.

137. Mark Hansen, *Yet Another S&L Settlement*, 80 A.B.A. J. 28 (Jan. 1994) (giving the latest figures for big firms' RTC settlements).

138. Himmelstein and Newdorf, *The Recorder* at 1 (cited in note 10). In 1990 the FDIC recovered \$373 million from professional liability claims. Four of the six largest legal malpractice settlements in history, totaling \$100 million, stem from savings and loan work.

139. Spaeth, 61 Temp. L. Rev. at 1216 (cited in note 136).

140. Id. See also Hansen, 80 A.B.A. J. at 28 (cited in note 137).

141. O'Malley interview (cited in note 6) (confirming the law firm was insured by ALAS). See also Henry J. Reske, *Firm Agrees to Record S&L Settlement: Shifting Standards Require Lawyers to Disclose More to Regulatory Agencies*, 79 A.B.A. J. 16, 16 (July, 1993). The \$75 million settlement consisted of a \$24 million payment to Lincoln investors and \$51 million to OTS. Id.

142. See Appendix C-3.

the legal malpractice lawsuits considered in the study settled, for an average value of \$60,393.¹⁴³ Why is there such a difference? Is legal malpractice litigation a "gold mine" for claimants, plaintiff's attorneys, and insurance defense attorneys?

Between 1979 and 1986, not only did the number of legal malpractice cases double, but the average settlement nationally soared from \$3,000 to \$45,000.¹⁴⁴ In 1991 the average legal malpractice insurance claim in California settled for \$90,000, and insurance carriers' legal expenses added another \$45,000 in each case.¹⁴⁵ Between 1985 and 1991 HOME paid an average settlement of \$35,000 for claims against its insured Colorado lawyers.¹⁴⁶ Another study, conducted during the same time as the ABA Study, found that the average legal malpractice verdict was \$43,575.¹⁴⁷

As seen in Table 4 below, the average Florida legal malpractice settlement paid on behalf of insured lawyers is considerably higher than the ABA Study suggests, and is steadily rising.

143. See Appendix A.

144. Mary Ann Galante, *Insurance Costs Soar; Is There Any Way Out?; Firms Seek Creative Solutions*, Nat'l L. J. 1 (March 10, 1986). There was no citation for the source of this information. See also Avery, *Phila. Daily News Bus. Mag.* at 25 (cited in note 48) (quoting Duke Nordlinger Stern in 1986: "The average settlement is about \$50,000, including defense costs").

145. Dorgan, *San Jose Mercury News* at 1A (cited in note 51).

146. Lignitz, *Denver Post* at C2 (cited in note 46).

147. Castle, 71 A.B.A. J. at 122 (cited in note 23).

Table 4: Florida Data: Claim/Lawsuit Settlement Amounts By Year¹⁴⁸

Year	Average Amount Paid For Claims¹⁴⁹	Average Amount Paid For Lawsuits¹⁵⁰
1981	\$ 9,568	\$ 36,916
1982	9,128	27,553
1983	18,633	35,744
1984	19,308	40,166
1985	26,654	39,163
1986	25,413	73,439
1987	26,236	58,050
1988	34,720	95,459
1989	18,544	72,337
1990	47,081	123,132
1991	24,946	153,873
1992	51,178	80,792
1993	38,064	79,951
Total Average	\$ 26,777	\$ 65,740

Unfortunately, more complete data from insurance carriers and states regarding the average settlement amounts in legal malpractice claims and lawsuits are not available.¹⁵¹ The Florida data, however, do illustrate a significant trend of higher settlement amounts for legal malpractice claims and lawsuits, and are probably representative of the national trend.¹⁵² ALAS, while refusing to provide specific information, has acknowledged receiving progressively more claims, settling more claims, and paying higher settlement amounts.¹⁵³

The severity of legal malpractice claims has been devastating not only to attorneys who are sued, but also to the insurance indus-

148. Bodiford interview (cited in note 73). See also Appendices C-3 and C-4. Lawsuits were distinguished from claims in the Florida data by segregating claims in which zero dollars were reported for defense counsel from those claims where more than one dollar was reported. Although there are serious doubts as to whether Florida is receiving reports from even a majority of the actual claims, there is no reason to think that the unreported claims would necessarily differ from these figures. According to Bodiford, noncompliance usually occurs with certain insurance carriers that fail to report few if any of their claims. However, there are other insurance carriers that report all of their claims.

149. See Appendix C-4.

150. See Appendix C-3.

151. O'Malley interview (cited in note 6). See also Wangberg interview (cited in note 6); Hall letter (cited in note 106).

152. Galante, Nat'l L. J. at 1 (cited in note 144). See also Dorgan, San Jose Mercury News at A1 (cited in note 51); Avery, Phil. Daily News Mag. at 25 (cited in note 48); Locke, 42 Denv. Bus. J. at 1 (cited in note 54).

153. O'Malley interview (cited in note 6).

try.¹⁵⁴ While insurance carriers, the organized bar, and individual insurance defense attorneys are reluctant to discuss the "iceberg," plaintiffs' attorneys are eager to brag.¹⁵⁵ Insurance carriers often pay top dollar to settle a legal malpractice case once it is obvious that it may go to the jury.¹⁵⁶

Despite the trend to curtail confidential settlement agreements,¹⁵⁷ almost all legal malpractice settlement amounts are still confidential.¹⁵⁸ Insurance carriers' "hide and seek" approach to disseminating statistics frustrates any attempt to get an accurate picture. However, we now have enough information to demonstrate that legal malpractice has become a major problem for the profession, and that it is not just a problem for solo practitioners, personal injury, or

154. Mike Stone, *Reliance Enters State's Lawyer Malpractice Market*, L.A. Bus. J. 5 (June 12, 1989) (citing Robert Chick, president of Lawyers Mutual Insurance Company, California's lawyer-owned legal malpractice carrier: In 1987, legal malpractice carriers in California were paying, for every \$1.00 received in premiums, \$1.64 for the claimants and \$1.19 for defense costs, or a total of \$2.83. The total paid out by insurance carriers in California for 1987 was \$83 million compared to \$56 million paid in 1986). See Mary Ann Galante, *Malpractice Rates Zoom; Legal Insurance Crisis*, Nat'l L. J. 1, 25-26 (June 3, 1985). Catastrophic losses forced twenty-five legal malpractice insurance companies to leave California in a seven-year period. *Id.* at 25. Nationwide, eighty to ninety percent of the companies writing legal malpractice insurance in 1981 were no longer writing it in 1985. *Id.* at 26. See also Darrell Preston, *Legal Malpractice Woes Mounting For Lawyers Hit With Huge Claims*, Dallas Bus. J. 1, 21 (April 16, 1990) (reporting that in Texas the average legal malpractice claim increased from less than \$20,000 in the early 1980s to several million dollars in the late 1980s. In March 1990, the London-based London United Investments PLC, one of the largest legal malpractice carriers in Texas and other states, stopped writing new business and suspended trading on the London Stock Exchange pending an analysis of its reserves); Judy Greenwald, *Home Chairman Says Insurer 'Out From Under'*, Bus. Ins. 90 (Feb. 18, 1991) (reporting that HOME, the nation's largest legal malpractice insurance carrier with 70,000 insured lawyers, was on the brink of insolvency in February 1991 before being rescued by a group of European investors).

155. Jane Baird, *Lawyer's Specialty: Suing Lawyers; Malpractice Attorney Says He Isn't Shunned By Members of Profession*, Houston Post 1D (Jan. 31, 1988) (reporting that Houston lawyer Larry Doherty sued well over 100 lawyers for legal malpractice in a three-year period). See also Dorgan, *San Jose Mercury News* at 1A (cited in note 51) (quoting San Diego attorney Dan Stanford, former head of California's Fair Political Practices Committee: "All I do is sue lawyers." His law business is "booming." He handles 30 to 35 cases per year involving lawsuits ranging from \$100,000 to \$3,000,000); Paul D. Rheingold, *Legal Malpractice: Plaintiffs' Strategies*, 15 *Litigation* 13, 14 (1989) (noting that "virtually all" of his twenty-five legal malpractice cases have been settled. A recent case settled for \$1.5 million. Rheingold, a New York lawyer, will not take any case under \$100,000, or under \$500,000 if the liability is in doubt).

156. Rheingold, 15 *Litigation* at 16 (stating: "I do, however, want to reveal a little secret . . . insurance companies apparently believe that lawyers make poor defendants. . . . [T]he carriers' view, in turn, shapes their willingness to settle even marginal malpractice claims. . .").

157. See generally Doggett and Mucchetti, 69 *Tex. L. Rev.* 643 (cited in note 7).

158. Except in savings and loan legal malpractice cases where the government is a plaintiff, or bankruptcy cases, almost all legal malpractice cases settle with confidentially agreements. Despite numerous "Sunshine Acts," no state prohibits lawyers as parties from agreeing to confidentiality as to the amount of settlement. Florida, through the mandatory reporting statute, Fla. Stat. Ann. § 627.912, is the only state where one can determine (if a case is reported) the settlement amount and the name of the settling insured attorney.

real estate lawyers. Based on current trends, the frequency and seriousness of legal malpractice claims and lawsuits will only continue to increase.

III. WHY THE LEGAL MALPRACTICE EXPLOSION?

Why, since 1970, has there been such an explosion in the number of legal malpractice claims and lawsuits?¹⁵⁹ Why are legal malpractice settlement amounts steadily increasing?¹⁶⁰ There are many answers that, taken together, give a broad picture of how the status quo changed so quickly. Two factors especially deserve attention: (1) the increase in the public's and jurors' hostility toward lawyers, and (2) the greater chance that a jury, not a judge, will decide issues of credibility,¹⁶¹ liability, damages, and defenses in legal malpractice lawsuits.

Perhaps the most obvious and most publicized change regarding the legal profession has been the growing hostility of the public toward lawyers.¹⁶² Images of lawyers as dishonest, self-interested, greedy individuals inevitably impact on the attitude and reactions of not only hostile jurors, but legislators, judges, and policymakers.¹⁶³ Traditional barriers that have served to keep legal malpractice cases away from juries have quickly eroded. Reasons to treat lawyers differently from others fall on deaf ears. More lawyers are willing to sue lawyers.¹⁶⁴ More clients and nonclients are willing to sue lawyers. More settlement monies are being paid out to those who sue lawyers.¹⁶⁵

159. Mallen and Smith, 1 *Legal Malpractice* at 22 (cited in note 11).

160. See Table 4. See also Appendices C-3 and C-4.

161. The Author's experience is that if it is the defendant lawyer's word against the client's, then unless the lawyer has a writing corroborating his version, the client usually is believed by the jury.

162. Randall Samborn, *Anti-Lawyer Attitude Up; But NLJ/West Poll Also Shows More People Are Using Attorneys*, Nat'l L. J. 1 (Aug. 9, 1993) ("NLJ/West Poll") (reporting that, according to a National Law Journal/West Publishing Co. poll, "the widely held perception that resentment of lawyers—ranging from lawyer-bashing jokes to outright vilification—is running at a fever pitch. And it is especially high among better-educated, higher wage earners in society").

163. Gary A. Hengstler and R. William Ide, III, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, 79 A.B.A. J. 60, 64 (Sept. 1993) ("ABA Poll") (reporting that, according to the ABA poll done by Peter Hart Research Associates, Inc., lawyers are not caring or compassionate, not easily understood, not honest and ethical, not putting clients first, and not dedicated to rights. Lawyers are smart/knowledgeable and solve problems, but make too much money, and are too greedy).

164. Ostberg and Rudy, *If You Want To Sue a Lawyer* at 3 (cited in note 15).

165. See Table 4. See also Appendices C-3 and C-4.

A. *Lawyers, Greed, Burn Out, and Hostile Jurors*

In the movies,¹⁶⁶ television,¹⁶⁷ the tabloids,¹⁶⁸ the mainstream press,¹⁶⁹ and the public opinion polls,¹⁷⁰ lawyers are increasingly seen as dishonest, greedy, and selfish. Perhaps most disturbing, recent polls show that, although greater numbers of nonlawyers are having business or social contact with lawyers, the more contact a person has with a lawyer, the greater the likelihood that the person comes away with a negative impression of lawyers in general.¹⁷¹ Lawyers appear to have a better image among the poor and minority groups—people who have less contact with lawyers.¹⁷²

166. In 1993 the two top grossing movies, "The Firm" and "Jurassic Park," fed the public's negative image of lawyers. In "The Firm," greedy lawyers killed each other for money. The dinosaur's first victim in "Jurassic Park" was a lawyer, and audiences cheered.

167. *It's A Laugh-Hate Relationship, Lawyer Complains*, St. Petersburg Times Bus. Mag. 8 (July 12, 1993) (reporting criticism of two popular commercials by the president of the California Bar, Harvey Saferstein. In a Miller Lite Beer ad, a rodeo cowboy lassos an overweight, white, middle-aged male tax lawyer. A Reebok ad shown during the 1993 Super Bowl reminded viewers, on a "perfect planet there would be no lawyers." Saferstein said "the lawyer-bashing that is going on is vastly more pervasive and intense than it was 10 or 15 years ago. On a regular, mean-spirited basis, lawyer-bashing tends to dehumanize lawyers and to make it easier for someone to act like this [referring to the unhappy client who shot and killed eight lawyers and other employees at the San Francisco law firm of Petit and Martin on July 1, 1993]").

168. Larry Haley, *Bribes, Lies and Forgeries—That's How Sleazy Lawyers Drum Up Business: They Pay Off Cops And Doctors And Even Sneak Into Funeral Homes To Get Clients*, The Nat'l Enquirer 41 (June 22, 1993).

169. Robert J. Samuelson, *Go Ahead, Bash Lawyers; The People Who Should Make the System Better are Making it Worse*, Wash. Post A21 (April 22, 1992) (arguing, in an opinion-editorial, that "[w]hat's wrong with lawyers is that they have an economic interest in cultivating and prolonging conflict. . . . [I]deally, the system should minimize conflicts by insuring that the rules are clear and that disagreements are resolved rapidly. The trouble is that lawyers' well-being runs in the opposite direction. The more conflict, the better. The more cumbersome and ambiguous society's rules, the better. . . . [L]awyers simply won't face the contradiction between their incomes and their professional responsibilities. The only real hope for change comes from a small but rising number of (yes) legal malpractice suits. If enough lawyers become victims of today's system, they may grasp the wisdom of changing it").

170. Ted Gest, *Why Lawyers are in the Doghouse*, U.S. News & World Report 38 (May 11, 1981) (reporting that an ABC News-Harris Survey showed law firms were last on the list of 13 institutions in which Americans had high confidence, below even Congress, the press, and labor unions). See also J. Gallup Jr., *The Gallup Poll of Public Opinion 191-93* (July 12, 1985) (finding that only realtors, labor union leaders, advertisers, insurance salesman, and car salesman were viewed as having lower honesty and ethical standards than lawyers); *NLJ/West Poll* at 1, 20 (cited in note 162) (reporting that during the past seven years the number of persons believing that lawyers were "less honest" increased from 17% to 31%. The number of adults who would recommend that their child become a lawyer decreased from 12% to 5%); *ABA Poll* at 64 (cited in note 163).

171. *NLJ/West Poll* at 20 (reporting that in 1986 only 52% of the poll respondents had any business or social contact with a lawyer. In 1993 it rose to 70%. The lawyers' image was worse with persons earning between \$50,000 and \$75,000).

172. *Id.* (reporting that lawyers' image was better with minorities and persons earning less than \$20,000). See also *ABA Poll* at 61 (cited in note 163).

Greed is the most common reason for legal malpractice cited by academic and lay writers. For lawyers, money is increasingly the be-all and end-all.¹⁷³ Solo practitioners are criticized,¹⁷⁴ as are the law firms.¹⁷⁵ Chris Coley, the president of an association comprised of lawyer-owned legal malpractice insurance companies, explains that "malpractice claims have increased in part because attorneys are taking on too many cases. . . . [T]he legal profession has become more competitive . . . forcing lawyers to work harder for their money."¹⁷⁶ Dan Stanford, a leading San Diego plaintiffs' legal malpractice attorney, says the number one cause of legal malpractice is greed: "Legal malpractice occurs when lawyers accept either too many cases or cases outside of their area or beyond their ability."¹⁷⁷ Thus, even the struggling lawyer who takes any case that walks in the door in order to pay the overhead is vulnerable.¹⁷⁸

Many would dismiss the contention that greed is the cause of legal malpractice, or that lawyers are any greedier than non-lawyers, but would admit that when lawyers are placed in situations where their own self-interest is up against their clients', it is naive to expect that their clients' interests will always prevail.¹⁷⁹ Increased competi-

173. Darrell Sifford, *A Lawyer's Worried View of Lawyers*, Phil. Inquirer 11 (Dec. 29, 1991) (citing Norman Perlberger, head of his own law firm, a practicing lawyer for 20 years, and an adjunct professor at Temple University Law School, who also believes that "there has been a rise in legal malpractice cases. Maybe this will force lawyers to clean up their act . . .").

174. Robert A. Burt, *Conflict And Trust Between Attorney and Client*, 69 Georgetown L. J. 1015, 1021 (1981) (noting the pervasive and inherent conflict of interests, ignored by traditionalist scholars, fueled by lawyers' greed and motivation for profit. The solo practitioner focuses on fees rather than results).

175. Frederick Rosenberg, *Legal Practice: Taking the Bite Out of Lawyers' Fees*, Wash. Post C3 (June 11, 1989) (stating that "[t]he past decade has seen legal costs at large firms skyrocket at nearly three times the rate of inflation. . . . At the core of this development is a profession concentrating itself into massive business organizations focusing primarily on profits, personal gain and power"). See also Ruth Marcus, *Risk of Ethics Litigation Raises Ante for Blue-Chip Law Firms*, Wash. Post B1 (May 26, 1987) (quoting Professor Ronald Rotunda of the University of Illinois School of Law: "The reason they don't see the conflict or they ignore it is that when they have two lucrative clients, they are reluctant to tell one of them to go home . . . [t]he problem is the love of the almighty buck at a time when lawyers' salaries . . . are getting to be much higher than normal").

176. Katheryn Kahler, *Legal Malpractice Suits Increased, But Not All Lawyers Are Insured*, Oregonian R13 (Aug. 25, 1991).

177. Jonathan Gaw, *Lawyers Shed Reluctance To Sue Their Own*, L.A. Times (San Diego County ed.) B1 (Dec. 14, 1992).

178. Research For Marketing, *1989 Survey* at ES-17 (cited in note 39) (reporting that 42% of Oregon's lawyers had all the work they could handle, 27% had more than they could handle, and 27% had less work than they could handle).

179. See Alan R. Marks, *Where is the Real Conflict of Interest? Examining Underlying Issues in Client Relationships*, 79 A.B.A. J. 112 (Feb. 1993) (explaining that often an attorney's self-interest is opposed to the client's interest). See also Alan R. Marks, *Conflict of Interest*, 79 A.B.A. J. 15 (Aug. 1993) (clarifying his thesis by stating: "I was not saying that lawyers are motivated primarily by self-interest [as suggested by Judge Herrell's letter, in 79 A.B.A. J. 14

tion reduces profit margins, and to maintain the same standard of living lawyers become more concerned with money and more receptive to cutting corners, focusing on quantity instead of quality.

Lack of professionalism is also a major problem.¹⁸⁰ To some, the increase in competition, especially the increase in lawyer advertising, was the beginning of the end for the profession.¹⁸¹ Others see competition as the only way to keep the legal profession acting in the public interest.¹⁸² There is no disagreement, however, that competition has taken over the profession, and that there are practically no limits to lawyer advertising and solicitation of business.¹⁸³ The final irony is that some lawyers now advertise for victims of legal malpractice.¹⁸⁴

(May 1993)], although obviously lawyers, as human beings, cannot escape the long-accepted combination of human motivations, to which they are necessarily subject. It is the self-interest portion of this combination, of course, that brings about the requirement for ethics rules in the first place. The underlying pervasive conflict I described should be thoughtfully recognized and analyzed—not denied. . . .").

180. ABA Poll at 1 (cited in note 163) (explaining that a 1992 ABA Survey of Lawyers "ranked improving the standing of the profession in the eyes of the public as one of the highest priorities they want the ABA to address"). Texas Supreme Court Justice Eugene A. Cook has written that "[t]his was the topic that lawyers wanted to talk about and address. At the National Conference of Bar Presidents, on August 4-5, 1989, in Honolulu, Hawaii, an issues update indicated that 'professionalism continued to dominate the concern of bar leaders. . . .'" Eugene A. Cook, *Professionalism and the Practice of Law*, 23 Tex. Tech L. Rev. 955, 987 (1992).

181. See generally Nancy J. Moore, *Professionalism Reconsidered*, 1987 Am. Bar Found. Res. J. 773 (1987) (reviewing ABA Commission on Professionalism, *In The Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (ABA, 1986) and taking the ABA's position that competition contributed to the decline of the profession. If there had been less competition and more direct bar regulations it would have prevented the decline in professionalism and the quality of work).

182. Richard L. Abel, *American Lawyers* 239-45 (Oxford U., 1989).

183. Former Chief Justice Warren Burger, in an April 1993 speech at the University of Tennessee, criticized "the outrageous breach of professional conduct we see in the huckster advertising of some attorneys. Perhaps huckster is not strong enough a word; shyster is more appropriate." "Shyster" Ads?, 79 A.B.A. J. 45, 45 (Aug. 1993). See also *Fax Poll*, 13 Cal. Law. 108, 108 (June 1993) (stating that 86% of California attorneys thought that lawyer advertising negatively contributed to the public's perception of lawyers); Don J. DeBenedictis, *Ad Controversy Erupts: Newspaper Appeals Seeking Burger Bacteria Victims Decried*, 79 A.B.A. J. 34 (May 1993) (discussing a recent newspaper ad which was run in the Northwest and which read: "Important Notice: If you or someone you know has been stricken by the recent outbreak of E. Coli 0157:H7 Bacterium DUE TO UNDERCOOKED HAMBURGER you may have a valuable legal claim for DAMAGES. To find out about your claim call THE LAW OFFICES OF D. SCOTT BLAIR, 527-2000 for a free consultation or appointment. . . . All cases taken on a contingency basis. No recovery, no fee"). Compare Tex. Penal Code Ann. § 38.12(d),(g),(h) (Vernon 1994) (making certain types of direct solicitation by a lawyer a misdemeanor for a first offense, or a third-degree felony, punishable by up to ten years in prison and a maximum \$10,000 fine for subsequent offenses).

184. During the fall of 1983 the Author saw a St. Petersburg, Florida local cable television advertisement urge viewers to call if a settlement amount negotiated by a prior lawyer for their accident was too small. Call 1-800-LAWYERS, the ad went on, to see if you have a good legal malpractice claim.

The need to work harder, in order to make more money, has also been blamed for the increase in the number of dissatisfied, "burned-out" lawyers.¹⁸⁵ One study found that billable hour requirements have doubled in the last fifteen years.¹⁸⁶ Another study found that in 1982 average associates in law firms were billing 1,723 hours.¹⁸⁷ From 1984 to 1990 the percentage of lawyers in private practice who billed more than 2,400 hours a year jumped from one-third to one-half.¹⁸⁸ In order to honestly bill 2,400 hours a year, or roughly fifty hours a week, one would have to work sixty to seventy hours a week, with no holidays or vacations. Thus, it is not surprising that lawyers experience more mental health problems,¹⁸⁹ alcohol use,¹⁹⁰ and drug use¹⁹¹ than the population at large.

Whether lawyers are less honest, more greedy, more competitive, more "burned-out," or more in need of treatment by psychiatrists or public relations professionals than the public at large is certainly debatable. After all, the largest and most comprehensive survey of private morals ever undertaken indicates that Americans believe that "the United States has become a greedier, meaner, colder, more selfish, and more uncaring place."¹⁹² Lawyers may only be as dishonest, greedy, selfish, and burned-out as nonlawyers. However, it is clear that the negative image of lawyers, even if erroneous, is a

185. American Bar Association Young Lawyers Division, *The State of the Legal Profession 1990* 1, 4, 24, and 52 (ABA, 1991) ("ABA State of the Legal Profession").

186. American Bar Association Commission on Women and the Profession, *Lawyers And Balanced Lives: A Guide to Drafting and Implementing Workplace Policies for Lawyers* 5 (ABA, 1990).

187. Altman & Weil, Inc., *The 1982 Survey of Law Firm Economics*, 23 *Law Off. Econ. & Mgmt.* 351, 354 (1982).

188. Nancy D. Holt, *Are Longer Hours Here To Stay?: Quality Time Losing Out*, 79 *A.B.A. J.* 62, 64 (Feb. 1993).

189. G. Andrew H. Benjamin, Elaine J. Darling, and Bruce Sales, *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 *Int'l. J. L. & Psych.* 233, 234 (1990).

190. Ted Rohrlich, *National Perspective; Attorneys Report Big Jump in Drinking in ABA Survey*, *L.A. Times A5* (Dec. 5, 1990) (quoting Ronald L. Hirsch, who directed the 1990 survey of 3,248 lawyers on behalf of the ABA Young Lawyers Division: "The data reflect . . . the concern of many that increases in hours worked and the resulting decrease in personal time have become a major problem . . . the legal profession has in recent years become a less pleasant place to work").

191. Benjamin, Darling, and Sales, 13 *Int'l J. L. & Psych.* at 241 (cited in note 189).

192. James Patterson and Peter Kim, *The Day America Told the Truth* 239 (Prentice Hall, 1991). See also *id.* at 45, 49, and 155 (claiming that 91% of Americans admit lying regularly, mostly to those they know best; only 31% believe that honesty is the best policy; the so-called Protestant work ethic is a myth; almost half of American workers admit to chronic malingering; only 10% of Americans are satisfied with their work; 17% of them drink or use drugs at work; and 70% of Americans have no sense of loyalty to their company).

critical factor with jurors, judges, and legislators. Perceptions, right or wrong, often become the reality.

B. Legislators and Judges Open the Gates

It is easy to understand that insurers, defense lawyers, and lawyer defendants increasingly settle legal malpractice lawsuits because of potentially hostile jurors, but public opinion has also affected the judiciary and the state legislatures, two institutions historically controlled by lawyers and the organized bar associations. As the public's opinion of lawyers' competence and ethics wanes, there appear to be corresponding increases in legislative and judicial decisions which liberalize the legal malpractice rules and allow legal malpractice actions to reach hostile juries.¹⁹³

Both the legislatures and the courts, state and federal, caught in the throes of the consumer movement,¹⁹⁴ have made it easier for clients and nonclients to sue for legal malpractice. Legal malpractice actions, judicially imposed sanctions, and government regulations have become the predominant methods of controlling lawyers,¹⁹⁵ largely because of ambiguous ethical codes and shortcomings in lawyer self-regulation.¹⁹⁶

193. Martin D. Begleiter, *Attorney Malpractice in Estate Planning—You've Got To Know When To Hold Up, When To Fold Up*, 38 U. Kan. L. Rev. 193, 273-74, 280-81 (1990) (arguing that "[t]he decisions removing the barriers to actions for legal malpractice will continue . . . [t]he defenses of privity and the statute of limitations have been routed . . . [t]he malpractice revolution has benefits for both lawyers and the public").

194. Gary Blankenship, *Scanlon: Change Lawyer PR Efforts*, 20 Fla. Bar News 1, 20 (1993) (reporting that ABA Consultant Mike Scanlon, who was hired to direct the ABA's \$750,000 communications efforts, launched after the *ABA Poll* (cited in note 163), told the Florida Bar Board of Governors on Oct. 1, 1993, in Tampa: "Most people think one in three lawyers is a bad apple. . . . The problem is one I call consumer relations. The whole consumer movement bypassed the legal profession and now they're coming back to get you. The public does not see you as a profession, they see you as a consumer service. They don't see you as consumer-friendly").

195. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 Yale L. J. 1239, 1279 (1991) (stating: "Legalized' regulation will undoubtedly continue to dominate the normative structure of the legal profession, through court-promulgated rules, increasingly intrusive common law, and public statutes and regulations. . . . The bar has become too large, diverse, and balkanized in its practice specialties for the old informal system to be effective as an institution of governance. . . . [T]he courts will continue to be an indispensable instrument for ordering and clarifying norms. . . .").

196. See Ostberg and Rudy, *If You Want To Sue a Lawyer* at 11 (cited in note 15) (stating: "The attorney discipline system is riddled with flaws. More than 90,000 complaints are filed each year with these agencies, but only two percent of the complaints result in more than private reprimand. Clients often don't file complaints because the process takes too long, it takes place in secret, it limits clients' rights to present their own cases or to appeal decisions and it does not provide any compensation").

Legislators, more often than not, are taking away or ignoring the legal profession's claim for self-regulation.¹⁹⁷ Legislation is expanding lawyers' liability. For instance, most states have consumer protection laws with treble damages which can potentially be invoked against lawyers.¹⁹⁸ The Financial Institutions Reform, Recovery, and Enforcement Act¹⁹⁹ ("FIRREA") federal legislative scheme,²⁰⁰ which preempts traditional state legal malpractice actions and defenses,²⁰¹ is also representative of the trend toward increasing liability for lawyers. The ABA has strenuously objected to this legislative trend toward regulating the profession.²⁰²

197. Hazard, 100 Yale L. J. at 1279 (cited in note 195).

198. Lis Wiehl, *Lawyers Find New Ways to Sue Other Lawyers*, N.Y. Times B4 (June 16, 1989) (reporting that at least six states, including Texas and Massachusetts, hold lawyers accountable under state consumer protection statutes designed to prohibit deception and the providing of consumer goods and services). The criticism is that the profession has been too slow to regulate itself. Lisa Richards of (HALT) has said that "[u]ntil better disciplinary avenues are available we favor the innovative use of these statutes to make lawyers accountable." *Id.* All states and Washington, D.C., have laws to prevent consumer fraud, but lawyers are usually exempt from the treble damages and attorneys fees provisions because state courts are deemed the exclusive regulators of the legal profession. See, for example, *Rousseau v. Eshleman*, 128 N.H. 564, 519 A.2d 243, 245 (1986) (holding that New Hampshire's consumer protection statute did not apply to an attorney). But several other courts have held that lawyers can be sued under these laws. Paul Marcotto, *New Threat to Attorneys?: N.J. Court: Lawyers Liable For Consumer Fraud*, 74 A.B.A. J. 17, 18 (Dec. 1988) (noting that courts in New Jersey, Louisiana, Massachusetts, Oregon, and Texas have applied consumer protection statutes to professionals).

199. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. §§ 1422 et seq. (1989).

200. FIRREA allows federal agencies such as the Resolution Trust Corporation ("RTC") and the Office of Trust Supervision ("OTS") to impose sanctions on the large law firms which represented defunct savings and loans associations. See 12 U.S.C. § 1813(u)(4) (Supp. 1993). The OTS quickly brought attention to FIRREA when it filed an administrative complaint and froze the assets of the large New York law firm of Kaye, Scholer, Fierman, Hayes & Handler, claiming \$275 million in damages for Charles Keating's Lincoln Savings and Loan Association's \$2 billion fraud. Amy Stevens and Paulette Thomas, *Legal Crisis: How a Big Law Firm Was Brought to Knees By Zealous Regulators*, Wall St. J. A1 (March 13, 1992).

201. See, for example, *FDIC v. Martin*, 770 F. Supp. 623, 627 (M.D. Fla. 1991) (holding that FIRREA allows for an assignment of a legal malpractice claims by the failed bank to the FDIC, preempting Florida law which prohibited the assignment). See also 12 U.S.C. § 1821(d)(3)(B) and (d)(5)(C)(i) (holding that potential attorney defendants have to file an administrative claim within ninety days of the Receiver's publishing "notice to the depository institutions creditors to present their claims or waive any affirmative defenses to a federal regulatory agencies' lawsuit for a failed savings and loan"); *FSLIC v. Shelton*, 789 F. Supp. 1367, 1373 (M.D. La. 1992) (finding no subject matter jurisdiction over affirmative defenses in FIRREA action); *FDIC v. Rusconi*, 796 F. Supp. 581, 589 (D. Me. 1992) (same).

202. Thomas C. Rice and Blake A. Bell, *Liability of Lenders Counsel* in ALI-ABA Committee on Continuing Professional Education, *Lender Liability and Other Complex Litigation Involving Financial Institutions* 273, 304 (ALI-ABA Course of Study, 1991) (stating that federal "regulators are urging the adoption of untested legal theories calculated to expand exponentially the scope of duties owed by attorneys and other professionals who represent financial institutions"). Despite the availability of new FIRREA actions, it is interesting to note that almost all savings-and-loan-related lawsuits against lawyers, including the well-publicized RTC,

While it is true that some legislatures are listening to consumer groups, becoming more anti-lawyer,²⁰³ and regulating lawyers more readily,²⁰⁴ organized attorney groups are still a powerful lobby. Certain legislatures continue to put up obstacles for plaintiffs in legal malpractice lawsuits.²⁰⁵ Lawyers, who comprise significant numbers in Congress and most state legislatures, on occasion still protect their assets.²⁰⁶

While the legislative trend to publicly regulate lawyers and hold them accountable to consumers has moved slowly, the judiciary's response to the consumer movement and the public's distaste for lawyers has been quicker—indeed almost revolutionary. The judiciary has dramatically changed the rules to favor claimants. For exam-

OTS, and FDIC lawsuits, involve only the traditional legal malpractice negligence theory. See *id.* (noting that "in pursuing actions against attorneys and other professionals, the government typically utilizes more traditional causes of action, particularly malpractice").

203. See Myrna Oliver, *State Bar Urged to Hire Independent Judges; Legislature May Act on Lawyer Discipline Otherwise, Van de Kamp Warns*, L.A. Times 3 (Sept. 20, 1987) (reporting that only three out of forty state senators in California are active attorneys, the legislature could be described as "hostile," and that State Senator Nicholas C. Petris (D-Oakland) told the California Bar's state convention that lawyers need to run for more legislative seats: "Most of my colleagues in the legislature are not only non-lawyers . . . they are down right hostile to lawyers").

204. See, for example, Mark Hansen, *Texas Makes Solicitation a Felony*, 79 A.B.A. J. 32 (Sept. 1993) (discussing Texas' new anti-solicitation statute). See also Ca. Bus. & Prof. Code § 6147(a)(6)(A) and 6148(a)(4)(A) (West Supp. 1994) (requiring California's lawyers to inform clients in writing if they have no malpractice insurance); Cal. Civ. Proc. Code § 2018(f) (West Supp. 1994) (removing an attorney's work product privilege when she is sued by her client for malpractice).

205. See Cal. Civ. Code § 1714.10(a) (West Supp. 1993) (allowing for the pretrial dismissal of conspiracy claims against attorneys). In a recent case an appellate court applied the statute to an "aiding and abetting" allegation, depriving the claimant of having a jury hear the evidence. See *Howard v. Superior Court*, 2 Cal. App. 4th 745, 3 Cal. Rptr. 2d 575, 576-77 (1992). While the statute can be justified on reputation concerns, the law and its application appear to be rather self-serving.

206. See, for example, Tex. Civ. Stat. Ann. art. 1528n and art. 6132a-1 (West Supp. 1994). A blatant example of legislative relief can be found in recent statutes such as those allowing professionals, including lawyers, to create a new legal entities known as "Limited Liability Partnerships" ("LLP") or "Limited Liability Companies" ("LLC"). A plaintiff who obtained a legal malpractice judgment against a partner in a firm organized under these statutes would first seek the lawyer's insurance policy, then the lawyer's personal assets or the firm's, but could not collect against the "innocent partners" personal assets under the traditional theory of vicarious liability. See Jonathan Groner, *This Tort Reform is Pro-Lawyer: D.C. Council Bill Would Ease Partners' Malpractice Liability*, Legal Times 1, 1 (Nov. 16, 1992) (reporting that the Washington, D.C. Council considered following Texas' lead and allowing a LLP entity for law firms). The Washington D.C. Council passed Session Law 10-34, allowing for LLPs, on July 29, 1993, effective Oct. 15, 1993. See 1993 D.C. Stat. 10-34, codified at D.C. Code § 41-146 (1993). See also Linda Himelstein, *S&L Counsel Turn to State Houses for Liability Relief*, The Recorder 2 (May 22, 1991) (reporting on attempts by lawyers in Louisiana and Ohio to curb their liability for representing financial institutions). The Louisiana state legislature passed a statute to curb exposure for bank lawyers requiring that any duties and responsibilities for bank and thrift counsel be defined by the state's Rules of Professional Conduct. See La. Rev. Stat. Ann. § 6:1351 (West 1993).

ple, New York,²⁰⁷ California,²⁰⁸ and Pennsylvania²⁰⁹ have all relaxed the strict privity rules that once required legal malpractice plaintiffs to be former clients.²¹⁰ Today, in fact, the most severe legal malpractice cases are brought by nonclients.²¹¹

Traditionally, under the "occurrence" rule of claim accrual, aggrieved clients often could not sue because the statute of limitations ran before they had discovered the malpractice (the "discovery" rule).²¹² The modern majority approach, however, is to start the clock when the claimant knew or should have known of the malpractice.²¹³

207. *Prudential Insurance Co. of America v. Dewey, Ballantine, Bushby, Palmer and Wood et al.*, 80 N.Y.2d 377, 605 N.E.2d 318, 320 (1992). In *Prudential*, a non-client lender detrimentally relied on a lawyer's typographical error stating the outstanding balance of a first mortgage as being \$92,885, when it was actually \$92,885,000. The court stated: "We now conclude that in circumstances such as these, a theoretical basis for liability against legal professionals can be presented. . . . [W]here, as here, the negligent acts, i.e., the creation of an opinion letter and the transmission of that letter to a third party for the party's own use, were carried out by the lawyer at the client's express direction, the ethical considerations of Canons 4 and 5 [of the Code of Professional Responsibility] are insufficient reason to insulate attorneys from liability." *Id.*

208. *Heyer v. Flaig*, 74 Cal. Rptr. 225, 449 P.2d 161 (1969) (en banc). The court used a balancing test to determine a lawyer's liability. The factors to be considered included: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to him; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injuries suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm. *Id.* at 164. Compare *Bily v. Arthur Young & Co.*, 3 Cal. App. 4th 370, 834 P.2d 745, 767 (1992) (holding that an accountant's duty of care in the preparation of an independent audit of a client's financial statements does not extend to nonclient investors).

209. *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (Pa. 1983). The Pennsylvania Supreme Court was hesitant to embrace the "Heyer factors" as being unworkable and potentially too expansive, but did require the following two factors: (1) the contracting parties (attorney and client) must have intended to confer benefit on the third party, and (2) the client must have intended to give the third party the benefit of the particular performance sued upon. *Id.* at 750-52.

210. Restatement (Third) of the Law Governing Lawyers § 73, comments e, f (ALI, Tentative draft No. 7, April 7, 1994) ("Restatement 3d Draft") (stating that liability under the erosion of the privity rule is still confined to a few categories such as will beneficiaries and recipients of opinion letters).

211. Robert E. O'Malley, *Preventing Legal Malpractice in Large Law Firms*, 20 U. Toledo L. Rev. 325, 328 (1989). O'Malley states:

A majority of the most severe claims [for legal malpractice] are coming not from the clients themselves, but from various third parties (investors, lenders, purchasers, stockholders, regulatory agencies such as FDIC and FLIC, etc.). . . . [I]n many of the most severe third-party claims, the quality of the defendant lawyer's legal work is not the real issue; for example, even if the prospectus . . . satisfies all of the requirements . . . the lawyer is, nevertheless, likely to be sued and has a high risk of liability if the enterprise fails.

Id. See also *ABA Study* at 47-48 (cited in note 8) (showing an increase in nonclient lawsuits, from 8% in 1977 to 21% in 1985).

212. See, for example, *Chapman v. Alexander*, 307 Ark. 87, 817 S.W.2d 425, 427 (1991) (finding that a change to the discovery rule would be unfair because the occurrence rule had been relied upon by professionals, and because of possible insurance coverage problems).

213. Mallen and Smith, 2 *Legal Malpractice* §18.14 at 132-34 (cited in note 11) (noting that "[n]otwithstanding the rapid, recent acceptance [of the discovery rule], the departure and

Accordingly, lawyer defendants, adjusters, and defense counsel are hesitant to go before hostile jurors on a technical statute of limitations defense, preferring instead to settle.²¹⁴

In order to get her case before sympathetic jurors, a plaintiff need only find one lawyer to take the case and another lawyer who, for a fee, is willing to testify that the defendant lawyer's conduct fell below the standard of care. Former clients are increasingly allowed to sue their prior counsel for negligently settling a civil case.²¹⁵ In the securities field, defendant lawyers' pleas for zealous advocacy, confidentiality, and client loyalty are falling on deaf ears.²¹⁶ Ethical rules are increasingly used as a sword,²¹⁷ even though they are either con-

ultimate abandonment of the occurrence rule was a slow and deliberate process, such as would be expected before overturning 140 years of precedent. . . . In no instance, however, has a court critically analyzed why a [prior occurrence] rule which forecloses a remedy before the client, or even a lawyer, could be expected to discover the error, should be continued"). See also, for example, Cal. Civ. Proc. Code § 340.6 (1982) (creating a one-year statute of limitation from discovery); Fla. Stat. § 95.11(4)(a) (1982) (creating a two-year statute of limitation from discovery). Other states have legal malpractice statutes of limitations that run up to six years from the date of discovery because any legal malpractice case can be pled as a breach of contract action. See, for example, *Lee Houston & Assoc., Ltd. v. Racine*, 806 P.2d 848, 855 (Alaska 1991) (applying a six year statute of limitation to claims for economic loss arising out of professional service relationships); *Oleyar v. Kerr*, 225 S.E.2d 398, 400 (Va. 1976) (applying a three-year statute of limitations).

214. For example, in 1989, the Author was told by the claims manager of a major legal malpractice insurance carrier that if there were no dispositive motions prior to a jury trial, such as on the statute of limitations, then authority to settle for \$20,000 or less would automatically be forthcoming. The carrier averaged more than \$20,000 per year for each legal malpractice lawsuit expended in defense costs alone.

215. See, for example, *Ziegelheim v. Apollo*, 128 N.J. 250, 607 A.2d 1298, 1304 (1992) (insisting "that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks"). See also *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 711 (9th Cir. 1992) (holding that assuring that a settlement is reasonable is one of a lawyer's duties). The Author handled an appeal for the lawyer defendants in *Mutuelles Unies*, where malpractice was found against an insurance defense counsel who rejected a settlement demand for \$2.2 million prior to an award of \$4 million in the underlying case. *Id.* Compare *Muhammad v. Strausburger, McKenna, Messer, Shilobod and Gutnick*, 526 Pa. 541, 587 A.2d 1346, 1349 (1991) (stating that "to allow [negligent settlement cases] will create chaos in our civil litigation system. Lawyers would be reluctant to settle a case. . . . We refuse to endorse a rule that will discourage settlements and increase substantially the number of legal malpractice cases").

216. Stevens and Thomas, Wall St. J. at A1 (cited in note 200). Timothy Ryan, then Director of the OTS, responded that the lawyer who artfully dodges his duties in order to put off an inevitable seizure of an institution is a "garden variety accomplice." Harris Weinstein, former chief legal counsel of the OTS, advocates a "whole law" advocacy: "The rules do not require you to disclose everything you know. . . . But if you make a statement, you cannot tell a misleading or partial truth." *Id.* at A6.

217. Michael J. Hoover, *The Model Rules of Professional Conduct and Lawyer Malpractice Actions: The Gap Between Code and Common Law Narrows*, 22 New Eng. L. Rev. 595, 612 (1988) (noting that the violation of an ethical rule usually leads to civil liability to a client or a third party).

fusing,²¹⁸ or inappropriate in certain contexts such as securities²¹⁹ or estate planning work.²²⁰

While most agree that liability for lawyers has expanded, some scholars believe that the “case within a case” approach to legal malpractice damages—that the defendant lawyer’s mistake does not produce liability when the plaintiff would have lost the underlying case anyway—is still skewed in favor of lawyers.²²¹ However, in practice this technical defense, or “excuse,” is difficult for lay jurors to accept: A “bad” underlying case becomes a winner; insignificant damages suddenly grow to two, three, or four times the true value of the underlying case. Moreover, states are increasingly allowing jurors a blank check in awarding emotional distress²²² and punitive damages in malpractice cases,²²³ neither of which are typically covered by insurance.²²⁴

218. O'Malley, 20 U. Toledo L. Rev. at 355 (cited in note 211) (noting that “[t]he honest lawyer, struggling with the question of what he or she can or must do upon discovering a prior client fraud, will be thoroughly bewildered by the contradictory interplay between and among Model Rules 1.6 (confidentiality), 1.13 (organization as a client), 1.16 (withdrawal), and 4.1 (truthfulness in statements to others), and the mysterious portion of the Official Comment under Rule 1.6 dealing with withdrawal: ‘Seek independent counsel if you are in this position’”).

219. Richard M. Phillips, *Client Fraud and the Securities Lawyer's Duty of Confidentiality*, 49 Wash. & Lee L. Rev. 823, 828-89 (1992) (discussing how corporate and securities members of the ABA have tried in vain to amend Rule 1.6 to add an exception for economic injury caused by a client defrauding others). See also *Philadelphia Reserves Supply Co. v. Nowalk & Associates*, No. 91-0449, 1992 US Dist. LEXIS 12745, *28 (E.D. Pa. August 25, 1992) (discussing the New Jersey rule that revises the duty of confidentiality to oblige lawyers to reveal privileged information when the attorney becomes aware that a client’s fraud threatens severe financial harm).

220. ABA Committee On Significant New Developments in Probate and Trust Practice Law, *Developments Regarding The Professional Responsibility Of The Estate Planning Lawyer: The Effect Of The Model Rules of Professional Conduct*, 22 Real Prop. Prob. and Tr. J. 1, 2 (1987) (noting that “Model Rules [as well as the Code of Professional Responsibility] do not deal effectively with some of the most important and difficult problems of professional conduct in the practice of estate planning”).

221. Joseph H. Koffler, *Legal Malpractice Damages in a Trial Within a Trial—A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 Marq. L. Rev. 40, 75 (1989) (stating that the “trial within a trial” approach to causation in legal malpractice cases is “skewed enormously in favor of the attorney and against the client. . . . Frequently several years have elapsed [due to the malpractice] and evidence needed to establish the claim has been lost or diluted by the passage of time . . . [thus] the attorney derives a benefit”). See also Joseph J. Fleischman and Margaret M. Monaco, *Tough Standards Hold in Malpractice Cases*, N.J. L. J. 6, 6 (Nov. 2, 1992) (stating: “Whereas a first-year law school Torts book in 1970 would be an inadequate resource for assessing 1992 [legal] malpractice causes of action, it would suffice for 1992 proof of damages” and discussing the use of the “suit within a suit” approach as one method of presenting proof of loss in New Jersey).

222. See, for example, *Gore v. Rains & Block*, 189 Mich. App. 729, 473 N.W.2d 813, 818-19 (1991) (holding that recovery for mental anguish arising from legal malpractice was not barred by lack of proof of physical injury); *Salley v. Childs*, 541 A.2d 1297, 1300-01 (Me. 1988). Compare *Quezada v. Hart*, Cal. App. 3d 754, 136 Cal. Rptr. 815, 820 (1977) (holding that damages for emotional distress are not recoverable for mere negligence in a legal malpractice case).

223. See, for example, *Rodriguez v. Horton*, 95 N.M. 329, 622 P.2d 261, 265 (Ct. App. 1980) (holding that an attorney who charged excessive fees, misrepresented breakdown of workers

The traditional legal malpractice defenses are disappearing as well. Lawyer defendants often plead numerous defenses, even though they present triable issues of fact for hostile jurors.²²⁵ Accordingly, such defenses fail to significantly reduce the settlement value of the case. Moreover, some defenses, such as judgment immunity, that were historically decided by judges in favor of defendant lawyers, are no longer available.²²⁶ Furthermore, the opportunity to better defend a case by asserting the "absolute" work product privilege²²⁷ in order to withhold any damaging evidence is also being taken away.²²⁸

compensation award, and settled the claim without the client's consent was liable for punitive damages); *Fillion v. Troy*, 656 S.W.2d 912, 915 (Tex Ct. App. 1983) (holding that a client could recover punitive damages from an attorney who committed fraud, misrepresentation, and undue influence). See also *Merenda v. Superior Court*, 3 Cal. App. 4th 1, 4 Cal. Rptr. 2d 87, 93 (1992) (holding that a client may recover as compensatory damages the amount of punitive damages she would have won in the underlying case). Compare Restatement 3d Draft § 75, comment h (cited in note 210) (advocating the rejection of this type of recovery).

224. ABA Standing Committee on Lawyers Professional Liability, *Coverage Quest* (1994). This computerized database contains forty-five currently available legal malpractice policies and an analysis of each. See also HOME, *Lawyers' Liability Errors and Omissions Policy* (1993) (unpublished, copy on file with the Author). The typical legal malpractice insurance policy excludes emotional distress and punitive damages.

225. See, for example, *Keegan v. First Bank of Sioux Falls*, 519 N.W.2d 607, 615 (S.D. 1994) (holding that a statute of limitations defense is a triable issue of fact for the jury); *Sutton v. Mytich*, 197 Ill. App. 3d 672, 555 N.E.2d 93, 98 (1990) (holding that a client's alleged contributory negligence in failing to discover the lawyers' drafting error is a question of fact for the jury); *Mali v. Odom*, 295 S.C. App. 78, 367 S.E.2d 166, 169 (1988) (holding that when a client denies knowledge and assumes the risk of a restrictive covenant, the issue becomes one of fact for the jury); *Mauldin v. Weinstock*, 201 Ga. App. 175, 411 S.E.2d 370, 372-73 (1991) (holding that a client can waive his right to complain if he failed to authorize the lawyer to proceed with wrongful termination claim, however, the issue is normally a matter for the jury); *Levine v. Gross*, 177 A.D.2d 290, 575 N.Y.S.2d 864, 864-65 (1991) (dealing with a res judicata defense); *Ziegelheim*, 607 A.2d at 1305 (holding that a client is not collaterally estopped by her statement in open court that her divorce settlement was "fair and equitable"); *North Carolina Federal Sav. & Loan Ass'n v. Ray*, 95 N.C. App. 317, 382 S.E.2d 851, 855 (1989) (refusing to allow a defense of equitable estoppel because the client's ambiguous instructions should have been clarified by the lawyer before securing a loan). See also Joe Holloway, *The Claim Repair System*, 52 Fla. B.J. 94 (1978) (stating that it is best not to miss an opportunity to mitigate or avoid the loss. Often the lawyer's liability carrier will cooperate with a former client, now the potential plaintiff, to "undo" the malpractice through a motion or appeal).

226. See, for example, *Cosgrove v. Grimes*, 774 S.W.2d 662-65 (Tex. 1989). The modern trend is illustrated by this Texas Supreme Court case, in which the attorney sued the wrong defendant. The court acknowledged that "[i]n some instances an attorney is required to make tactical or strategic decisions," but held that allowing the continued use of professional judgment immunity created "too great a burden for wronged clients to overcome." *Id.* at 664-65. However, if the judgment is one "which a reasonably prudent attorney could make in the same or similar circumstances, it is not an act of negligence even if the result is undesirable." *Id.* at 665 (emphasis deleted).

227. Mallen and Smith, 2 *Legal Malpractice* § 27.30 at 711-13 (cited in note 11).

228. See, for example, *Platt v. Superior Court*, 214 Cal. App. 3d 779, 214 Cal. Rptr. 32 (1989) (which the Author litigated). Neither side briefed or argued that the word "absolute" meant anything different. However, the opinion explained how the word "absolute" really did not mean "absolute." *Id.* at 39. While the case was pending before the California Supreme Court, the California legislature passed a statute retroactively mandating the production of work

The overall pattern seems unmistakable. The consumer movement has hit the legal profession. Several important factors—who is able to sue, the limitations period in which a suit may be brought, the areas of liability for which attorneys may be sued, the nature and the type of damages that can be recovered, and the erosion of traditional defenses—all seem to point toward greater numbers of legal malpractice claims and lawsuits. More significantly, the law is allowing hostile jurors, as opposed to perhaps more sympathetic judges, to decide issues of credibility, liability, damages, and defenses. The frequency and severity of legal malpractice claims and lawsuits will no doubt continue to spiral upward.

IV. CAN THE PROFESSION REGULATE ITSELF: “WEEDING OUT” THE “BAD” LAWYERS?

Law school admissions committees, state bar boards of examiners, and prospective law firm employers all try to ensure that future members of the legal profession are both moral and competent. Similarly, law schools, organized bar associations such as the ABA, sponsors of continuing legal education programs, disciplinary systems, alcohol/drug related lawyer assistance programs (“LAPs”), and the courts all have the individual attorney as their focus. Sanctions, education, and rehabilitation are the legal profession’s typical response to legal malpractice, while insurance underwriters similarly focus on the individual, attempting to find the “good risk” lawyers to insure. With such an enormous amount of time and money being spent on “weeding out,” sanctioning, educating, and rehabilitating the “bad apples,” observers are at loss to explain why legal malpractice is becoming even more widespread.

product to the former client who sues for legal malpractice. See Cal. Civ. Proc. Code § 2018 (Supp. 1994).

A. *Sanctions: Bar Examiners, Disciplinary Agencies,
and Judicial Fines*

Every state currently requires a certification of character as a prerequisite to obtaining a license to practice law.²²⁹ The number of individuals actually denied admission remains minimal.²³⁰ A major underlying purpose of the moral fitness requirements is to preserve the self-image of the legal profession, rather than to ferret out potential "bad lawyers."²³¹ Higher-echelon law school graduates apparently receive cursory investigations when compared to graduates of regional law schools.²³² Women are reviewed more lightly, but minorities are strictly reviewed.²³³ There is no generalized pattern emphasizing any one characteristic over another, and the practices among the fifty states are inconsistent.²³⁴ The ABA Commission on Professionalism, discussing ways to increase the competence and image of the legal profession, has criticized the investigations as too cursory and has stressed the need to be more thorough.²³⁵ However, it is unlikely that any investigation, no matter how thorough, can predict which lawyers will commit malpractice ten years later.

229. For example, the Florida Board of Bar Examiners sends out a form letter [1ZD, revised December 1992] (on file with the Author) to prospective bar admittants' references. The letter states that it is investigating the applicant's "character and fitness." The following questions are asked:

Would you recommend the applicant for a position of trust? . . . Is the applicant honest? . . . Is the applicant thorough in fulfilling obligations? . . . Has the applicant ever been: accused of a violation of the honor code or student conduct code, warned, placed on scholastic or disciplinary probation, suspended, requested or advised to discontinue studies, . . . (and) otherwise subjected to discipline for academic or personal conduct reasons by any educational institution?; A party to legal or administrative proceedings?; Arrested for any traffic or criminal charge?; Accused of a violation of trust?; Denied admission to the bar of any other state?; Excessive in the use of alcohol within the past ten years?; Involved with the use of (or used) unlawful drugs within the past ten years?; Addicted to or dependent upon the use of prescription drugs within the past ten years?; Afflicted with or received treatment for emotional disturbance, mental or nervous disorder; [or] delinquent in any financial obligations?

230. Rhode, 94 Yale L. J. at 502 (cited in note 12).

231. *Id.* at 509. See also M.A. Cunningham, Comment, *The Professional Image Standard: An Untold Standard of Admission to the Bar*, 66 Tul. L. Rev. 1015, 1026-32 (1992).

232. See Cunningham, *id.* at 1040-41.

233. *Id.* at 1040-42.

234. *Id.* at 1022-24.

235. ABA Center for Professional Responsibility, *In the Spirit of Public Service; Report by the Commission on Professionalism: A Blueprint for the Rekindling of Lawyer Professionalism* 46 (ABA, 1986).

Every lawyer takes an oath of admission before receiving her license.²³⁶ If such oaths were strictly enforced, most practicing lawyers would be disbarred. As is acknowledged by anyone who has ever practiced law, the oath of admission is wholly unrealistic, though it sounds good for public consumption. But with more than 90,000 complaints received by disciplinary agencies,²³⁷ and probably another 90,000 legal malpractice claims made every year,²³⁸ the bar examiner's technique of "weeding out" potentially bad lawyers through character certification and oath administration is highly suspect.

The huge numbers of disciplinary complaints and legal malpractice claims filed each year are sobering. And these numbers are certainly lower than they might be—clients often do not even bother to file disciplinary complaints because the process takes too long, it is done in secret, and there is no money for the claimant after the prosecution of the case.²³⁹ Note that the large numbers of complaints and claims do not necessarily mean that every year forty percent of lawyers are subject to either a claim for malpractice or a disciplinary action. Nor will each lawyer necessarily face six formal disciplinary complaints and six legal malpractice claims in her career. Perhaps some lawyers are cited or sued repeatedly—we simply do not know

236. See, for example, *The Rules Regulating the Florida Bar and Ideals and Goals of Professionalism; A Handbook for Florida Law Students* 11 (The Florida Bar, 1993). Florida's Oath of Admission states:

I DO SOLEMNLY SWEAR: I will support the Constitution of the United States and the Constitution of the State of Florida; I will maintain the respect due to Courts of Justice and Judicial Officers; I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land; I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval; I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So Help Me God.

35 Fla. Stat. Ann., *Bar and Judiciary Rules* 754 (West 1994) The oath is prefaced by the statement:

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar, which they are sworn on admission to obey and for the willful violation of which disbarment may be had.

Id.

237. Ostberg and Rudy, *If You Want To Sue a Lawyer* at 11-12 (cited in note 15).

238. See text accompanying notes 37-44. See also Mallen and Smith, 1 *Legal Malpractice* § 1.6 at 17-19 (cited in note 11).

239. Ostberg and Rudy, *If You Want To Sue a Lawyer* at 11-12 (cited in note 15). See also Deborah L. Rhode and David Luban, *Legal Ethics* 939-41 (Foundation, 1992).

the exact frequency. We do know that only about two percent of disciplinary complaints result in anything more than a private reprimand.²⁴⁰

Disciplinary codes and their enforcement cannot assure that lawyers will be ethical and competent.²⁴¹ Theoretically, the states' disciplinary systems proceed analogously to criminal cases, with similar goals of protecting the public, deterring future misconduct, and rehabilitating offenders,²⁴² but the systems are highly ineffective. For instance, the California State Bar, subsequent to a directive from the state legislature in 1987 to "clean up its own house" or have its authority to discipline lawyers stripped, found that almost 1,000 lawyers charged with crimes "at the felony level" were still practicing law.²⁴³

Whether California, with over 140,000 lawyers, now has its house in order is debatable. Three times as many California lawyers were disciplined in 1991 as in 1985. Since the publication of a toll-free complaint hotline, the California State Bar has been inundated with 8,000 calls per month.²⁴⁴ The dues for lawyers jumped from \$276 to \$470 per year in order to create a new California State Bar court for lawyer discipline, but there is no evidence that this \$35,000,000 a year effort is working.²⁴⁵ The main criticisms are that most disciplinary infractions, like legal malpractice, are still not reported, and that the State Bar never goes after partners in big law firms.²⁴⁶ In fact, big law firm lawyers are almost never disciplined.²⁴⁷ The only available statistics indicate that eighty percent of those disciplined are solo

240. Ostberg and Rudy, *If You Want to Sue a Lawyer* at 11-12.

241. Spaeth, 61 *Temp. L. Rev.* at 1235 (cited in note 136). See also Geoffrey C. Hazard, Jr., *Disciplinary Strategies Can Pay Off*, *Nat'l L. J.* 13, 14 (July 10, 1989) (stating that "[d]isciplinary enforcement resources inevitably will be 'inadequate,' because there is more lawyer misbehavior than any reasonable system can fully prosecute").

242. H. Patrick Furman, *Punishing Ethical Violations: Aggravating and Mitigating Factors*, 20 *Colo. Law.* 243, 243 (1991).

243. William Overend, *Passage of Measure to Improve Discipline by State Bar Urged*, *L.A. Times* § 2 at 4 (April 2, 1988).

244. Dorgan, *San Jose Mercury News* at 1A (cited in note 51).

245. *Id.*

246. *Id.* (reporting that "[a]n insurance executive who has filed numerous overbilling complaints to the State Bar ridicules the special court as 'an absolute joke.' 'They'll go after the solo practitioner who cheats an old lady out of \$50, but they never go after the big firms,' said the executive, who asked not to be identified, 'they say, that's too big for us—we can't handle it'").

247. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 *Cornell L. Rev.* 1, 19-20 (1991) (stating that the law firm entity itself should be disciplined since it is often difficult to determine which of the individual partners or associates are at fault).

practitioners.²⁴⁸ In one study, no disciplinary cases were found in firms of over seven lawyers.²⁴⁹

The frequency of disciplinary complaints varies widely from state to state. For example, in 1986 there was one complaint for every two lawyers in rural upstate New York.²⁵⁰ There was only one complaint for every forty-two lawyers in Washington, D.C., where most attorneys practice in large firms and government agencies.²⁵¹ Given the high disciplinary dismissal rates, in the eighty-five to ninety-five percent range,²⁵² legal malpractice lawsuits remain the most common method of regulating the legal profession. The organized bar simply does not have the resources or the motivation to regulate effectively through various disciplinary proceedings.²⁵³

In contrast to disciplinary actions, sanctions by judges have had a tremendous effect on the behavior of litigators.²⁵⁴ In numerous published and unpublished decisions,²⁵⁵ courts have granted significant monetary awards.²⁵⁶ Judicially enforced sanctions have become a powerful means of defining the scope of litigation.²⁵⁷ However, the United States Supreme Court, bowing to lawyers' protests, has re-

248. Abel, *American Lawyers* at 145 (cited in note 182) (using 1981-82 statistics from California, Illinois, and the District of Columbia).

249. *Id.*

250. Martha Middleton, *54,600 Complaints Filed Against Lawyers*, Nat'l L. J. 19, 19 (Dec. 7, 1987).

251. *Id.*

252. Symposium, *Weighing Public, Private Needs In Discipline Process*, N.J. L. J. 15, 28 (Jan. 27, 1992) (quoting John V.R. Bull, Assistant to the Executive Editor of the Philadelphia Inquirer: "I was particularly disturbed as a member of the public—I am not a lawyer—to find that 85% of cases you get are dismissed. I recognize that many of them are matrimonial cases and many of them are probably dismissed. But it raises one hell of a big question in my mind . . . I find that not credible as a member of the public").

253. Jonathan L. Kirsch, *A Changing Insurance Game Threatens Lawyers*, Cal. Law. 30, 31 (July 1985).

254. L. Ray Patterson, *An Inquiry into the Nature of Legal Ethics: The Relevance and Role of the Client*, 1 Georgetown J. Legal Ethics 43, 44 (1987) (stating the fact "[t]hat a procedural rule can achieve in just a few months what codes of ethics failed to achieve . . . over eight decades suggests that something is amiss").

255. Stephen B. Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* 59 (Amer. Judicature Society, 1989) (noting that fewer than 10% of Rule 11 decisions are published).

256. See, for example, *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 122, 125 (1989) (upholding the district court's award for sanctions of \$100,000 for an insufficiently investigated factual allocation by plaintiff's counsel); *Brandt v. Schal Assoc., Inc.*, 131 F.R.D. 485, 503 (N.D. Ill. 1990) (upholding an award for sanctions of \$350,000); *In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (9th Cir. 1988) (imposing a six month suspension), modified in 850 F.2d 597, 599 (9th Cir. 1988) (revoking suspension due to lawyer's inexperience).

257. Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 B.Y.U. L. Rev. 959, 985 (arguing that Rule 11 "has tremendous potential for transforming the bar without people knowing about it." In our imperfect legal system, fraught with self interest by all parties, a national standard of lawyering may ultimately be preferable").

cently approved changes to Federal Rule of Civil Procedure 11, which now requires a lawyer seeking sanctions to notify the offending party of the perceived Rule 11 violation and to provide a twenty-one day "safe harbor" for correcting the offending practice. Without this notice and opportunity to correct, no sanctions may be awarded.²⁵⁸ Thus, it is likely that the change will decrease the frequency of Rule 11 sanctions and their effectiveness as a basis for regulating lawyers, and will place more attention on legal malpractice actions.

B. Rehabilitation and Education: LAPs, Law Schools, and CLE

In addition to imposing sanctions, the legal profession is making some efforts to educate and rehabilitate lawyers so as to prevent legal malpractice. However, these efforts—by lawyer assistance programs ("LAPs"), law schools, and CLE programs—are, like disciplinary actions, conspicuously ineffective.

LAPs attempt to identify and rehabilitate lawyers who have alcohol, drug, or mental problems. According to the ABA Commission on Impaired Attorneys, state "bars have estimated that 40 to 75% of all [disciplinary] complaints stem from lawyer impairment."²⁵⁹ Similarly, in Oregon sixty percent of the lawyers who entered the state bar's LAP had pending legal malpractice cases against them. After one year of abstinence, the now sober lawyers' legal malpractice rate dropped, and only two percent had a new legal malpractice claim made against them.²⁶⁰

Consequently, Oregon's LAP was credited for a low seven percent legal malpractice rate in 1986, when the national average was ten percent.²⁶¹ However, as shown by Appendix B, the Oregon PLF's frequency rate since 1983 has never been below 8.7 percent. In 1986 the Oregon PLF's rate was actually ten percent. Moreover, if Oregon's LAP has been so effective, why has that state's annual rate for malpractice claims steadily increased from 8.7 percent in 1988 to

258. Henry J. Reske, *A New Rule 11?: Court OKs Procedural Amendments*, 79 A.B.A. J. 26 (July 1993).

259. ABA Commission on Impaired Attorneys, *An Overview of Lawyer Assistance Programs in the United States* 1 (1991). See also Nancy Blodgett, *Cocaine Blues: Lawyers Said to Be Vulnerable*, 72 A.B.A. J. 25, 25 (May 1986) (citing Norman Honeycutt, president of Employee Support Systems Co., hired by the California State Bar to assist alcohol and drug dependent lawyers, "40 percent to 60 percent of those lawyers who appear before disciplinary boards have drug abuse problems").

260. Michelle Goff, *The Oregon State Bar Professional Liability Fund Attorney Assistance Program*, reprinted in Dale A. Masi, ed., *Drug Free Workplace* 143, 145 (Buraff, 1987) (citing former Oregon PLF CEO, Lester Rawls).

261. *Id.* at 148.

13.2 percent in 1993?²⁶² The Oregon PLF now notes that “between 1985 and 1988, the claim count actually decreased by twenty-seven percent. We think the 1980’s claim surge was due in large part to the 1982 recession.”²⁶³ Today little credit is given to Oregon’s LAP for the twenty-seven percent decrease in claims.

Lawyers, some say, experience more mental health problems than the population at large.²⁶⁴ Compared with persons involved in 104 other occupations, lawyers are almost four times as likely to suffer from depression as the average person.²⁶⁵ Lawyers’ stress, alcoholism, and drug use are also higher than the average.²⁶⁶ One major problem with LAPs is that lawyers are hesitant to report other lawyers’ ethical violations, mental problems, or physical problems.²⁶⁷ Lawyers need to improve generally their ability to detect and promptly deal with attorneys who are having dependency and mental problems.²⁶⁸ Another major problem with LAPs is that, as with any treatment to cure non-lawyer alcohol, drug, or mental problems, individual intervention is not enough, especially when “cured” persons are sent back to the same malignant situations that created the problem.²⁶⁹

Education, both in law schools and in optional CLE programs, is another method of reducing legal malpractice that focuses on changing an individual’s knowledge, behavior, and attitude. Although

262. 1993 Oregon PLF at 1 (cited in note 28). See also Appendix B.

263. 1993 Oregon PLF at 4. See also Appendix B. Compare Hall Letter at 2 (cited in note 106) (stating that “[t]here are many factors other than lawyer assistance issues which push frequency and severity rates up and down. . . . In any event, we know for certain that our lawyer assistance efforts have avoided numerous malpractice claims which otherwise would have arisen”).

264. Benjamin, Darling, and Sales, 13 Int’l J. L. & Psych. at 235-36 (cited in note 189).

265. William W. Eaton, et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. Occupational Med. 1079, 1083, 1086 (1990).

266. Benjamin, Darling, and Sales, 13 Int’l J. L. & Psych. at 240-41 (cited in note 189).

267. Michael A. Bloom and Carol Lynn Wallinger, Symposium, *Lawyers and Alcoholism: Is It Time for a New Approach*, 61 Temp. L. Rev., 1409, 1428-29 (1988) (noting that the rules to report fellow drunk lawyers are already in place, but “[w]hat is lacking is a major commitment on the part of the entire bar to effectively self-regulate. . . . The conspiracy surrounding lawyers and alcoholism must be broken”). See also Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 939 (Prentice Hall, 2d ed. 1990) (stating that the enforcement of the duty to report the misconduct of other lawyers “is virtually non-existent”).

268. O’Malley, 20 U. Toledo L. Rev. at 360 (cited in note 211) (arguing that law firms should require that an attorney certify that she has filed her latest income tax return. The idea is that a partner will seek help if the problem is such that she would neglect to file a tax return).

269. See David F. Musto and Manuel R. Ramos, *Notes on American Medical History: A Follow-Up Study of the New Haven Morphine Maintenance Clinic of 1920*, 304 New Eng. J. Med. 1071, 1076 (1981) (suggesting that situational factors are more important in explaining the fate of drug users than is the mere physiological dependency on drugs).

the ABA mandates that professional responsibility be taught in law schools,²⁷⁰ some question the effectiveness of the course.²⁷¹ Even though most state bars now require multiple-choice professional responsibility examinations, law schools have been severely criticized for relegating professional responsibility courses to inexperienced faculty, and for creating an environment in which students merely learn to memorize the rules and, when in doubt, to take the moral high ground.²⁷² Only 1.4 percent of the average law school textbook is devoted to issues of ethics or discipline.²⁷³ Most law professors believe that professional responsibility is not "their" course or that "[t]heir course is not about [ethics]."²⁷⁴ Stetson University College of Law is the only ABA accredited law school that offers a legal malpractice course.²⁷⁵

Even if law professors were to integrate professional responsibility and legal malpractice issues into their substantive courses, there is still doubt whether such an education could alter a law student's later behavior in practice.²⁷⁶ Law students who intern in law firms can quickly learn the wrong lessons regarding ethical obligations and legal malpractice from their employer attorneys: "Many students saw a lawyer lie, cheat, or disserve a client, frequently doing so as if this were 'business as usual' in the legal profession."²⁷⁷

The growing disillusionment with required professional responsibility courses at the ABA accredited law schools is just part of a larger concern that the law schools are not adequately training future lawyers. Several law schools, such as William and Mary, the University of Denver, and the University of Montana, have completely

270. ABA Standards For The Approval of Law Schools, Standard 302(A)(iii) (1974).

271. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. Legal Educ. 31, 40 (1992).

272. *Id.* at 40-41.

273. *Id.* at 41.

274. *Id.* at 52.

275. See Braunstein, *Law Line Database* at 9 (cited in note 2); Hatcher interview (cited in note 2); Fleishman, *Teaching Avoidance* at 3.2 (cited in note 2); U. of Denver Registrar interview (cited in note 2).

276. Geoffrey C. Hazard, Jr., *Law Schools Must Teach Legal Ethics*, 14 Nat'l L. J. 17, 17 (Oct. 7, 1991) (stating that "there is good evidence that many beginning lawyers are taught by example to be indifferent to elementary ethical obligations and are tacitly invited to violate them. Hence, law school training must not only overcome ignorance but must anticipate that many students soon will be plunged into work settings that are ethically negligent or malignant. Programs of continuing legal education in professional ethics should proceed on the same premise").

277. Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 Georgetown J. Legal Ethics 537, 575 (1991).

restructured their first year programs, dropping the traditional courses, and placing their first year students into "law firms" that deal with cases and issues, including ethical and malpractice issues, as they may actually arise in practice. The professors are the "partners" and the students are the first year "associates." The students interview and counsel clients, conduct negotiations, and work on appellate briefs and pretrial documents as part of their research and writing.²⁷⁸ Such a dramatic change in the traditional first-year curriculum is a recognition that something is fundamentally wrong with the traditional approach to legal education. For instance, the ABA, after three years of study and public hearings in Los Angeles, Ann Arbor, Chicago, and Washington concluded in the MacCrate Report that:

There was also general agreement that law school graduates are not prepared to practice law without supervision. . . . There was less consensus, but certainly a fair amount of support for the proposition that law school graduates are not adequately prepared for their first jobs in law practice and that the gulf is widening as the practice of law becomes more complex and the range of skills more diverse.²⁷⁹

At a February 1993 ABA House of Delegates, the Illinois State Bar proposed that the mission statement of law schools, Standard 301(A) of the ABA accreditation standards, be changed by adding the italicized language: "A law school shall maintain an educational program that is designed to qualify its graduates for the bar *and to prepare them to participate effectively in the legal profession.*"²⁸⁰ The amendment passed in August 1993.²⁸¹ If legal education is not currently designed to prepare students for more than entrance to the bar—that is, not designed to prepare them for practice in the profession—then something is desperately wrong. The increasing frequency and severity of legal malpractice claims and lawsuits, and of disciplinary complaints, suggest that the ABA accredited law schools cannot afford to maintain the status quo.²⁸²

278. Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. Legal Educ. 57, 69 (1992).

279. ABA, *Legal Education and Professional Development Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 386 (1992) ("MacCrate Report").

280. Tom Leahy, *The Isolation of Legal Education*, 81 Ill. B. J. 512, 542 (1993).

281. *Id.*

282. See Wade Lambert, Margaret A. Jacob, and Junda Woo, *Suit Says ABA Accreditation Is Out of Date*, Wall St. J. B1 (Nov. 24, 1993). After the Massachusetts School of Law, whose faculty consists of mostly adjunct professors, was denied accreditation, it sued the ABA claiming that the ABA requirements "result in law school tuitions that are 40% to 50% higher than they would otherwise be; are biased in favor of programs that teach legal theory at the expense of such practical skills as drafting contracts or negotiating agreements; and [students] in most law

Mandatory CLE programs now exist in forty states.²⁸³ Many state bars established mandatory CLE programs during the 1970s, ostensibly as a result of "an effort to prevent professional obsolescence" and "assure the continuing competence of professionals."²⁸⁴ Mandatory CLE requirements were imposed in response to growing criticism regarding the competence of the legal profession, Watergate, and scornful comments by highly placed lawyers such as then-Chief Justice Warren Burger.²⁸⁵ Proponents of mandatory CLE requirements argue that it is better to prevent problems than to rely on a system of legal malpractice or disciplinary measures.²⁸⁶ Opponents of mandatory CLE requirements note that there is no evidence that CLE programs enhance professional competence.²⁸⁷

In February 1992 California became the thirty-fifth state to adopt a mandatory CLE program. A year later, seventy-nine percent of California attorneys who responded to a poll were against mandatory CLE and eighty-nine percent of them did not think that the CLE program would reduce unethical or incompetent lawyering.²⁸⁸

Of the forty states that now have mandatory CLE, twenty-seven have a legal ethics portion; only one, Arizona, has a mandatory CLE legal malpractice prevention component, only three have a substance abuse education requirement, only one has an office management portion, and only one has an elimination of bias

schools today are being taught by people who don't know the life these students will have and don't have the skills the students will need." *Id.* But see, John J. Costonis, *The MacCrate Report: Of Leaves, Fishes, and the Future of American Legal Education*, 43 *J. Legal Educ.* 157, 189 (1993). Costonis, Dean of the Vanderbilt Law School, notes that law schools are not medical schools and do not have the financial resources to teach lawyers to actually practice law: "[T]he American law school produces graduates who require post-law-school seasoning to mature their competence as lawyers." *Id.*

283. *ABA-CLE* at 54-55 (cited in note 3) (listing each state's mandatory continuing legal education requirements). The eleven jurisdictions without any requirements are Alaska, Connecticut, the District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Nebraska, New Jersey, New York, and South Dakota. *Id.*

284. John S. Roth, Note, *Is Mandatory Continuing Legal Education Valid Under the United States Constitution? Verner Vision and the Rationally Related Competence Connection—A Fortiori or A Lot of Alliteration?*, 11 *Whittier L. Rev.* 639, 640 (1989).

285. *Id.* at 641.

286. See Toni M. Massaro and Thomas L. O'Brien, *Constitutional Limitations on State-Imposed Continuing Competency Requirements for Licensed Professionals*, 25 *Wm. & Mary L. Rev.* 253, 258-59 (1983).

287. Tracy Schroth, *Critics Say MCLE May Harm Profession: Cost to Bar, Loss of Billable Hours Cited*, *N.J. L. J.* 29, 29 (Nov. 5, 1987) (reporting that some argue that MCLE may not and probably will not increase competency). See also Alan Ogden, *Mandatory Continuing Legal Education: A Study of its Effects*, *J. Prof. Legal Educ.* 3, 3 (June 1985) (stating that there is an inability to determine a relationship between mandatory CLE and professional competence).

288. *Fax Poll*, 13 *Cal. Law.* at 108 (cited in note 183).

course.²⁸⁹ Most organized state bars obviously believe that there is no need for CLE courses on these problems. At least legal ethics has been recognized as important enough to be included in twenty-seven states' CLE programs. However, the CLE courses in legal ethics are probably no better than the professional responsibility courses taken in law school.²⁹⁰

Although only Arizona has a mandatory legal malpractice prevention program, there are several commercial sponsors of such programs in other states, including in-house programs sponsored by large law firms or insurance companies. For instance, when the Reliance Insurance Company agreed with the California State Bar to become the officially endorsed carrier of the bar, and to write legal malpractice insurance for six years, Reliance committed itself to an ambitious malpractice prevention and loss control program, with extensive seminars and handbooks on how to avoid malpractice. Although laudatory, the effectiveness of Reliance's anticipated efforts has been discounted by legal malpractice experts.²⁹¹

The legal malpractice prevention experts who run the programs present basically the same list of "Do's and Don'ts," focusing on education and on changing the individual's behavior.²⁹² One expert notes that the "best way for lawyers to minimize the likelihood of malpractice is to screen clients and cases, and to document the progress of cases they handle."²⁹³ The overwhelming focus of legal malpractice prevention programs is clearly on the individual attorney,²⁹⁴ and there is no evidence that these programs are effective.

289. ABA-CLE at 54 (cited in note 3).

290. Rhode, 42 J. Legal Educ. at 40 (cited in note 271).

291. Stone, L.A. Bus. J. at 5 (cited in note 154) (quoting Ronald Mallen, a leading legal malpractice expert: "There are only a handful of legal malpractice experts in the country. I don't know how they are going to increase that number").

292. Ronald E. Mallen, *Tips on Minimizing Your Malpractice Exposure*, Mich. Law. Wkly. S5 (July 15, 1991). Mallen's Do's and Don'ts are: (1) do not promise a specific outcome; (2) advise regarding fees; (3) do not ignore the client; (4) do not prejudice the client; (5) do not represent adverse interests unless disclosed in writing; (6) calendar; (7) obtain a client's prior consent to associate another attorney; (8) get help if you are out of your field of regular practice; (9) do not criticize prior lawyers without all the facts; (10) do not reveal that you have malpractice insurance; and (11) do not defend your own legal malpractice claim. See also Victor R. Levit, *17-Point Checklist for Malpractice Prevention*, Mass. Law. Wkly. 38 (Dec. 21, 1992). Levit, Mallen's law partner and another legal malpractice expert, adds a few more to Mallen's list: (12) maintain complete and detailed time records; (13) let the client know of any problems; (14) confirm all instructions or conversations by letter; and (15) do not talk down to your client.

293. Sandy Goldsmith, *By the Letter: Writing Around Potential Malpractice Hazards*, 79 A.B.A. J. 103, 103 (July 1993) (quoting Stephen M. Blumberg).

294. Stephen M. Blumberg, *Risk Management: Preventing Malpractice Claims*, 13 Legal Econ. 52, 52 (Sept. 1987). Blumberg states:

Many malpractice claims can be avoided by identifying and refusing to work with problem clients. Experienced practitioners recognize the following characteristics as "red

C. *The Insurance Carriers' Answer: Restricting Coverage*

Despite a wealth of experience and analysis of data from claims, insurance underwriters are still unable to accurately predict, or even come close to predicting, which lawyers will have claims brought against them.²⁹⁵ Some insurance carriers are involved in efforts to improve their insured attorneys' risk through prevention programs²⁹⁶ or incentive premium pricing.²⁹⁷ However, given high defense costs and indemnity payments,²⁹⁸ it appears that most legal malpractice insurance carriers have focused on limiting coverage or avoiding involvement with legal malpractice claims.²⁹⁹

flags": The client is changing attorneys in the middle of a case; The case already has been rejected by one or more firms; The client wants to proceed with the case out of principle, regardless of cost; The client already has contacted numerous government representatives; The case has an element of avoidable urgency, such as when a client with 30 days to respond to a pleading visits the attorney on the 29th day.

Id.

295. Darrell Preston, *Lawyers Find Tables Turned in Liability Suits*, Dallas Bus. J. 1, 21 (June 20, 1988) (citing Joe Barnard, president of a Dallas-based legal malpractice carrier, who admits that although his company has been scrutinizing applicants for legal malpractice insurance for many years, it is difficult to predict who will be sued).

296. Stone, L.A. Bus. J. at 5 (cited in note 154). See also Geoffrey C. Hazard, Jr., *How to Cut the Cost of Malpractice*, Nat'l L. J. 15, 16 (Dec. 17, 1990). Hazard states that "[i]nsurers now have systematic education and training programs, trying to get lawyers to adopt appropriate preventive measures. Larger firms have a 'compliance' lawyer whose responsibility is to make sure that these measures are actually followed." Id. The measures usually employed are: an adequate conflicts-checking system; an adequate system for handling funds; a written employment letter with every client; avoiding bad clients; and not representing doctors in business deals. Id.

297. Anthony E. Davis, *Law Practice Management: Preventing Massive Money Claims*, N.Y. L. J. 1, 7 (Nov. 12, 1992) (arguing that insurers should "develop incentive pricing schemes, designed to accelerate the process towards improved risk and practice management. . . . [T]he insurers can sponsor studies to help determine the optimum forms and structures for effective risk prevention"). Thus, if a law firm agrees to implement certain techniques such as a conflict review process, continuous monitoring and review, opinion letter reviews, dealing with problems and potential claims, appointing an "ethics" partner, and using training programs and policy manuals, the carrier should charge less in premiums as an incentive. Id.

298. David Z. Webster, *Insuring the High Professional Risk Law Firm*, 20 Mass. Law Wkly. 923 (Feb. 3, 1992). Specifically, Webster states that "[b]ecause malpractice claims are technically two complex cases (malpractice and the underlying case), defense costs can equal up to 35 percent of an insurers total cost. . . . I estimate less than 29 percent of premium dollars paid by lawyers for malpractice insurance reach injured clients because of the result of the legal malpractice." Id. at 923. He then gives the following breakdown of the premium dollar: administrative costs are between 12¢ and 30¢; defense costs are between 26¢ and 35¢; the plaintiff's attorney's fees are between 29¢ and 50¢. Id.

299. Galante, Nat'l L. J. at 1 (cited in note 154) (stating: "Insurers have increasingly narrowed coverage . . . insurers are talking about wanting to exclude coverage for defense of claims involving alleged violations of consumer protection statutes, or organized crime and racketeering laws [RICO]. [There are] industry-wide trends to attempt to exclude coverage for punitive damage claims and malicious behavior such as abuse of process. . . . Other methods . . . include subtracting defense costs from policy limits, recovering damage claims only from lawyers clients

There is no way around the fact that insurance carriers are in the business of making money. It is much easier and more economical to deny claims that are made late³⁰⁰ or that are precluded by a prior acts exclusion,³⁰¹ or to enforce "related acts" limits on multiple claims, than to engage in full-scale prevention programs.³⁰² Unfortunately for most attorneys, the coverage problem is discovered only after the claim is made. The general trend in the courts has been toward strict interpretations of contract language and away from extrinsic rules that might expand coverage.³⁰³ Some attorneys would be surprised to find that activities they consider "lawyering" are not covered by legal malpractice insurance.³⁰⁴ These "gaps" in coverage are not always addressed by the experts.³⁰⁵

The insurance industry has been badly hit by the savings and loan scandal. Eight-figure legal malpractice settlements with the FDIC, RTC, and OTS have become common.³⁰⁶ Insurance commis-

as opposed to third parties such as investors or will beneficiaries and refusing to cover bad faith sanctions and awards under Rule 11 for vexatious litigation").

300. See, for example, *Pacific Employers Insurance Co. v. Superior Court*, 221 Cal. App. 3d 1348, 270 Cal. Rptr. 779, 781-82 (1990) (holding that policy language limiting coverage to claims made and reported during policy period does not violate public policy); *Hirsch v. Texas Lawyers' Insurance Exchange*, 808 S.W.2d 561, 565 (Tex. Ct. App. 1991) (upholding carrier's denial of coverage because of late notice of claim); *National Union Fire Insurance Co. v. Talcott*, 931 F.2d 166, 167 (1st Cir. 1991) (upholding denial of coverage where notice was not timely); *St. Paul Fire & Marine Insurance Co. v. Estate of Hunt*, 811 P.2d 432, 435 (Colo. Ct. App. 1991) (holding that mental incapacity does not excuse timely notice in a "claims made" policy).

301. *Sparks v. St. Paul Insurance Co.*, 100 N.J. 325, 495 A.2d 406 (1985). A prior acts exclusion means that any acts that occur before the beginning of the policy are excluded. Thus, the *Sparks* court held the clause unenforceable because the insurance was illusory: the act, the discovery, and the making of a claim rarely would occur in the first year of the policy. *Id.* at 414. However, by 1990 courts decided that they could not avoid the clear language of the insurance contract agreed to by the parties. See, for example, *Merrill and Seeley, Inc. v. Admiral Insurance Co.*, 225 Cal. App. 3d 624, 275 Cal. Rptr. 280, 283 (1990) (denying the "insured" attorney coverage due to the prior acts exclusion).

302. See, for example, *Gregory v. Home Insurance Co.*, 876 F.2d 602, 604-06 (7th Cir. 1989) (discussing the related acts doctrine). When lawyers buy insurance there are two limits, such as \$500,000 for the individual claim and a \$1,000,000 policy limit of all aggregate claims within a given year. However, if two or more claims arise from a "related act," they will be covered by the single limit and not a separate \$500,000 limit. For instance, when the lawyer prepares only one securities offering, and two investors sue, they have to share the maximum single-occurrence limit of \$500,000.

303. Roger Raphael, *Pressure Points for Professional Liability; Malpractice Policies Cost More and Cover Less*, *The Recorder* 8 (Mar. 13, 1992).

304. *Lawyering Acts Not Covered By Malpractice Can Surprise*, *Mich. Law. Wkly.* S8 (July 15, 1991) (reporting that "[a]mong the activities not covered are: conservatorship, guardianship, serving as a distributee and work as an executor or executrix . . . investment advisors . . . deal makers").

305. *ABA Study Desk Guide* at 199-200 (cited in note 91). Conspicuously missing from the ABA's malpractice insurance checklist of important "key issues to consider" is the standard exclusion for emotional distress damages. There are thirty-five other items on the exclusion issue checklist.

306. Hansen, 80 A.B.A. J. at 28 (cited in note 137).

sioners in six states are allowing legal malpractice carriers to write policies that specifically exclude any action or claim made by those federal regulatory agencies.³⁰⁷ Similar efforts are pending in all other states.³⁰⁸ Though the FDIC has fought these exclusionary clauses, the clauses have been upheld in seven of eighteen cases.³⁰⁹ Lawyers who have represented or continue to represent savings and loans and banks now face a big insurance "gap."³¹⁰

The insurance industry has largely given up on education and prevention programs to reduce the risk of malpractice. Instead, they write insurance policies that cost more and cover significantly less. Thus, an insured lawyer, while having peace of mind, often may not be better off than one who is uninsured.³¹¹ Ironically, the growing number of uninsured lawyers³¹² may actually be more careful and prevention-oriented than "insured" lawyers. Nonetheless, if a mistake is made by an insured lawyer, the aggrieved client has a higher probability of being compensated.

There is no way to completely prevent legal malpractice. Law schools try to "weed out" unethical or incompetent students, but do not teach courses on legal malpractice. State bar boards of examiners similarly try to eliminate unethical and incompetent law graduates through arbitrary moral fitness checks and questionable bar examinations. The legal profession attempts to regulate itself through grossly ineffective and inefficient disciplinary systems that punish lawyers who turn bad. A few states try to rehabilitate lawyers through LAPs, but the lawyers are sent back to the same malignant situations that caused their problems. Forty states now require mandatory CLE, reportedly to increase the level of competence in the profession, but the programs are largely ineffective and have only served to create a profitable bureaucracy and a new "cruising for credits" image problem.³¹³ But because legal malpractice prevention programs do not

307. Linda Himelstein, *Insurers Dodge S & L Claims Against Lawyers; But Regulators, Eyeing Deep Pockets, Resist Carriers' Tack*, Legal Times 1 (April 29, 1991).

308. *Id.*

309. Himelstein and Newdorf, *The Recorder* at 1 (cited in note 10).

310. *Id.* (reporting that Keith Fisher, chair of the ABA task force studying lender liability, notes that "[t]he kind of cases filed by the FDIC aren't any different from any other garden-variety malpractice," but are excluded simply because the plaintiff is a regulatory agency).

311. Andrew S. Hanen and Jett Hanna, *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 S. Tex. L. Rev. 75, 78-111 (1992) (identifying the "multitude of exclusions and other provisions in legal malpractice policies that can negate coverage").

312. See Moss, 73 A.B.A. J. at 84 (cited in note 44) (reporting uninsured lawyer rates of up to 50% in California and 30-35% in most other states).

313. Mark D. Killin, *Professor Seeks BAN on 'Exotic' CLE Seminars*, Fla. B. News 22 (May 1, 1993) (reporting that while CLE Committee Chair John Edward Alley cited Florida's CLE "most profitable year in history, which helps to avoid the specter of dues increases," University of

work, insurers do everything to avoid expensive claims, leaving lawyers with only the illusion of coverage. Despite the continued massive effort at social and behavioral control, and millions of dollars being spent every year, all available evidence suggests that the status quo is not working. Legal malpractice claims and lawsuits are becoming more widespread. The image of the legal profession continues to fall.

V. LEGAL MALPRACTICE AND MALIGNANT SITUATIONS

Unethical³¹⁴ or incompetent³¹⁵ lawyers are not necessarily the source of legal malpractice. The focus too often is on identifying, eliminating, educating, and rehabilitating only the "bad" lawyers. However, Ronald E. Mallen, the nation's most recognized "lawyers' lawyer," notes, "I get to defend some of the finest lawyers in the country."³¹⁶ Similarly, Lester L. Rawls, the former chief executive officer of Oregon's PLF, writes: "Of the 1,000 Oregon lawyers who have had claims made against them, I venture to say that very few of those lawyers would be considered bad lawyers. . . . [M]ost are among the finest lawyers in Oregon, and certainly would rank among the finest lawyers in the United States."³¹⁷

Legal malpractice prevention should not only focus on the bad lawyer; it also needs to ask why good lawyers malpractice. Good lawyers, on occasion, deviate from established social norms and regulations. People in general also deviate from social norms in certain situations.³¹⁸ In the fields of philosophy,³¹⁹ sociology,³²⁰ psychology,³²¹

Florida law professor David M. Richardson warned against a future headline in the Miami Herald which would be, "*Lawyers Take Deductible Vacation With Aid of the Florida Bar*". See also *Good Terms, Easy Credit*: (California State Bar's minimum continuing legal education program course offerings), 13 Cal. Law. 56 (Sept. 1993) (including: "When Fans Hit The Ship, For 13 Days in September, the Crystal Harmony cruises the Mediterranean. There's Venice, Rome, the Greek Islands and James M. Kierspealghon 'Ethics and Law Office Management', Seven MCLE credits; \$4,425, including airfare" or "It's a Med, Med, Med World, Exchango views with Superior Court judges at Club Med, Sonora Bay, Mexico, the \$1,499 fee includes airfare, all the amenities of the Club and 5 CLE credits").

314. See Peter Caws, *On the Teaching of Ethics in a Pluralistic Society*, 8 Hastings Center Rep. 32, 33-38 (Oct. 1978) (asserting that moral education may affect moral values but not necessarily moral conduct. One study found that there was no difference in the moral beliefs of ministers and prison inmates).

315. Cheryl Morrison, *Malpractice Suits on Rise; Anyone Can Make a Mistake*, Nat'l L. J. 8 (March 28, 1983).

316. Id.

317. Rawls, Nat'l L. J. at 12 (cited in note 38).

318. Patterson and Kim, *The Day America Told the Truth* at 45, 49 (cited in note 192).

criminology,³²² engineering,³²³ and legal theory,³²⁴ and in literature³²⁵ and the mass media,³²⁶ more attention is being given

319. See generally Daniel McNeill and Paul Freiberger, *Fuzzy Logic* (Simon & Schuster, 1993). The "fuzzy logic" movement began with philosopher Bertrand Russell. It is a significant departure from the Aristotelian logic accepted by most Westerners: the all or nothing; a, or not a; the idea that one can make sharp distinctions in life; good people, bad people; good lawyers and bad lawyers. Temperature, distance, beauty, friendliness, greenness, pleasure, all come on a sliding scale. Such sliding scales often make it impossible to distinguish members of a class from non-members. Easterners, in the traditions of Buddha revel in the gray areas, see the world filled with contradictions, and use the world's impreciseness to their advantage.

320. Stuart H. Traub and Craig B. Little, eds., *Theories of Deviance* xvi (F.E. Peacock, 1975) (stating: "The common thread linking all these [sociological] theories [on deviance] is a movement toward an understanding of deviance as more than the bizarre, idiosyncratic, pathological behavior of individuals which must be treated and cured like one would a disease. . . . [One must attempt to] understand deviance in the context of class, status, conflict, and power in American society").

321. Stanley Milgram, *Obedience to Authority: An Experimental View* 34-35, 188 (Harper & Row, 1974) (discussing a study in which two-thirds of participants obeyed white robed "scientists" and shocked others despite the pain. The author notes: "Each individual possesses a conscience. . . . But when he merges his person into an organizational structure, a new creature replaces autonomous man, unhindered by the limitations of individual morality, freed of humane inhibition, mindful only of the sanctions of authority"). See also Bruno Bettelheim, *Individual and Mass Behavior in Extreme Situations*, 38 *J. Abnormal & Soc. Psychol.* 417, 433-43 (1943) (discussing World War II concentration camp inmates' changes in behaviors and attitudes, such as identifying with the aggressor, were attributed to obvious situational factors); Justin Aron Freed, *Conduct and Conscience: The Socialization of Internalized Control Over Behavior* 30-31, 40, 263 (Academic, 1968) (listing various studies showing the strong influence of situations on human behavior).

322. See Musto and Ramos, 304 *New Eng. J. Med.* at 1072 (cited in note 269) (discussing drug addiction as a self-limiting process for two-thirds of addicts). See also Manuel R. Ramos, *The Hippies: Where Are They Now?*, in Frank R. Scarpitti and Susan K. Datesman, eds., *Drugs and the Youth Culture* 223, 244 (London Sage, 1980) (stating that: "[a]s society continues, however ineffectively, to deal with the 'drug problem,' one thing is certain: The perseverance of adolescent deviant behavior, be it drug use, delinquent gangs, burglary rings, or car thefts, to the extent that it is encouraged and supported by an adolescent peer group, becomes suspect. When young criminals and youthful deviants do leave the confines and influence of their peer-oriented, nonconventional world, their baggage—the characteristic deviant and anti-social attitudes, behaviors and beliefs—are also left behind for the next generation of young criminals and youthful deviants").

323. See generally McNeill and Freiberger, *Fuzzy Logic* (cited in note 319). By seizing on the "fuzzy logic" movement, and not ignoring it like Americans have, the Japanese have incorporated it in a multimillion dollar industry of "smart" computers, washing machines, cameras, toasters, and subway systems that do not just turn on/off but automatically adjust to the world's lack of precision. Engineers fear that the United States' inability to seize on the quasi-logic movement will place it at a competitive disadvantage.

324. Juan Martinez, Book Review of Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard U., 1991), 9 *Harv. BlackLetter J.* 163, 165-66 (1991) (stating: "Chaos theory therefore suggests that legal decisions are *not* arrived at through the application of doctrine to facts, that doctrine is *not* determined by standards of judicial review, that such standards are *not* determined by normative models, and that such models are *not* determined by philosophical conceptions of value. Instead, it suggests that legal decisions are the manifestations of dynamic systems—courts, legislatures, or popular voting—whose processes are not orderly. 'Law,' in Chaos terms, is both a *product* and a *manifestation* of society—a society that is chaotic, not determined. Williams operates from a similar thesis about the legal system. . . . 'Most scholarship in law is rather like the 'old math': static, stable, formal—rationalism walled against chaos"). See also Robert E. Scott, *Chaos Theory and the*

to how solutions to problems may not necessarily lie within an individual and her willpower or logical and analytical abilities, but instead within the less flattering and less popular³²⁷ situational approach to human behavior.

The situational approach to legal malpractice pays more attention to the nurture portion of the age-old nature/nurture controversy regarding human behavior. Both individual traits *and* environmental factors play a role in human behavior. This nature/nurture debate, however, is often ignored in the legal malpractice area. The "bad apples" approach looks for diseased, malignant, or bad individuals, and either tries to cure them or cut them out of the profession. Instead, the situational approach to legal malpractice looks for the diseased, malignant, or bad situations (environmental, bureaucratic, or societal), and attempts to determine how changing those bad situations may facilitate the desired individual behavior.

The "Christian-romantic" view of the self, the traditional view of moral behavior, is the more flattering one: We are in charge, we confront a temptation and use our virtue and willpower to make the right choice.³²⁸ Not surprisingly, the situationalist perspective has found very few adherents among Western lawyers.³²⁹ A few legal

Justice Paradox, 35 Wm. & Mary L. Rev. 329, 348-50 (1993) (stating: "Chaos theory tells us to accept the contradictions, the disorder, in our legal system. All systems, including the legal system, are unpredictable and erratic. . . . Chaos in law describes human life").

325. D.J. Taylor, *Getting Inside the Outsider; Franz Kafka*, London Sunday Times, Culture Magazine 9 (June 20, 1993) (citing J.G. Ballards, who notes that "Kafka may be the most important writer of the 20th century. . . . [h]e describes the fate of the isolated man who is surrounded by a vast and impenetrable bureaucracy, and begins to accept himself on the terms the bureaucracy imposes on him. Human beings today are in a very similar position. We are surrounded by huge institutions we can never penetrate: the City, the banking system, political and advertising conglomerates. . . . they're rather subtle, subservient tyrannies, but no less sinister for that").

326. *The Last Laugh*, Parade Magazine 5 (July 18, 1993) (quoting Jay Leno of the popular NBC television program *The Tonight Show* as saying he re-reads Charles Dickens "A Christmas Carol" at least once a year "[b]ecause it's sort of the first book where what happens to people is a product of their society. . . . Dickens showed that people's fate grew out of their [social] circumstances, and they couldn't get out by themselves. We try to lead a good life. But it's that knowledge of our weakness that gives us compassion").

327. See Maria D. Vesperi, *Exploring the 'Universe of the Undiscussed'*, St. Petersburg Times 7D (Aug. 22, 1993). The concept of "the universe of the undiscussed" was introduced by social theorist Pierre Bourdieu. It means that there are thoughts and ideas that people simply will not entertain. Such avoidance is usually a clue to a deeper social problem. Whether it is the focus of the war on drugs on drug dealers as opposed to poverty, or the war on tuberculosis as opposed to poverty, the idea of working to end poverty is considered "off topic" and beyond the scope of either drug or tuberculosis control. Many professionals are aware of the real situation but quickly learn that professionalism "means remaining silent on the issues that are most embarrassing (for whites) and speaking softly on issues which are unavoidable." *Id.*

328. Roberto M. Unger, *Passion, An Essay on Personality* 24 (MacMillan, 1984).

329. Larry Richard, *The Lawyer Types*, 79 A.B.A. J. 74, 77 (July 1993) (noting that law attracts relatively few sensor-feeler [SF] personality types because the 'meat and potatoes' law

scholars have embraced it,³³⁰ but law students, lawyers, bar leaders, law professors, judges, and legislators are likely to resist the situationalist perspective for a variety of reasons. One of the most important may be that "it diminishes the role of law in behavior and hence the authority of legal reasoning."³³¹

Individuals, even rational lawyers, will concede that they behave differently and exhibit different attitudes depending on the situation. A lawyer may be one person to his law firm partners, another to the firm's associates, another to the judge, another to his

practice involves analytical thinking about broad legal principles, the domain of the intuitive/thinker [IT], personality type. The individual with an SF preference enjoys mastering facts and details in the service of helping individuals. SF's may find their niche in estate planning, pension and ERISA advising, or education of law. However, IT personality types are found in 90% of all the lawyers). See also Raymond B. Marcin, *Psychological Type Theory in the Legal Profession*, 24 U. Toledo L. Rev. 103, 118-119 (1992) (criticizing and exploring why SF types never become lawyers or leave the profession: "What will the law and the legal system lose in the way of feeling and people-oriented values [if SF types are not lawyers]? . . . [T]here is the persistent intrusion into jurisprudence of the phenomenon of 'equity,' a conceptual system that does seem to be guided by a responsible attention to intuitions, feelings and values. When those [Sensor/Feeler] personality types . . . are subtly steered away from the law, the effect on the profession and on the legal system itself is not difficult to surmise. . . . Law professors have, for generations, routinely advised beginning law students that their task is to learn to 'think like a lawyer' . . . stress[ing] attention to facts, rules and logic [and creating an] atmosphere that motivates [Sensor/Feeler] types to have second thoughts. . .").

330. Rhode, 42 J. Legal Educ. at 42 (cited in note 271) (arguing that a well constructed course in law school should "focus on the structural conditions underlying moral dilemmas. So, for example, in addressing issues such as abuse of discovery procedures, it is useful to consider not only codified rules and case law but also the incentives arising from hourly billing practices, law firm promotion pressures, under-financed disciplinary systems, and over-burdened judiciaries"). See also Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 Vand. L. Rev. 75, 118 (1993) (stating that conclusions "based on pervasive situationalism, will never be broadly embraced, no matter how well they are established empirically. . . . In judging others, we look for dispositional flaws that explain why things went wrong, rather than acknowledging the complex presence of situational factors that make the action more ambiguous. . . . [L]awyers [are not] likely to take a strong situationist perspective. From the first day of law school, the legal profession celebrates hyper-rationality, and so will hardly endorse a widespread characterization of attorney behavior in which ego-driven thought processes interfere with mindful scrutiny of the available facts and circumstances. That characterization is too threatening to the profession's self-esteem"); David Luban, Alan Strudler, and David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 Mich. L. Rev. 2348, 2391-92 (1992) (stating: "Our argument, however, has been that discrete and bounded episodes of moral challenge arise in a moral world far different from that of bureaucratic organizations in which modern men and women lead their lives. . . . [T]he organizational setting changes the contours of moral challenge and thus of moral virtue. . . . The institutionalization of everyday life may demand fewer of the virtues of a soldier or saint and more of the virtues of a detective, a scientist, or a trial lawyer aiming to reconstruct shards of evidence into a coherent theory"); Hazard, 14 Nat'l L. J. at 17 (cited in note 276) (arguing that "law school training [and continuing legal education] must not only overcome ignorance but must anticipate that many students soon will be plunged into work settings that are ethically negligent or malignant"). Professors Rhode, Langevoort, Luban, and Hazard, of Stanford, Vanderbilt, Maryland, and Yale, respectively, have published other works that bring in the situationalist perspective.

331. Langevoort, 46 Vand. L. Rev. at 118 n.171.

adversary, another to a spouse, another to his mother, and then another to his children. Who the real person may be is not as important as recognizing that the lawyer is different in each situation. The situation, not necessarily the individual, is evoking the appropriate behavior.

The few empirical studies that have been done on lawyers' conduct show how important situational factors can be. Based on over one hundred interviews, sociologist Jerome E. Carlin's study of Chicago's solo practitioners in 1957 shows how little some aspects of the practice of law have changed. In his study Carlin noted that solo practitioners, accounting for over half of the lawyers in Chicago, were "generally at the bottom of the status ladder . . . at the margin of [their] profession, enjoying little freedom in choice of clients, type of work, or conditions of practice."³³² Moreover:

[B]ecause of the residual character of his practice, the individual [solo] lawyer generally finds it difficult if not, in some instances, impossible to conform to the ethical standards of practice. In his efforts to obtain business, and in his dealings with clients and various public officials, he is frequently exposed to pressures to engage in practices contrary to the official norms.³³³

In his second study, of the New York City bar, performed in 1960 and based on a sample of 800 lawyers, Carlin also found "nothing to suggest that what I found to be true about individual lawyers in Chicago is unique to Chicago."³³⁴ Carlin noted that:

[T]he practicing lawyer is constantly confronted with contending interests and conflicting loyalties. He may not only find himself in situations where his own interests run counter to those of his clients, but where service to clients may be inconsistent with his responsibilities as [an] officer of the law. A critical research task, therefore, is to explore the conditions supporting and impairing the lawyer's capacity to carry out his ethical obligations.³³⁵

Carlin identified the following situational factors that serve as threats to the lawyer's integrity: the highly competitive market for legal services,³³⁶ lawyers becoming captive to their clients (or their clients' money) and finding it extremely difficult to exercise independ-

332. Jerome E. Carlin, *Lawyers on Their Own* 206 (Rutgers U., 1962).

333. *Id.* at 209.

334. *Id.* at ix.

335. Jerome E. Carlin, *Lawyers' Ethics: A Survey of the New York City Bar* 4 (Russell Sage Found., 1966).

336. *Id.* at 7.

ent judgment or authority,³³⁷ and weak bureaucratic courts and governmental agencies.³³⁸

In addition to Carlin's work on urban lawyers, studies on small-city,³³⁹ rural,³⁴⁰ and in-house lawyers³⁴¹ also conclude that unethical and errant behavior increasingly depends on situational factors such as the degree of exposure to temptations, work-place demands, and attitudes of clients and peers. For instance, Joel F. Handler, using the same questionnaire used by Carlin, found that:

The same factors that were related to ethical behavior of Prairie City [a mid-sized city of 90,000] lawyers were also related to the ethical behavior of the New York City lawyers. In other words, when the lawyers in Prairie City were faced with pressures similar to those faced by the New York City lawyers, they tended to respond in the same way.³⁴²

Country lawyers, according to Donald Landon, were far from zealous advocates for their clients: "Excessive zeal becomes deviance. Thus, while the rural lawyer's conduct may be informed by the professional code, it is ultimately shaped by the day-to-day necessities implicit within the containing community."³⁴³

Contrasting Landon's findings on country lawyers to his and Edward Laumann's study on Chicago lawyers,³⁴⁴ John Heinz noted that "we argued that the social structure of the Chicago bar was 'client driven,' Landon finds that the country lawyers are 'community driven.' What the two bars have in common is that neither is 'lawyer driven.' Both respond to social forces that are external to the profession, and neither appears to be greatly governed by professional norms."³⁴⁵

After studying corporate managers and in-house lawyers, Robert Jackall also found that "independent morally evaluative judgments get subordinated to the social intricacies of the bureaucratic

337. *Id.* at 8.

338. *Id.*

339. Joel F. Handler, *The Lawyer and His Community: The Practicing Bar In A Middle-Sized City* 155 (U. of Wis., 1967).

340. See generally Donald D. Landon, *Country Lawyers: The Impact of Context on Professional Practice* (Praeger, 1990).

341. Robert Jackall, *Moral Mazes: The World of Corporate Managers* 105, 122-23 (Oxford U., 1988); Telephone interview with Professor Robert Jackall, Williams College (Nov. 1, 1994) (confirming that his study included lawyers who are managers and managers who are lawyers).

342. Handler, *The Lawyer and His Community* at 155 (cited in note 339).

343. Landon, *Country Lawyers* at 145 (cited in note 340).

344. John P. Heinz and Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (Russell Sage Found., 1982).

345. Landon, *Country Lawyers* at xiv (cited in note 340) (Foreword by John P. Heinz).

workplace. Notions of morality that one might hold and indeed practice outside the workplace . . . become irrelevant. . . .³⁴⁶

The solo practitioner, the lawyer in a small firm, and even the big firm lawyer cannot be evaluated in a vacuum. As noted in a study of criminal lawyers by Abraham S. Blumberg, done almost thirty years ago, individual solo practitioners are part of a greater situation—society itself and a judicial system, a bureaucracy of enormous proportions where the clients' interests often give way to the lawyers' need to conform or to develop good relations with other clients, opposing counsel, judges, prosecutors, probation officers, the police, regulatory agencies, insurance companies, and the organized bar.³⁴⁷

Thus, even though a solo practitioner may not be technically or legally associated with a group of other lawyers, situationally she is part of a bigger organization: society and the judicial system.³⁴⁸ The studies of lawyers by Carlin, Handler, and Blumberg were done prior to 1970, when legal malpractice claims and lawsuits started to rise exponentially.³⁴⁹ Society, and the practice of law, have changed since 1970, significantly exacerbating the malignant situations described by Carlin, Handler, and Blumberg.

A situationalist analysis of legal malpractice must first include the larger situation or social environment: the society in which the individual lawyers, their families, their friends, and their colleagues live.³⁵⁰ And, as noted in Part III, lawyers may only be as cold, unethical, or greedy as other Americans.³⁵¹ There may even exist in America

346. Jackall, *Moral Mazes* at 105 (cited in note 341); Jackall interview (cited in note 341).

347. Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 *Law and Society Rev.* 15, 20-21 (June 1967) (reporting a study of criminal lawyers which showed that the lawyers routinely sacrificed their clients' interests in order to remain part of a system or bureaucracy).

348. See generally Richard T. DeGeorge, *The Status of Business Ethics: Past and Future*, 6 *J. Bus. Ethics* 201 (1987) (arguing that before promoting ethics, beyond socialization, such as law firm ethics committees, or sensitization, such as continuing legal education courses on ethics, there is a need to understand the extent to which the actual structures of practice affect the ability of the individual to comply with ethical norms).

349. Mallen and Smith, 1 *Legal Malpractice* § 1.6 at 17-19 (cited in note 11).

350. See Geoffrey C. Hazard, Jr., *Doing the Right Thing*, 70 *Wash. U. L. Q.* 691, 694, 701 (1992) (stating that "[i]t is the ethics of such real-world people that should be compared with the ethics of a real world lawyer. . . . A parent will protect and lie for a child. . . . An employer will defend an employee. . . . Fellow employees cover for each other. . . . Trying to do the right thing, when it is impossible to do so without conflicts in values, is one of society's dirty jobs. However, no one is compelled to become a lawyer, and many who have originally chosen the profession find it repugnant and leave").

351. Patterson and Kim, *The Day America Told the Truth* at 239 (cited in note 192).

a culture of litigation³⁵² and a legal system that at times appears focused on greed and vindictiveness rather than justice.³⁵³

The rate of civil litigation, however, has increased faster than the population only in the areas of divorce, prisoners' and discrimination lawsuits, and, during the early 1980s, in lawsuits against the Social Security Administration by recipients denied benefits by the Reagan administration.³⁵⁴ Product liability lawsuits, which increased in number in the early 1980s, have actually fallen in the past five years.³⁵⁵ California's civil lawsuits have declined despite dramatic population gains.³⁵⁶ Thus, the increase in the frequency and seriousness of legal malpractice is not merely a result of more litigation in general.

If a culture of litigation does exist, the legal profession and individual lawyers should be reaping the benefits and lawyers should be in a financial and psychological state of well-being. However, there are too many lawyers serving too few people, and only large corporations are able to pay the high attorneys' fees. As noted by Attorney General Janet Reno, eighty percent of the poor and working poor "don't have access to legal services. . . ."³⁵⁷ The competition for

352. Peter Carlson, *Legal Damages*, Wash. Post Sunday Mag. § W, at 11 (March 15, 1992) (stating that the culture of litigation "has skewed the American psyche, tilting it away from taking responsibility for one's misfortune (or cursing the fates) and toward blaming it all on somebody else, preferably somebody with deep pockets or good insurance coverage. A shift from 'cest la vie' to 'Sue the bastards!' . . . The culture of litigation produces the fear of litigation, which causes people to hire lawyers for defense purposes, which causes a greater demand for lawyers, which produces more lawsuits, which cause more fear of lawsuits, which causes a greater demand for lawyers, which produces more lawyers, who produce more . . .").

353. Bruce Vielmetti, *We May Not Like Lawyers, But We Use Them*, St. Petersburg Times Bus. Mag. 9 (Aug. 9, 1993) (reporting that, in response to the National Law Journal/West Publishing Company poll [see *NLJ/West Poll*, cited in note 162] and the recent "lawyer bashing," Patricia Seitz, Florida's state bar president, said "[t]he legal system is also driven by the greed and vindictiveness of some in society, by people's willingness to sue rather than settle, to demand rights rather than exercise responsibility, and to win at all costs rather than obtain justice. Maybe it's time for lawyers to take an insightful look at prospective clients and their causes . . . and not take the case or the money—a decision weighted by the lawyer's responsibility to the courts, the profession and the entire justice system").

354. See Marc Galanter, *The Life and Times of the Big Six; Or, the Federal Courts Since the Good Old Days*, 1988 Wis. L. Rev. 921, 925.

355. Marc Galanter and Charles R. Epp, *A Beginner's Guide to the Litigation Maze*, Bus. Econ. 33, 35-38 (Oct. 1992) (noting that "[t]he available evidence . . . suggests a more benign reading of our current [litigation] situation").

356. Dorgan, San Jose Mercury News at A1 (cited in note 51) (reporting that in fiscal 1987 California, had 137,458 tort lawsuits filed in Superior Court. In 1991, there were only 117,088 tort lawsuits filed in California's Superior Courts).

357. Steve Marshall, *Poor Legal Services*, USA Today A3 (Aug. 2, 1993).

high-paying clients is stiff, and usually lawyers are willing to take in more business than they can handle competently.³⁵⁸

A. *The Nature of Law Practice*

Whether there exists a culture of litigation, a culture of greed, or too many lawyers in too few places, lawyers often pile on too much work and bill too many hours in order to make more money. Over half of the lawyers in one survey report billing at least 2,400 hours a year.³⁵⁹ Too much work may be one significant situational factor that leads to a greater incidence of malpractice. In a study by the ABA Young Lawyers Division, lawyers complained of intolerable daily stress, work overload, time pressures, poor interpersonal relationships at work, inadequate support, and too much competition.³⁶⁰ As many as fifty-five percent of the men and sixty-one percent of the women said they had no time for themselves or their families.³⁶¹ Ronald L. Hirsch, who directed the 1990 survey states:

The profession has lost its roots . . . the data reflect . . . the concern of many that the increases in hours worked and the resulting decrease in personal time have become a major problem [and] that the legal profession has in recent years become a less pleasant place to work.³⁶²

Up to one-third of lawyers in another survey doubted whether they would remain in the profession.³⁶³ There are currently 40,000 lawyers leaving the profession every year.³⁶⁴

Whether we speak of attorneys working in large firms or solo practitioners, there may be a disproportionate number of attorneys suffering from either depression, alcohol or drug use, or who are

358. Kahler, *Oregonian* at R13 (cited in note 176) (reporting that Chris Coley, president of a group of 25 lawyer-owned legal malpractice insurance companies believes that malpractice claims have increased because lawyers, facing a more competitive economic environment, are taking on too many cases). See also Research For Marketing, *1989 Survey* at 17 (cited in note 39) (reporting that 69% of the Oregon lawyers stated they had either all the practice they could handle [42%] or more than they could handle [27%]).

359. Holt, 79 A.B.A. J. at 64 (cited in note 188).

360. ABA *State of the Legal Profession* at 24 (cited in note 185).

361. *Id.*

362. Rehrlich, *L.A. Times* at A5 (cited in note 190).

363. *Survey Reveals Disturbing Truth: Lawyers Unhappy With Profession*, *Bar Leader* 22, 22-23 (March/April 1989) (reporting that a study of 270 Maryland lawyers cited the reasons for dissatisfaction as the negative public image, high costs, case overloads, no time for personal life, and excessive business orientation of law firms). See also Rosalind Rosnick, *Too Many Lawyers, Florida Bar Members Say*, *Miami Herald Bus. Mag.* 15 (Aug. 2, 1993) (reporting that a survey of Florida lawyers found that 13% plan to leave the profession).

364. David Margolick, *Alienated Lawyers Seeking—and Getting—Counsel in Making the Transition to Other Careers*, *N.Y. Times* B7 (Feb. 10, 1989).

merely dissatisfied with their careers or their lives.³⁶⁵ The rate of alcoholism and depression among lawyers is two to three times the national average.³⁶⁶ Sharee Swetin, the staff director of the ABA's Committee on Lawyers' Professional Liability, believes that "a high percentage of legal malpractice problems are caused by . . . alcohol, chemical dependency and stress. [But] we don't have any statistics."³⁶⁷ Some research, however, has noted that hard work alone does not account for the negative symptoms found among practicing lawyers. For instance, it has been found that law professors work as hard as practicing lawyers, but do not exhibit the same symptoms of "burn out."³⁶⁸

If it is not simply overwork, why do so many lawyers "burn out," increasing their exposure to legal malpractice? Amiram Elwork and G. Andrew H. Benjamin, in a forthcoming article, "Lawyers in Distress,"³⁶⁹ acknowledge the lack of hard empirical evidence, but make three hypotheses: (1) the adversary legal system itself encourages suspiciousness, hostility, aggression, and cynicism—traits that researchers have confirmed as being more prevalent among lawyers;³⁷⁰ (2) there is an emphasis on detail-oriented rational analysis, and a strong preference for "logical" thinking as opposed to value laden "feeling-helping behavior;"³⁷¹ (3) there exists role conflict and ambiguity, whether one is an officer of the court, an advocate, or a

365. *Just One For the Road*, 13 Cal. Law. 17 (July 1993) (reporting that "[a] new study shows that one-third of the nation's attorneys suffer from either depression, alcohol or drug use. And 60% of California lawyers who are sued for malpractice have a related mental health or substance abuse problem").

366. Eaton, et al., 32 J. Occupational Med. at 1081 (cited in note 265). The reasons given are: the sputtering economy; making less money; increased competition; the pressure of billable hours and bringing in new clients; making the practice of law seem solely a business; forcing many lawyers into becoming salesmen (something many lawyers are uncomfortable with); working longer hours, with less time for families; the drudgery of legal work; dashed expectations of becoming an "equity" partner; greater depersonalization of the legal profession; the waning of congeniality; mounting paper work; and the growing threat of legal malpractice claims. See Jack Z. Smith, *Able Attorneys Pressured Out of Profession*, St. Paul Pioneer Press Dispatch 6D (March 2, 1992).

367. Rohrlich, L.A. Times at A5 (cited in note 190).

368. Brian S. Gould, *Beyond Burnout: You Can Withstand the Heat of Ambition*, 10 Barrister 4, 4-6 (Summer 1983).

369. Amiram Elwork and G. Andrew H. Benjamin, *Lawyers in Distress* (forthcoming, copy on file with the Author).

370. G. Andrew H. Benjamin, et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 Am. Bar Found. Res. J. 225, 246. See also Richard Francis, et al., *Lawyers' Alcoholism*, 4 Advances in Alcohol and Substance Abuse 59 (Winter 1984) (discussing a study of twelve alcoholic lawyers).

371. Debra Cassens Moss, *Lawyer Personality: Logical Problem Solvers Happiest, Consultant Claims*, 77 A.B.A. J. 34, 34 (Feb. 1991). See also Richard, 79 A.B.A. J. at 77 (cited in note 329) (applying the Myers-Briggs Type Indicator to a sample of lawyers); Marcin, 24 U. Toledo L. Rev. at 118-19 (cited in note 329) (discussing psychological type theory).

counselor, whether one is forced to hurt people or help them, and whether one's job is prestigious or ridiculed by the public.³⁷²

B. The Solo Practitioner and Small Firm Lawyers

Some believe that legal malpractice is more prevalent among lawyers in solo practice or small firms.³⁷³ However, as seen in Part II, we do not know whether there are disproportionately more legal malpractice claims and lawsuits among this group of lawyers.³⁷⁴

Those contending that solo practitioners and small-firm lawyers commit a disproportionate amount of malpractice give certain reasons to explain the phenomenon. For example, the quality of certain "non-repeating" business, such as writing a will, handling a divorce, defending a misdemeanor, or helping a client buy a house—this type of work, "combined with the small fees encourages a mass processing of cases" which inevitably leads to lower quality.³⁷⁵ As noted by another scholar:

[I]t is not far wrong to say that lawyers for big corporations are the only practitioners regularly afforded latitude to give their technical best to the problems they work on. The rest of the bar ordinarily has to slop through with quickie work or, as one lawyer put it, make good guesses as to the level of malpractice at which they should operate at in any given situation.³⁷⁶

In an American Bar Foundation study of trial attorneys, more than one-third believed that economic considerations affected the amount of time spent on a case, and that excessive case loads created less time to adequately prepare the cases for trial.³⁷⁷ Many lawyers who take on a matter for a friend, or take work on a "loss leader" basis, quickly realize that a good deed never goes unpunished. A "no

372. American Bar Association, *The Report of At the Breaking Point: A National Conference on the Emerging Crisis in the Quality of Lawyers' Health and Lives—Its Impact on Law Firms and Client Services* 12-13 (Airlie House, 1991). See also Benjamin, Darling, and Sales, 13 *Int'l J. L. & Psych.* at 240-41 (cited in note 189) (discussing stress and alcohol and drug use among lawyers); Sam Benson, *Why I Quit Practicing Law*, *Newsweek* 10 (Nov. 4, 1991) (discussing the difficulties with the adversarial system).

373. Robin, 40 *U. Miami L. Rev.* at 1102-04 (cited in note 98).

374. Gates, 37 *Mercer L. Rev.* at 566 (cited in note 101).

375. Jerome E. Carlin and Jan Howard, *Legal Representation and Class Justice*, 12 *UCLA L. Rev.* 381, 385 (1965).

376. Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* 152-53 (Yale U., 1978).

377. Dorothy Linder Maddi, *Improving Trial Advocacy: The Views of Trial Attorneys*, 1981 *Am. Bar Found. Res. J.* 1049, 1068.

fee" or "low fee" situation increases the chances of not doing a competent job.³⁷⁸

Many lawyers in solo or small firm practice—those who make up the majority of lawyers—could avoid malpractice by merely creating a situation that allows for more time spent on each client and each case. However, it is unlikely that such situations can be created if one's paramount goal is the maximization of profit. Many small-firm lawyers do not have the luxury of well-heeled clients that the large law firms enjoy, and therefore face the situational determinant of having to take on too much work in an effort to increase income and prestige. If the high stress, overwork situation of the majority of lawyers does not change, neither will the high incidence of malpractice.

C. *The Big Law Firms*

Perhaps it is easier to accept the situationalist perspective when looking at big law firms. One scholar notes: "To say that the bulk of unethical conduct in law firms has organizational rather than individual roots may exaggerate the case. Yet, it would be foolhardy to suppose, especially for the larger firms, that bureaucratic failings and collective decisions do not play a significant causal role."³⁷⁹

Although lawyers who work in large firms are still in the minority, an increasing percentage of today's legal work is done by large firms. In the 1940s only a handful of law firms had over seventy lawyers. Today there are over 250 law firms with more than 125 lawyers, and 60 law firms with more than 300 lawyers.³⁸⁰

Partners in big firms have a tremendous incentive to overwork associates. Each additional associate hour billed after meeting the overhead is pure profit for the partners, who are all too eager to base yearly bonuses and promotions on hours billed over "minimums" of

378. Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice*, 17 Mem. St. U. L. Rev. 521, 528-30 (1987). Professor Johnston, a former practitioner, argues that the "loss leader" approach does not provide sufficient incentive for most practitioners to take the time and effort necessary to do a thorough, competent job of estate planning and that this situation should be avoided by charging by the hour for routine matters and not taking work outside of one's competence. However, there is a tendency at least among general practitioners not to refer estate planning work to others, perhaps due to a concern that the attorney to whom work is referred will, in the future, be asked to undertake work for the client in areas where the referring attorney previously had rendered services. *Id.* at 530.

379. Schneyer, 77 Cornell L. Rev. at 20 (cited in note 247).

380. Roger C. Cramton, *The Changing Legal Profession*, in Timothy W. Floyd and W. Frank Newton, eds., *The Lawyer as a Professional* 29, 35 (Texas Center for Legal Ethics and Professionalism, 1991).

1,800 to 2,000 hours. Average billable hours have grown, and the trend is to hire fewer lawyers to do more work.³⁸¹ In a recent ABA poll, fifty percent of the 3200 lawyers surveyed reported annual billable hours of 2400 or more, sometimes as high as 2500 to 2700.³⁸² The pressure to bill hours is reflected in the monthly reports of associates' billable hours published by some law firms. Salary and partner status depend on the number of hours billed.³⁸³ Partners or senior associates do not supervise the younger associates, because clients will not pay for it, and because such supervisors will themselves fall short of billable hours requirements for bonuses or promotions. Pro bono and bar activities are not favored by big firm lawyers, because they do not result in billable hours.³⁸⁴

Rewarding high billable hours in a law firm, to the extent that the attorney is able to be thorough with a "deep pocket" client's work, should actually reduce the frequency of the malpractice claims. The lawyer has the luxury of being thorough, "looking under every rock," and even billing for what could only be seen as malpractice prevention. Moreover, institutional clients serve to remind the lawyer of the potential for future business, which further inspires quality work.³⁸⁵ However, sophisticated institutional clients are refusing to pay for legal malpractice prevention, and are more willing to switch law firms or go in-house to reduce fees.³⁸⁶

381. Holt, 79 A.B.A. J. at 64 (cited in note 188).

382. *Id.*

383. Paul Marcotte, *Hours Way Up: 2,500 Now Magic Number*, 74 A.B.A. J. 18, 18 (Dec. 1988) (reporting that lawyers in the most demanding firms average 2500 billable hours, up from 2210 in 1982).

384. O'Malley, 20 U. Toledo L. Rev. at 361 (cited in note 211). O'Malley, head of the ALAS prevention program, notes that:

[s]ome firms' compensation formulas overemphasize client-getting and client billings, and deal unfairly with partners who are in the trenches doing first-class legal work for clients brought in by rainmakers. Occasionally, individual and institutional greed aggravates the situation. The bottom-line mentality takes over. This type of atmosphere has an adverse effect on the quality of the clients and the work. In some cases this atmosphere threatens the stability of the firm, and in some well-publicized recent cases has destroyed the firm.

Id.

385. David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 375, 392-93 (1990).

386. Don J. DeBenedictis, *Growing Pains*, 79 A.B.A. J. 52 (March 1993) (citing a 1992 Price Waterhouse survey of 140 Fortune 500 companies which showed that the median amount of \$9.8 million in fees paid to outside counsel in 1990 dropped 24% to \$7.4 million in 1991). See also *Lawyer Glut*, 13 Cal. Law. 19 (May 1993) (discussing Chevron Corporation's ability to reduce its outside legal fees annual budget by \$10 million from its prior \$60-\$75 million by "developing billing guidelines, seeking out inexpensive small law firms and finagling rate discounts" from existing big law firms).

The frequency of malpractice claims by clients is often not as significant a statistic for large law firms as is the severity of claims by third parties, such as investors and regulatory agencies.³⁸⁷ A first-class job for the client may not head off the legal malpractice claim from a nonclient.³⁸⁸ For instance, as of October 31, 1993, the RTC had received \$202 million in settlements from thirty-one large law firms stemming from the failure of only twenty-two savings and loans.³⁸⁹ As noted in Part II above, ALAS-insured law firms' average settlement amount for a securities' claim was \$5,688,888.³⁹⁰ As shown in Appendix C-3, one ALAS-insured law firm's \$75 million settlement³⁹¹ was more than was paid to settle all reported Florida legal malpractice lawsuits between 1981 and 1993. Thus, legal malpractice is, in at least one sense, worse in the big law firms.

Perhaps the problem with big law firms is that no one person is in control. Even though a particular law firm's culture can be characterized as "friendly mania," "sweat shop," or "clubby,"³⁹² a firm is still a bureaucratic culture where young lawyers look for unwritten mores and try to emulate the successes of senior partners. The messages that are conveyed by the "power partners" to the rest of the firm regarding case handling, client relations, and ethical and malpractice concerns cannot be over-emphasized.³⁹³ In many cases, profits are high priority; ethics are a luxury that only academics can afford.

The costs of running the large law firms have increased dramatically.³⁹⁴ During recessionary times, when work slows down, lawyers can either churn the files and pad the bills or put their jobs at risk and reduce their chances of partnership.³⁹⁵ A recent study of large law firm lawyers found pervasive deception in client billing.³⁹⁶ The scholar noted:

387. O'Malley interview (cited in note 6) (citing ALAS' one percent annual claims rate).

388. O'Malley, 20 U. Toledo L. Rev. at 328 (cited in note 211).

389. Hansen, 80 A.B.A. J. at 28 (cited in note 137).

390. See Appendix D.

391. Reske, 79 A.B.A. J. at 16 (cited in note 141).

392. Barbara Buchholz, *Melting Pots: Redefining Law Firm Cultures in Changing Times*, 79 A.B.A. J. 62, 63 (March 1993).

393. Michael G. Trachtman, *Malpractice Avoidance and Professional Responsibility*, in PLI, 440 *Commercial Law and Practice: Course Handbook Series* 371, 378 (Practising Law Institute, 1987).

394. Rosenberg, Wash. Post at C3 (cited in note 175).

395. Steven Brill, *The End of Up-Or-Out*, Am. Law. 3 (Dec. 1988).

396. Lerman, 138 U. Pa. L. Rev. at 665 (cited in note 12).

The legal profession is becoming increasingly competitive and intense. This makes it more difficult for lawyers to be honest. . . . They must work outrageous hours [and] face intense pressures to bring in business. . . . [E]arning money is valued above all else. . . . The structure of the work in large firms places large firms on an institutional collision course with many humanistic values such as truthfulness and altruism.³⁹⁷

The largest and most prestigious law firms in the country, with the top lawyers from the top law schools, became so embroiled in the savings and loan scandal that they were forced to pay the largest ever legal malpractice settlement awards.³⁹⁸ The lawyers involved in this scandal were not necessarily bad, venal, or stupid.³⁹⁹ The confusing and contradictory legal and ethical rules regarding the reporting of a client's fraud perhaps encouraged the lawyers to rationalize their continued involvement.⁴⁰⁰ However, more importantly, research in social psychology shows that "there are reasons . . . to doubt that lawyers will be very good gatekeepers once they have committed to representation and built a positive [social psychological] schema regarding the client and the situation."⁴⁰¹

The situational perspective is particularly helpful in showing how, in big law firms, legal malpractice is as much a product of the nature of the practice, where profit is king, as of any trait of the indi-

397. *Id.* at 759.

398. Hansen, 80 A.B.A. J. at 28 (cited in note 137), provides the following chart:

**TOP FIVE SETTLEMENTS BETWEEN LAW FIRMS AND
THE RESOLUTION TRUST CORP. (through Oct. 31, 1993)***

DATE	FIRM	AMOUNT
April 1993	Jones, Day, Reavis & Pogue	\$51 Million**
September 1993	Paul, Weiss, Rifkind, Wharton & Garrison	\$45 Million
March 1992	Kaye, Scholer, Fierman, Hays & Handler	\$41 Million
February 1993	Troutman, Sanders, Lockerman & Ashmore	\$20 Million
February 1992	Richard Swandon; Dorsey & Whitney, And Other Nonlawyer Defendants	\$8.75 Million

*Does not include separate settlements between law firms and the Office of Thrift Supervision. Source: Resolution Trust Corp.

**Another \$24 Million was paid directly to the investors. See Reske, 79 A.B.A. J. at 16 (cited in note 141).

399. Langevoort, 46 Vand. L. Rev. at 114 (cited in note 330).

400. *Id.* See also O'Malley, 20 U. Toledo L. Rev. at 354-55 (cited in note 211) (criticizing the ABA Model Rules of Professional Conduct as incomprehensible and contradictory in their effort to address the client fraud issue).

401. Langevoort, 46 Vand. L. Rev. at 117. Langevoort also notes that "[i]n all likelihood, individual lawyers will never be resistant to commitment-generated biases unless and until they see their relationship with a client as something different from a commitment. Given the ABA's celebration of loyalty and commitment, it may be impossible to generate more perceptive, as opposed to more ethical, lawyers." *Id.* at 114 n.156.

vidual lawyers. All the situational factors suggest that lawyers in large law firms should have the luxury of being thorough and avoiding malpractice, but the requirement of higher billable hours, and an intense pressure to cut corners leads lawyers to sacrifice thoroughness to efficiency in order to make more money.

The twin factors of too much work and too little money are situational determinants that can explain much of the exponential rise in legal malpractice in solo, small, and big firm practice. Thus, by looking at the situational determinants of legal malpractice, the problem becomes significantly more complex. Curtailing legal malpractice is not merely an issue of getting rid of a "few bad apples." Switching the focus from the individual to the situation also shifts the emphasis from making ineffective cosmetic changes to making more fundamental changes in the situations that nurture legal malpractice claims and lawsuits.

VI. REGULATING LAWYERS: THE NEED FOR FUNDAMENTAL CHANGES

The ABA, the "world's largest voluntary professional organization," and the most vocal supporter of self-regulation, is decreasing in size despite the increasing numbers of lawyers,⁴⁰² and probably counts fewer than one-third of the nation's lawyers as active fee paying members.⁴⁰³ ABA members are not representative of lawyers.⁴⁰⁴ In California, only twenty-six percent of the 140,000 lawyers belong to the ABA.⁴⁰⁵ The same California lawyers, by almost eighty percent, would prefer to disband the integrated California Bar due in part to soaring fees for the new State Bar Court Disciplinary System and a

402. James Podgers, *Head Count: ABA Membership Levels Remain Steady in Difficult Year*, 79 A.B.A. J. 105, 105 (Aug. 1993) (noting that ABA membership for 1992-93 dropped 1.4%).

403. See *ABA Membership Data* (cited in note 39) (noting that for 1992-93 there were 357,032 ABA members out of 844,905 lawyers—but approximately 40,000 first year lawyers are automatically enrolled free and a significant number of others, such as this Author, whose employers automatically pay the dues would probably not be members).

404. See James E. Brill, *What Have You Done For Me Lately? How the ABA Can Be of Help to Solo Practitioners*, 79 A.B.A. J. 97, 97 (Aug. 1992) (positing that the ABA may sometimes neglect solo practitioners and small firms). See also *ABA Membership Data*. The ABA membership is approximately 25% women, but no statistics are kept on the racial or ethnic composition of its members. It would probably be fair to guess that the ABA has relatively few members of color since its membership is more representative of large law firms, who, in turn, have almost no partners and few associates of color. See, for example, Talbot "Sandy" D'Alemberte, *Racial Injustice and American Justice (After the Verdict)*, 78 A.B.A. J. 58, 59 (Aug. 1992) (noting that only 1.7% of lawyers in the 250 largest law firms are black; only 49 of the 250 firms had more than one minority partner).

405. *ABA Membership Data* (reporting that California and Florida have 36,312 and 18,226 lawyers, respectively, who are members of the ABA).

widespread sense of over-regulation.⁴⁰⁶ A similar move to disband Florida's mandatory bar has gained ground.⁴⁰⁷

The ABA recommends only cosmetic changes to the existing system. The McKay Report, for example, recommends expedited procedures on "minor misconduct" disciplinary cases if the lawyer agrees to give up expenses and time-consuming due process procedures.⁴⁰⁸ It also calls for voluntary arbitration of legal malpractice cases, mediation, mandatory arbitration of fee disputes, substance abuse counseling, and practice assistance.⁴⁰⁹

The ABA's interest in protecting its member lawyers is obvious, but its attempts to "tweak" the existing system simply are not enough. Lawyers are unlikely to give up their due process rights in disciplinary proceedings. Clients are unlikely to give up their right to go before juries hostile to lawyers in legal malpractice cases.

Robert E. O'Malley, loss prevention counsel and vice chairman of ALAS, the nation's largest insurer of lawyers,⁴¹⁰ believes "that the courts, the various bar associations and the disciplinary boards cannot deal with most of the problems."⁴¹¹ O'Malley's proposed solutions for legal malpractice at least acknowledge, in part, the importance of the situation: (1) insurance carriers should recognize their self interest and serve as a catalyst requiring structural changes in law practice; (2) there should be more sharing of information regarding legal malpractice claims and lawsuits;⁴¹² and (3) there should be more legal malpractice education of lawyers.⁴¹³

406. *Fax Poll*, 13 Cal. Law. at 109 (cited in note 183).

407. Bruce Vielmetti, *Lawyers Unite to Cast Off the Bar*, St. Petersburg Times 1B (Oct. 25, 1993) (reporting that the newly formed Attorneys' Bar Association of Florida wants to abolish the Florida Bar because of mandatory CLE programs, mandatory pro bono programs, and advertising restrictions, and wants to move from self-regulation to public regulation by the same state agencies that regulate doctors, accountants, architects, and other professionals).

408. ABA Center for Professional Responsibility, Commission on Evaluation of Disciplinary Enforcement, *American Bar Association Report to the House of Delegates* 13 (1991) ("*McKay Report*").

409. *Id.* at 13, 18.

410. Hansen, 80 A.B.A. J. at 28 (cited in note 137). See also O'Malley interview (cited in note 6).

411. O'Malley, 20 U. Toledo L. Rev. at 363-64 (cited in note 211).

412. O'Malley interview (cited in note 6). However, O'Malley refused the Author's request for information to supplement and update the ALAS Table duplicated at Appendix D.

413. O'Malley, 20 U. Toledo L. Rev. at 363-64 (cited in note 211).

O'Malley, in advising large law firms, has identified certain "Dangerous Situations" and matched them up with recommended structural changes in a law firm, or a "Responsible Committee."⁴¹⁴ Some firms, instead of adopting the committees suggested by O'Malley, have hired a full-time "quality assurance manager" to create and oversee calendaring, conflict checks, in-house education, work allocation, and a peer review system for associates and partners, and to develop a practice manual.⁴¹⁵

While these situational changes look good, and some insurance companies like ALAS may be able to convince insured lawyers to implement them, there is nothing to force large law firms to set up *effective* committees where supervision is rewarded as much as billable time, or to have quality assurance managers who are not merely traditional office managers with added responsibilities.

Others have argued that disciplinary boards should target the law firm entity itself, and have it pay fines or restitutions and suffer probation or adverse publicity. "For example if a firm was disciplined because an associate had padded her hours, the firm could decide for itself whether its policy of requiring associates to bill 2300 hours a

414. Id. The "dangerous situations" and the type of committees are:

DANGEROUS SITUATIONS	RESPONSIBLE COMMITTEE
A. New clients in financial	New business committee
B. Entrepreneurial activities	Management committee
C. Litigation	Practice committee
D. Trusts and estate practice	Practice committee
E. Opinions	Opinions committee
F. Transactional practice	Practice committee and new business committee
G. Involvement in a matter outside the lawyer's area of expertise	Practice committee and new business committee
H. Year-end crunch	Practice committee and new business committee
CAUSE OF CLAIMS	RESPONSIBLE COMMITTEE
A. Deficient procedures with respect to new client/new matters	New business committee
B. Decline clients	New business committee
C. Client fraud or other misconduct	Legal ethics committee
D. Lack of attention to ethics rulings and opinions	Legal ethics committee
E. Conflicts of interest	Legal ethics committee
F. A suit against a client for unpaid fee	Management committee
G. Branch offices, lateral partners, mergers and vast growth	Management committee
H. Health problems	Management committee
I. Poor client relations	Practice committee
J. Attitudes	Management committee

415. Stephen G. Hirsch, *At Long & Levit, Quality is Job One*, The Recorder 2 (Dec. 23, 1991) (noting that Long & Levit, at the insistence of its partner and well known legal malpractice expert, Ron Mallen, hired a full-time quality assurance manager).

year posed unacceptable ethical risks.⁴¹⁶ The problem with this solution is that underfunded disciplinary agencies simply will not do battle with the big law firms.⁴¹⁷ But something must be done—changing the law, or the names of law firm committees or office managers, is not enough. Such cosmetic institutional reforms are suspect, especially with the large law firms' moral culture saying one thing but doing another.⁴¹⁸

Legal malpractice claims and lawsuits will continue to plague the profession in even greater numbers unless lawyers, whether practicing in big firms, small firms, or on their own, make fundamental changes. Consumer groups will continue to lobby legislatures to take regulation of the profession away from self-interested lawyers and their organizations. Public regulation of lawyers is not only beneficial to consumers, but eventually may improve the image of lawyers. When lawyers are treated like everyone else, they will not invite the public's scorn as they do now.⁴¹⁹

A. *Mandatory Reporting and Mandatory Legal Malpractice Insurance*

Lawyers cannot be effectively regulated without credible information regarding the causes of malpractice. The regulation of lawyers and the attempt to determine the causes of legal malpractice are extremely difficult when the lawyers' insurance carriers refuse to share information.⁴²⁰ Even when there are mandatory legal malprac-

416. Schneyer, 77 Cornell L. Rev. at 30-31 (cited in note 247) (stating that there is nothing to prevent a law firm entity itself from being disciplined in states that have adopted ABA Model Rule 5.1(a)). See also Hazard and Hodes, *The Law of Lawyering* at 456 (cited in note 267) (stating: "Model Rule 5.1(a) theoretically could apply to all partners in the firm for having no structural mechanism for realistic supervision or conflicts checks. However, realistically, disciplinary agencies will not proceed unless they feel the individual partner can be found. Sometimes in a large firm the guilty person in charge cannot be found").

417. Dorgan, San Jose Mercury News at A1 (cited in note 51).

418. Luban, Strudler, and Wasserman, 90 Mich. L. Rev. at 2389-90 (cited in note 330). (using the following corporate example: Exxon Corporation requires employees who notice misconduct or dangerous situations to notify superiors in writing. Superiors must respond in writing, and if no response, the employee must go over that superior's head. However, these preemptive obligations may well have a moral culture that discourages such whistle blowing, employees fearing going over superiors heads will "take the fall" when things go wrong, insulating the superiors. So it serves as a liability screen rather than whistle blowing).

419. *NLJ/West Poll* (cited in note 162). See also *ABA Poll* (cited in note 163).

420. O'Malley interview (cited in note 6). See also Wangberg interview (cited in note 6); Fishleder letter (cited in note 90) (stating: "All [Oregon] PLF claims information is kept confidential, and all claims information is exempt from the public records law").

tice reporting laws, such as those in Florida, California, and North Dakota, states seem powerless against the insurance industry.⁴²¹

Moreover, there is no reason, from the consumer's point of view, to allow parties in legal malpractice cases who use the public court system to settle in secrecy. Under the current system, potential clients cannot even find out if a lawyer has been sued for malpractice or has had disciplinary complaints filed against him. Every state in the nation allows parties to keep secret the amount of the settlement in a legal malpractice case.⁴²² Consumers, lawyers, judges, legislators, law professors, and the general public need to accurately determine the frequency and seriousness of legal malpractice claims and lawsuits, an impossible task when settlement amounts are kept secret. Since probably only one to two percent of legal malpractice lawsuits ever result in actual trial judgments, it becomes imperative that settlement amounts be made public.

If states were to adopt Oregon's mandatory legal malpractice approach, all legal malpractice information would be retrievable from one source, barring confidentiality problems. If they choose not to follow Oregon, states should at least follow the lead of Florida and adopt mandatory reporting statutes that require insurance carriers to fill out a detailed questionnaire on each closed legal malpractice claim or face statutory fines. Such statutes should be strictly enforced to insure full compliance. The data should then, like Florida's, be available to the public, the insurance underwriters, actuaries, and academic scholars doing research.

In the late 1970s, the California Legislature passed a mandatory malpractice insurance law, but the bill was vetoed by the governor. Oregon then borrowed the legislation from California and passed it as its own. Today, Oregon is the only state with mandatory legal malpractice insurance. Lester Rawls, former chief executive officer of Oregon's PLF, notes that prior to the mandatory insurance legislation: "[a]bout 35 percent of our attorneys were not covered by any insurance at all. . . . It wasn't because they couldn't afford it,

421. St. Clair, 13 Legal Econ. at 25-26 (cited in note 66). See also Bodiford interview (cited in note 73); Zank interview (cited in note 68); Fagerlund, 64 N.D. L. Rev. at 698 n.247 (cited in note 67).

422. Doggett and Mucchetti, 69 Tex. L. Rev. at 659 n.71-72 (cited in note 7). Compare Bodiford interview (stating that only in Florida can one circumvent confidentiality provisions in legal malpractice settlement agreements, but obviously only if, under the mandatory reporting law, the insurer reports the case, the amount of the settlement, and the name of the insured lawyer, as required).

they just didn't want to pay for it. 'The public be damned' they'd say. Our bar association didn't think that was an appropriate position."⁴²³

Mandatory legal malpractice insurance legislation has been unsuccessfully proposed in Arizona, California (again), Colorado, Delaware, Washington, and Wisconsin.⁴²⁴ The most recent argument against mandatory legal malpractice insurance was made by Harry H. Schneider, Jr., chairman of the ABA Standing Committee on Lawyers' Professional Liability. Schneider made the following points: (1) "[T]here is no reliable data documenting that [legal malpractice] is a widespread phenomenon"; (2) "[M]andatory malpractice insurance effectively defers to the insurer . . . who will . . . be permitted to practice law"; (3) "[P]remiums surely will rise across the board as all acceptable risks are pooled automatically with those who otherwise would be considered high-risk lawyers"; and (4) "[A]nnouncing publicly the availability of funds to pay claims will tend to increase the frequency of malpractice claims, frivolous and otherwise."⁴²⁵

Others arguing against mandatory malpractice insurance add that, because the program has to take everyone, careful attorneys will pay for the mistakes of careless attorneys who have no incentive to avoid malpractice, rates will increase for all lawyers, and must be passed on to clients, and there is no data which indicate that a serious problem exists regarding claims against uninsured attorneys.⁴²⁶

However, legal malpractice is a widespread phenomenon with both insured and uninsured attorneys.⁴²⁷ There will probably never be any data which indicate that a serious legal malpractice problem exists with uninsured attorneys alone. Legal malpractice cases are rarely pursued against an uninsured attorney unless that attorney has significant assets. Because attorneys can hide assets or choose bankruptcy, plaintiffs and their attorneys are usually willing to settle a legal malpractice case for the "policy limits," even if the plaintiff is not fully compensated.⁴²⁸ There may well be more valid claims made against lawyers once they are all insured.

423. Laurel Defoe, *Bill Would Force Malpractice Insurance on Lawyers*, Bus. J. Sacramento §1 at 18 (Aug. 4, 1986).

424. John J. Lynch, *The Insurance Panic for Lawyers*, 72 A.B.A. J. 42, 46 (July 1986).

425. Schneider, 79 A.B.A. J. at 45 (cited in note 9).

426. Lynch, 72 A.B.A. J. at 42-46 (cited in note 424).

427. See Table 2.

428. Fishleder letter (cited in note 90) (stating that Oregon's PLF has had "between two and four cases over 15 years which required attorneys to contribute to the settlement from their own pockets"). It was also exceedingly rare, in the Author's practice, that a plaintiff's attorney would insist on the insured attorney contributing his own money, other than the insurance deductible, towards a settlement.

The Oregon PLF's 1986-1991 annual claims rate of 8.7 percent to 13.2 percent⁴²⁹ conforms with the six to ten percent annual claims rate against insured lawyers in other states,⁴³⁰ even though those states have significant numbers of uninsured lawyers.⁴³¹ While the Oregon PLF's rate is two to three times HOME's 3.5 percent annual claims rate for 1985-1991,⁴³² it is closer to, and may be even less than, HOME's "5.8 percent *or more*" annual rate for Colorado, Florida, California, Texas, and Montana.⁴³³ Oregon's PLF will give coverage to any licensed member of the Oregon bar,⁴³⁴ whereas private insurance carriers try to avoid bad risks and will not insure everyone. The Oregon PLF's annual frequency rate probably more closely reflects the true "reported" legal malpractice picture, and should be expected to be somewhat higher than states with high numbers of "insulated," uninsured lawyers. However, as noted in Part II above, the actual incidence of legal malpractice, reported and unreported, is probably over twenty percent annually.

In 1988 and 1989 Oregon lawyers' \$300,000 insurance policy cost \$2,500. In 1990 it dropped to \$2,300. From 1991 through 1993 it cost only \$1,800. For 1994 it is \$2,100.⁴³⁵ Premiums are less than those charged by commercial legal malpractice insurance carriers,⁴³⁶ and the coverage is broader.⁴³⁷ A full eighty percent of the lawyers in Oregon support the program.⁴³⁸ And they should—after fifteen years it clearly works to give all claimants protection at a lower cost than insured lawyers in other states.

If it works, why has the Oregon PLF, a model mandatory insurance program, stayed only in Oregon? Lawyers in other states do not like it. The ABA is against it.⁴³⁹ Insurance carriers oppose it.⁴⁴⁰

429. See Table 1 and text accompanying notes 41-63.

430. *Id.*

431. Moss, 73 A.B.A. J. at 84 (cited in note 44).

432. Lignitz, *Denver Post* at C2 (cited in note 46).

433. *Id.* (emphasis added).

434. Schneider, 79 A.B.A. J. at 45 (cited in note 9).

435. 1993 *Oregon PLF* at 1 (cited in note 28).

436. *Id.* at 1-2.

437. Fishleder letter (cited in note 90) (noting that Oregon's 1994 claims made policy has "no deductible . . . [and] provides free tail coverage for all individuals when they leave private practice"). See also 1993 *Oregon PLF* at 2 (stating that "PLF excess rates will drop by 6 percent next year [1994] because of good claims experience in the excess layer. Standard rates will be \$1,175 per lawyer for excess coverage of \$700,000 above the PLF primary limits, and \$1,959 per lawyer for excess coverage of \$1.7 million above the PLF primary limits [\$300,000]. This is better than the cost of comparable coverage in neighboring states").

438. 1993 *Oregon PLF* at 1-2.

439. Schneider, 79 A.B.A. J. at 45 (cited in note 9).

440. O'Malley interview (cited in note 6).

Many attorneys would prefer not to pay several thousand dollars a year in premiums, and believe that the best insurance is to be "bare": it is cheaper and most plaintiff's attorneys will simply not bother to prosecute a legal malpractice case against them. Insurance carriers do not like the idea of legislation that might put them out of business. ALAS, the nation's largest legal malpractice insurer based on premium income, is opposed to mandatory insurance because "it simply does not work."⁴⁴¹ The Alliance of American Insurance is also against mandatory legal malpractice insurance: "Guaranteeing injured clients the means to collect gets beyond what the insurance product is designed to do."⁴⁴² Because any mandatory legal malpractice insurance program must cover all lawyers, it is unlikely that any insurance carrier will commit to writing a state's mandatory program. Insurance companies relegated to offering excess coverage would soon see premium income decrease substantially. Some might even go out of business.

Viewed from the standpoint of consumer protection, the arguments against mandatory legal malpractice insurance are unsupportable and offer little hope of keeping down the frequency of legal malpractice claims and lawsuits. The former California legislature's State Bar Monitor, Robert Fellmeth,⁴⁴³ and a former president of the State Bar of California, P. Terry Anderlini,⁴⁴⁴ have both come out in favor of mandatory legal malpractice insurance. Once the extent of legal malpractice and the extent of uninsured lawyers becomes known, mandatory legal malpractice insurance programs will take hold. Most Canadian law societies, and the Australian, English, and Irish law societies, to which all barristers and solicitors from those countries must belong to practice law, require legal malpractice insurance.⁴⁴⁵

441. Id.

442. Laurel Defoe, *Bill Would Force Malpractice Insurance on Lawyers*, Bus. J. Sacramento 18 (Aug. 4, 1986).

443. Carla Rivera, *State Bar Monitor Sees 'Best-In Nation' Disciplining of Lawyers*, L.A. Times 29 (Sept. 3, 1988).

444. Anderlini favors surcharges for adverse claim experience, so "if people are priced out of practicing law it would be by their own deeds and negligence." Moss, 73 A.B.A. J. at 84 (cited in note 44).

445. David Z. Webster, *At Issue: Mandatory Malpractice Insurance; Has the Time Come to Require Coverage? Yes: It's Essential to Public Trust*, 79 A.B.A. J. 44, 44 (Nov. 1993).

Both California⁴⁴⁶ and Virginia⁴⁴⁷ now require lawyers to disclose to clients when they do not have legal malpractice insurance. Some argue that, because forcing the disclosure of the absence of legal malpractice insurance hurts business, such laws should suffice.⁴⁴⁸ However, a closer look at these existing mandatory disclosure laws does not reveal any realistic enforcement leverage. The attorney who fails to disclose is still "entitled to collect a reasonable fee,"⁴⁴⁹ and clients need to know the law exists in order to ask.⁴⁵⁰ These cosmetic changes clearly do not go far enough.

Rhode Island requires malpractice insurance for court-appointed lawyers.⁴⁵¹ Similarly, most bar association-sponsored lawyer referral services require evidence of insurance for enrolled lawyers.⁴⁵² Sophisticated clients such as banks, title companies, insurance companies, and large corporations routinely require proof of insurance before retaining the services of a lawyer. It is the unsophisticated clients of the eleven to fifty percent of uninsured lawyers⁴⁵³ who are now most at risk. The reputation of the legal profession will suffer even more if, for purely self-interested economic reasons, lawyers continue to oppose mandatory malpractice insurance reforms. Most lawyers will not call for legal malpractice insurance. However, it is a fundamental change that a knowledgeable public and legislatures will inevitably embrace.

446. Cal. Bus. & Prof. Code § 6147(a) (6) and § 6148(a) (4) (1993).

447. Rules of the Supreme Court of Va., Pt.6, § IV, ¶ 18 (Financial Responsibility). See also *Public Can Receive Data*, Richmond News Leader at 25 (cited in note 76) (reporting that "[a]ll active members of the state bar must report such information to the state bar, which is the arm of the Virginia Supreme Court responsible for the regulation of the practice of law in Virginia").

448. Schneider, 79 A.B.A. J. at 45 (cited in note 9).

449. For example, Cal. Bus. & Prof. Code § 6147(b) and 6148(c) are not all that troublesome for uninsured lawyers. These sections provide that "[f]ailure to comply with any provision of this section renders the [retainer] agreement voidable at the option of the [plaintiff/client], and the attorney shall, [upon the agreement being voided,] be entitled to collect a reasonable fee." *Id.*

450. *Public Can Receive Data*, Richmond News Leader at 25 (cited in note 76) (noting that, in Virginia, the client must know to telephone the Virginia State Bar to determine if the lawyer has reported that she has no malpractice insurance).

451. Webster, 79 A.B.A. J. at 44 (cited in note 445).

452. *Id.*

453. Moss, 73 A.B.A. J. at 84 (cited in note 44).

B. Avoiding Malpractice: "Triple Check Everything"?

Like so many of society's ills, legal malpractice is a problem without a solution. As long as there are attorneys, there will be legal malpractice claims and lawsuits. If it is true that every year an average of ten percent of adult Americans get sued,⁴⁵⁴ then it is not surprising that more than twenty percent of practicing American lawyers have or should have a legal malpractice claim made against them every year.⁴⁵⁵ As we have seen, both good lawyers and bad lawyers make mistakes. Understanding both the individual and situational underpinnings of legal malpractice, and making fundamental changes in regulation based on that understanding, should decrease the incidence and seriousness of legal malpractice.

Legal malpractice claims and lawsuits, a few leading lawyers argue, are actually beneficial to both lawyers and the public. James Vorenberg, then Dean of the Harvard Law School, argues that they put pressure on lawyers to maintain high professional standards.⁴⁵⁶ Louis Nizer, from the vantage point of his sixty-two years of practice, tends to agree. His anti-malpractice lawsuit formula includes a healthy tinge of paranoia: "I triple-check everything that leaves this office."⁴⁵⁷

Do legal malpractice claims or lawsuits effectively deter legal malpractice?⁴⁵⁸ David Randolph, the president of the Texas Lawyers Insurance Exchange, Texas' largest legal malpractice insurance carrier, does not believe so: "My first view when I started in this business was that the lawyer with a claim would be the best risk. It was true of some, [but we found a greater tendency for lawyers to slide into a downward spiral. The time span between claims becomes progressively shorter.]"⁴⁵⁹

454. *The Real Estate Group, Headline News, "Factoid"* (CNN television broadcast, Sept. 12, 1993).

455. See Appendix B. See also text accompanying notes 39-49.

456. William L. Tabac, *Crossfire at the Bar*, N. Y. Times § 6 at 30 (May 3, 1987).

457. *Id.*

458. Begleiter, 38 U. Kan. L. Rev. at 280 (cited in note 193) (stating: "The malpractice revolution has benefits for both lawyers and the public. . . . [Forced s]pecialization may offer great benefits to lawyers. Complaining is the wrong response. Recognizing the benefits . . . for both attorneys and the public and doing what is necessary to complete each estate plan competently and effectively is what the malpractice revolution is all about. The time of the gambler is over"). See also Samuelson, Wash. Post at A21 (cited in note 169).

459. Baird, Houston Post at 1D (cited in note 155) (reporting also that Larry Dougherty, a Houston plaintiff malpractice lawyer who has sued over 100 lawyers, says: "I have yet to see someone found guilty of malpractice turn over a new leaf and become a better lawyer. Anyone who thinks civil litigation will improve the situation is dreaming").

What is also often forgotten is that it is usually the insurance carrier that pays the settlement and defense costs.⁴⁶⁰ For instance, most law firms that represented failed savings and loans have not suffered. Indeed, the firms that have paid huge settlement amounts to the FDIC, OTS, and RTC continually portray themselves as victims, while their insurance carriers pay. ALAS, the insurer for the Cleveland-based law firm Jones, Day, Reavis & Pogue, paid almost all of the \$75,000,000 that it took to settle the legal malpractice lawsuits arising from Lincoln Savings' \$2 billion federal government bailout. The firm's managing partner, William McCartan, doubts that the firm will make any changes due to the settlement. He notes that the charges by the government's regulators and the investors were quite unique, that "politics had overwhelmed the merits," and that "what was truly amazing is the regulators' success in shifting responsibility for their own shortcomings and ineptitude to the professionals who serviced thrifts."⁴⁶¹

Legal malpractice claims or lawsuits may do little to reform an individual lawyer or law firm. However, mandatory legal malpractice insurance will not only give all injured clients and nonclients some redress, but will act as a depository for much needed information on legal malpractice and, perhaps, even reverse the profession's sagging prestige.

Additional interdisciplinary research is also needed on whether reformation of existing laws, policies, or institutions will affect the behavior of attorneys who act detrimentally to themselves and their clients. For example, if the adversary system per se is the problem, it may make sense to do comparative studies of jurisdictions that rely heavily on alternative dispute resolution ("ADR") programs. Scholars should measure whether problem-solving, ADR, counseling, negotiation, and mediation approaches affect the level of hostility in dispute relationships. Varying rules on the limits of discovery may alter the combativeness and distress experienced by litigation attorneys. Altering trial calendaring or slowing the "fast tracking" of cases may decrease stress and malpractice by giving attorneys more time to be prepared, and not forcing them toward quick and negligent settlements. Changing or abolishing outmoded, conflicting, or ambiguous ethical guidelines and reducing the importance placed on "zealously"

460. Steve France, *Just Deserts: Don't Cry for Kaye, Scholer*, *Legal Times* 28, 28 (April 6, 1992).

461. Reske, 79 A.B.A. J. at 16 (cited in note 141).

representing one's client may make a difference in reducing lawyers' exposure to legal malpractice lawsuits by nonclients.

An expanded legal education curriculum that deals with social science, psychology, and other approaches to the practice of law will probably have little effect if law graduates end up in malignant situations. Without knowledge of how those situations impact lawyer behavior, changing those situations will not be possible. Education, alternative work schedules, reduced billable hour requirements, encouraged participation in alcohol, drug, or depression assistance programs, and an effort to place a premium on supervision and "people" factors rather than profits could collectively start to make a difference.⁴⁶²

The legal profession is at a crossroads. Legal malpractice should not remain a taboo subject; it should be studied. It should be taught in law schools.⁴⁶³ It should be taught as a mandatory CLE course.⁴⁶⁴ Legal and lay publications should publish more legal malpractice articles.⁴⁶⁵ Lawyers should discuss it. Settlement agreements should not be confidential.⁴⁶⁶ Insurance companies should be forced to give out detailed information, especially in states like Florida where dissemination is statutorily required.⁴⁶⁷ The ABA insists that legal malpractice is not widespread or serious,⁴⁶⁸ but legal malpractice is rampant and cannot be ignored. Fundamental changes must occur and must be undertaken with the situational perspective in mind.

The worn-out, unworkable "weeding out the bad apples" approach will only further fuel the legal profession's downward spiral. Information is now available showing that legal malpractice is significantly more widespread than previously thought. The legal profession's dirty little secret is out. Legal malpractice is an "iceberg" that is unlikely to thaw anytime soon.

462. See ABA, *State of the Legal Profession* at 1, 4, 24, and 52 (cited in note 185). See also ABA Commission on Women and the Profession, *Lawyers And Balanced Lives* at 5 (cited in note 186); P.C. Heintz and C.A. Ingram, *Slaying the Dragon: A Plan to Combat Lawyer Dissatisfaction*, 54 Phila. Bar Ass'n Q. Mag. 2026, 2040-50, 2056 (1991); Elwork and Benjamin, *Lawyers in Distress* at 30-32 (cited in note 369).

463. The Author teaches a course at Stetson University School of Law on legal malpractice. Stetson is the only ABA accredited law school to offer a legal malpractice course. See Braunstein, et al., *Law Line Database* at 9 (cited in note 2); note 275 and accompanying text.

464. ABA-CLE at 54-55 (cited in note 3) (noting that only Arizona mandates a legal malpractice component in its CLE program).

465. See note 1.

466. Doggett and Mucchetti, 69 Tex. L. Rev. at 643 (cited in note 7).

467. See notes 64, 69 and accompanying text.

468. Schneider, 79 A.B.A. J. at 45 (cited in note 9).

APPENDICES

Appendix A

		AUTHOR'S STUDY ⁴⁶⁹		ABA STUDY ⁴⁷⁰	
		#S	%	#S	%
1. ⁴⁷¹	How many lawyers were insured on the policy?				
	a. One	16	38.0	10212	34.9
	b. 2 to 5	21	50.0	12737	43.6
	c. 6 to 30	4	9.6	5631	19.3
	d. Over 30	1	2.4	647	2.2
2.	How many years had the insured been admitted to practice <i>at the time of the alleged error</i> ?				
	a. Under four years	2	4.7	1308	4.5
	b. 4 to 10 years	6	14.3	8728	29.9
	c. Over 10 years	34	81.0	19139	65.6
3.	What type of law office is the insured a member of?				
	a. Legal Clinic	0	0	N/A ⁴⁷²	N/A
	b. Legal Aid	0	0		
	c. Privato Practice	42	100		
	d. _____				

⁴⁶⁹. Based on the Author's southern California case list of 42 cases, the last group of legal malpractice lawsuits and claims defended by him between February 1991 and December 1992. The same ABA Study questionnaire was used. All of the cases were assigned by one insurance carrier and were predominatly in San Diego, Orango, and Riverside counties. The Author received all the insurance carrier's cases for San Diego County during this time period. He does not contend that these cases form a representative sample of lawyers sued for malpractice. For instance, the insurance carrier, one of the major legal malpractice carrier's in the country, did not generally insure larger law firms. The insurance carrier was pushed out of Southern California by Golden Eagle Insurance Company of San Diego with premium rates that were thirty to forty percent lower. Consequently, after Febrnary 1992 this insurance carrier had few if any, new claims in San Diego, Orange, and Riverside counties.

⁴⁷⁰. See generally *ABA Study Data* (cited in note 78).

⁴⁷¹. Id. at 508-09. This column of questions are from the ABA Study Questionnaire. Questions regarding the state of the claim and size of the city are omitted.

⁴⁷². "N/A" means these numbers were not published by the ABA and are not available.

Appendix A (cont'd)

	AUTHOR'S STUDY		ABA STUDY	
	#S	%	#S	%
4. What is the insured's relationship to the claimant?				
a. Free legal service	0	0	176	.6
b. Member pre-paid legal plan	0	0	110	.4
c. Client other than a or b	30	71.5	25064	85.8
d. Non-client	12	28.5	3877	13.3
5. Did the claim arise after the insured made an attempt to collect a fee?				
a. Yes	5	11.9	2002	6.8
b. No	37	88.1	27225	93.2
6. Did this claim arise from an area of law:				
a. Normal to the insured's practice	32	76.2	N/A	N/A
b. Not normal to the insured's practice	10	23.8		
c. Not applicable				
7. How was the claim disposed of?				
a. No payment—claim abandoned	0	0.0	2760	50.0
b. Settlement payment—no suit commenced	1	3.0	1075	19.5
c. Settlement payment—suit commenced	28	84.8	664	12.0
d. Suit dismissed/judgment for defendant	4	12.2	958	17.4
e. Payment—judgment for plaintiff	0	0.0	63	1.1

Appendix A (cont'd)

	AUTHOR'S STUDY		ABA STUDY	
	#S	%	#S	%
USE THE FOLLOWING RANGES FOR THE COMPLETION OF QUESTIONS #8 AND #9	Settlement Cost Q #8	Defense Cost Q #9	Settlement Cost Q #8	Defense Cost Q #9
a. \$ 0 - 1,000	1 3.0%	0 0.0%	3873 70.0%	3623 65.6%
b. 1,001 - 5,000	0 0.0	2 6.0	494 8.9	1047 19.0
c. 5,001 - 10,000	2 6.0	11 33.3	365 6.6	357 6.5
d. 10,001 - 25,000	3 9.0	15 45.5	361 6.5	263 4.8
e. 25,001 - 50,000	9 27.3	4 12.1	167 3.0	93 1.7
f. 50,001 - 100,000	11 33.3	0 0	103 1.9	58 1.1
g. Over 100,001	4 12.1	1 3.0	167 3.0	79 1.4
 8. What amount was paid to the claimant (including the deductible)	Average Settlement	Average Defense Costs	Average	Average
	\$60,393	\$20,130	N/A	N/A
 9. What amount was paid for loss expenses (including the deductible)				

Appendix A (cont'd)

SECTION B					
IN WHICH AREA OF LAW WAS THE		AUTHOR'S STUDY		ABA STUDY	
INSURED RETAINED BY THE CLIENT?		#'S	%	#'S	%
a.	Real Estate	5	11.9	6808	23.30
b.	Estate, Trust & Probata	4	9.5	2038	6.97
c.	Family Law	6	14.3	2303	7.88
d.	Personal Injury/Property Damage— Plaintiff	18	42.9	7331	25.10
e.	Personal Injury/Property Damage— Defendant	1	2.4	942	3.22
f.	Worker's Compensation	1	2.4	624	2.14
g.	Securities (S.E.C.)	1	2.4	582	1.99
h.	Patents, Trademarks, Copyrights	0	0	167	.57
i.	Collection and Bankruptcy	2	4.8	3066	10.50
j.	Taxation	0	0	458	1.57
k.	Criminal	0	0	976	3.34
l.	Admiralty	0	0	86	.29
m.	Antitrust	0	0	45	.15
n.	Civil Rights and Discrimination	0	0	319	1.09
o.	Consumer Claims	0	0	192	.66
p.	Construction (Building Contracts)	0	0	228	.78
q.	Corporate and Business Organization	0	0	1554	5.32
r.	Environmental Law	0	0	31	.11
s.	Government Contracts and Claims	0	0	101	.35
t.	Immigration and Naturalization	0	0	28	.10
u.	International Law	0	0	13	.04
v.	Labor Law	0	0	193	.66
w.	Local Government	0	0	191	.65
x.	Natural Resources	0	0	62	.21
y.	Business Transactions/Commercial Law	4	9.5	889	3.04

Appendix A (cont'd)

SECTION C**INDICATE THE ONE MAJOR ACTIVITY
WHICH THE ATTORNEY WAS ENGAGED
IN AT THE TIME THE ALLEGED ERROR
OCCURRED**

a.	Commencement of action or proceeding (initial pleading, service)	16	38.1	7234	24.8
b.	Pre-trial, pre-hearing (investigation, subsequent pleading, discovery motion)	4	9.5	2324	8.0
c.	Trial or hearing	0	0	1978	6.8
d.	Post trial or hearing	0	0	793	2.7
e.	Appeal activities	0	0	760	2.6
f.	Preparation, transmittal or filing of documents other than pleadings	6	14.3	6169	21.2
g.	Settlement and negotiation	9	21.4	2319	8.0
h.	Ex parte (noncontested) proceedings i.e. adoption, and probate	1	2.4	443	1.5
i.	Investigation, other than litigation	2	4.8	794	2.7
k.	Tax reporting or payment	0	0	494	1.7
l.	Title opinion	0	0	1338	4.6
m.	Other written opinion	0	0	53	1.8
n.	Consultation or advice	3	7.1	3242	11.1
o.	Recommendation of or referral to another professional including another lawyer	1	2.4	221	.8
p.	Other (please specify) _____	0	0	486	1.7

Appendix A (cont'd)

SECTION D

INDICATE THE ONE ALLEGED ERROR OR MISCONDUCT WHICH IS THE MOST SIGNIFICANT TO THE CAUSE OF THE CLAIM BEING MADE

	AUTHOR'S STUDY		ABA STUDY		
	#'S	%	#'S	%	
a.	Failure to calendar properly	2	4.8	3254	11.2
b.	Failure to react to calendar	3	7.1	1015	3.5
c.	Failure to know or ascertain deadline correctly	4	9.5	1997	6.9
d.	Failure to file documents where no deadline is involved	1	2.4	1230	4.2
e.	Procrastination in performance of services or lack of follow-up	5	11.9	1406	4.8
f.	Error in mathematical calculation	0	0	221	.8
g.	Lost file, document or evidence	0	0	193	.7
h.	Clerical error	0	0	425	1.5
i.	Error in public record search	0	0	1382	4.7
j.	Planning or strategy error	0	0	2238	7.7
k.	Inadequate discovery of facts or inadequate investigation	10	23.8	2615	9.0
l.	Failure to understand or anticipate tax consequences	0	0	537	1.8
m.	Failure to know or properly apply the law	2	4.8	2766	9.5
n.	Failure to follow clients instructions	2	4.8	1631	5.6
o.	Failure to obtain clients consent or to inform client	4	9.5	2686	9.2
p.	Impreper withdrawal from representation	1	2.4	433	1.5
q.	Conflict of interest	3	7.1	979	3.4
r.	Libel or slander	0	0	436	1.5
s.	Malicious prosecution or abuse of process	5	11.9	1224	4.2
t.	Violation of civil rights	0	0	502	1.7
u.	Fraud	0	0	1213	4.2
v.	Other, (please specify) _____	0	0	750	2.6

Appendix B⁴⁷³

OREGON DATA
NUMBER, FREQUENCY, AND SEVERITY OF CLAIMS

PLAN YEAR	# OF INSURED LAWYERS	CLAIMS MADE	ANNUAL FREQUENCY RATE	SEVERITY ⁴⁷⁴
1983	4532	480	10.6%	\$15,885
1984	4676	456	9.8%	15,803
1985	4648	569	12.2%	14,642
1986	4668	475	10.2%	17,750
1987	4700	465	9.9%	12,503
1988	4786	416	8.7%	15,451
1989	4868	505	10.4%	14,539
1990	4989	570	11.4%	16,037
1991	5126	636	12.4%	14,821
1992	5257	646	12.3%	16,327
1993 ⁴⁷⁵	5378	710	13.2%	N/A

CLAIMS MADE BY AREA OF LAW

AREA OF LAW	PERCENT OF CLAIMS				
	1993	1992	1991	1990	1989
Personal Injury	16.1%	18.1%	16.0%	18.35%	20.73%
Business	12.1	13.3	14.6	19.57	26.83
Real Estate	17.0	12.2	10.7	14.98	17.68
Family Law	16.1	12.1	16.3	13.15	11.18
Bankruptcy/ Debtor-Creditor ⁴⁷⁶	13.0	11.1	10.4	0.61	N/A
Estate and Probate	7.2	7.8	6.4	6.73	7.11
Workers' Comp.	5.5	7.6	7.2	9.17	4.88

473. See 1993 Oregon PLF (cited in note 28). See also 1989-1992 Oregon PLF (cited in note 38); Letter from Rudd & Wilson, Inc. to Oregon PLF CEO Kirk R. Hall (Aug. 4, 1993) (on file with the Author) (regarding the 1994 Oregon PLF assessment).

474. Memorandum from Kirk R. Hall to PLF Board of Directors (Aug. 5, 1993) (unpublished, on file with the Author). Hall uses a \$15,850 "severity figure" (\$10,250 indemnity and \$5,600 expense) as the average for all claims. See also Hall letter at 4 (cited in note 106) (stating that the average settlement amount figures were not available for claims or lawsuits that settle). However, once the average settlement for the two-thirds of claims for which indemnity was paid is refigured, the average settlement on claims and lawsuits that settle becomes \$25,625. See also Table 3.

475. 1993 Oregon PLF (cited in note 28) ("Projected" numbers only).

476. This new category was added in late 1989. See 1990 Oregon PLF (cited in note 38).

Appendix B (cont'd)

AREA OF LAW	PERCENT OF CLAIMS				
	1993	1992	1991	1990	1989
Criminal	5.9	7.1	5.0	3.98	3.66
Securities	0.4	3.3	1.7	1.22	2.24
Tax ⁴⁷⁷	0.8	1.6	2.2	N/A	N/A
Other	5.9	5.8	8.6	2.45	5.08
Total	100.00	100.00	100.00	100.00	100.00

477. This new category was added in 1990. See *1991 Oregon PLF* (cited in note 38).

APPENDIX C-1⁴⁷⁸
 FLORIDA LAWYER'S CLOSED CLAIMS
 BY YEAR SUMMARY

YEAR	INDEMNITY \$	ALLOC. LOSS ADJ. EXPENSE	TOTAL \$	NO./% OF CLAIMS WITH INDEMNITY	NO. PAYMENT & NO EXPENSE	NO. OF CLAIMS EXPENSE ONLY	TOTAL NO. OF CLAIMS
1981	\$3,795,473	\$1,244,402	\$5,039,875	128 34.8%	175	65	368
1982	3,424,042	1,727,611	5,151,653	145 32.7	169	130	444
1983	5,808,468	2,228,989	8,037,457	185 32.5	211	173	569
1984	3,460,297	1,935,387	5,395,684	93 22.7	215	102	410
1985	3,776,045	1,870,216	5,646,261	106 24.3	237	94	437
1986	6,852,279	3,495,396	10,347,675	109 34.5	122	85	316
1987	5,996,562	3,389,735	9,386,297	117 36.2	127	79	323
1988	9,242,387	4,086,319	13,328,706	114 30.3	174	88	376
1989	6,374,901	3,908,707	10,283,608	103 35.8	97	88	288
1990	8,412,865	2,940,618	11,353,483	85 33.5	125	44	254
1991	12,501,089	3,670,592	16,171,681	98 32.3	116	89	303
1992	7,153,128	2,649,289	9,802,417	101 29.9	159	78	338
1993 ⁴⁷⁹	6,430,220	3,128,024	9,558,244	93 33.5	113	72	278
Total	83,227,756	36,275,285	119,503,041	1,477 31.4	2,040	1,187	4,704

⁴⁷⁸ Florida Dept. of Insurance, Computer Printouts (May 1993) (unpublished, on file with the Author).

⁴⁷⁹ Id. Data includes all closed claims received through May 1993.

APPENDIX C-2
 FLORIDA LAWYER'S CLOSED CLAIMS
 TYPE OF CLAIM SUMMARY: 1988 TO MAY 1993

CLAIM TYPE	INDEMNITY \$	ALLOC. LOSS ADJ. EXPENSE	TOTAL \$	NO. OF CLAIMS WITH INDEMNITY	NO. PAYMENT & NO. EXPENSE	NO. OF CLAIMS EXPENSE ONLY	TOTAL # OF CLAIMS
Abstracting					1		1
Administrative	75,000	5,961	80,961	1	3		4
Admiralty-Marine		15,430	15,430		5	1	6
Appellate	45,000	12,855	57,855	2	3	1	6
Aviation					1		1
Banking	6,214,919	488,275	6,703,194	7	9	4	20
Bankruptcy	277,828	122,068	399,896	8	12	7	27
Civil Rights	149,500	149,419	298,919	4	5	3	12
Collect/Foreclose	197,307	58,942	256,249	9	15	9	33
Commercial- Civil Lit	1,918,289	798,267	2,716,556	21	18	21	60
Communications (FCC)		10,341	10,341			1	1
Condominium	590,000	48,727	638,727	1		2	3
Constitutional	96,000	58,281	154,281	2	1		3
Constr-Litigation	165,000	180,517	345,517	2	2	2	7
Constr-Mech Leins	170,705	125,320	296,025	9	8	3	20
Corporate	3,435,293	1,573,957	5,009,250	27	29	27	83
Criminal	137,500	165,492	302,992	2	12	19	33
Emp/Benefits (ERISA)		710	710		2	1	3
Entertainment		4,100	4,100			1	1
Family Law	807,940	617,165	1,425,105	17	31	32	80
General Practice	269,143	231,924	501,067	11	23	16	50
Immigration	5,000	9,900	14,900	1	1		1
International	36,000		36,000	1	1		2
Juvenile	10,740	4,197	14,937	2			2
Appendix C-2 (Cont'd)							

Labor Relations						1	2	3
Negligence - Defense	2,695,487	4,556	1,014,762	21	39		23	83
Negligence-Plaintiff	5,442,816		1,673,803	99	121		37	257
No Response	1,404,572		387,882	6	7		5	18
Other Claim Types	3,660,333		918,518	39	89		33	161
Patent/TM/Copyright			13,859		3		3	6
Probate/Trust	848,789	455,860	1,304,649	15	21		11	47
Public Utilities					2			2
Real Estate	7,863,176	3,611,143	11,474,319	105	106		60	271
Real Estate- No Title	962,500	519,212	1,481,948	19	29		11	59
Securities (S.E.C.)	482,400	349,212	831,612	3	6		3	12
Securities—Exemption	70,000	182,500	252,500	1	2		1	4
Social Security		19,040	19,040				1	1
Tax	92,500	107,801	200,301	2	5		2	9
Tenant/Landlord	72,309	50,594	122,903	3	3		2	8
Trial - Civil	243,342	218,468	461,810	11	12		7	30
Trial - Criminal		2,231	2,231		1		2	3
Trial - Injury/Death	498,000	131,450	629,450	13	30		4	47
Will/Estate/Plans	174,000	309,303	483,303	5	14		11	30
Worker's Compensation		15,597	5,597		10		5	15
Total	39,111,888	14,666,875	53,778,763	470	682		373	1,525

APPENDIX C-3

FLORIDA LAWYER'S CLOSED CLAIMS [LAWSUITS]

By Year Summary

CLAIMS IN WHICH \$1 OR MORE IS REPORTED FOR DEFENSE COUNSEL

YEAR	INDEMNITY \$	ALLOC. LOSS ADJ. EXPENSE	AVERAGE SETTLEMENT	TOTAL \$	NO. OF CLAIMS WITH INDEMNITY	NO. PYMT & NO. EXPENSE	NO. OF CLAIMS EXPENSE ONLY	TOTAL # OF CLAIMS	% SETTLED
1981	\$3,470,146	\$1,244,402	\$36,916	\$ 4,714,548	94		65	159	59.1%
1982	3,141,047	1,727,611	27,553	4,868,658	114		180	244	46.7
1983	4,932,705	2,228,989	35,744	7,161,694	138		173	311	44.4
1984	3,209,287	1,935,387	40,116	5,144,674	80		102	182	44.0
1985	2,976,423	1,870,216	39,163	4,846,639	76		94	170	44.7
1986	6,242,349	3,495,396	73,439	9,737,745	85		85	170	50.0
1987	5,340,659	3,389,736	58,056	8,730,394	92		79	171	53.8
1988	8,304,946	4,086,319	95,459	12,391,264	87		88	175	49.7
1989	6,004,009	3,897,093	72,337	9,901,102	83		85	168	49.4
1990	7,141,666	2,901,335	123,132	10,043,001	58		41	99	58.6
1991	12,002,150	3,524,237	153,873	15,526,387	78		72	150	47.5
1992	5,413,067	2,406,191	80,792	7,819,258	67		74	141	48.6
1993	5,516,667	3,116,684	79,951	8,633,351	69		71	140	48.6
Total	73,695,120	35,823,595	65,740	109,518,715	1,121		1,159	2,280	49.2

APPENDIX C-4

FLORIDA LAWYER'S CLOSED CLAIMS [CLAIMS ONLY]

BY YEAR SUMMARY

CLAIMS IN WHICH \$0 IS REPORTED FOR DEFENSE COUNSEL

YEAR	INDEMNITY \$	AVERAGE SETTLEMENT AMOUNT	NO. OF CLAIMS WITH INDEMNITY	NO. OF CLAIMS PAYMENT & NO. EXPENSE	NO. OF CLAIMS EXPENSE ONLY	TOTAL NUMBER OF CLAIMS	% PAID
1981	\$ 325,327	\$ 9,568	34	175		209	16.3
1982	282,995	9,128	31	169		200	15.5
1983	875,763	18,633	47	211		258	18.2
1984	251,010	19,308	13	215		228	5.7
1985	799,622	26,654	30	237		267	11.2
1986	609,930	25,413	24	122		146	16.4
1987	655,903	26,236	25	127		152	16.4
1988	937,442	34,720	27	174		201	13.4
1989	370,892	18,544	20	97	3	120	16.6
1990	1,271,199	47,081	27	125	3	155	17.4
1991	498,939	24,946	20	116	17	153	13.1
1992	1,740,061	51,178	34	159	4	197	17.3
1993	913,553	38,064	24	113	1	138	17.4
Total	9,532,636	26,777	356	2,040	28	2,424	14.6

APPENDIX C-5
FLORIDA LAWYER'S CLOSED CLAIMS
RANGE SUMMARY BY INDEMNITY: 1981 TO MAY 1993

	RANGE	NO. OF CLAIMS	\$ AMOUNT
CUMULATIVE COUNT	\$0	3206	165,000
CUMULATIVE COUNT	1-1000	52	165,000
CUMULATIVE COUNT	1001-4999	190	38,541
CUMULATIVE COUNT	5001-10,000	234	203,541
CUMULATIVE COUNT	10,001-25,000	346	565,677
CUMULATIVE COUNT	25,001-50,000	234	769,218
CUMULATIVE COUNT	50,001-100,000	181	1,868,934
CUMULATIVE COUNT	100,001-250,000	88	2,638,152
CUMULATIVE COUNT	250,001-500,000	71	6,092,796
CUMULATIVE COUNT	500,001-750,000	10	8,730,948
CUMULATIVE COUNT	750,001-1,000,000	5	8,710,894
CUMULATIVE COUNT	1,000,001-2,000,000	3	17,441,842
CUMULATIVE COUNT.	4,000,001-5,000,000	1	13,195,445
			30,637,287
			12,624,164
			43,261,451
			20,750,131
			64,041,582
			5,820,945
			69,862,527
			4,422,274
			74,284,801
			3,726,905
			77,561,706
			4,200,000
			81,761,706

APPENDIX D⁴⁸⁰

The following chart summarizes ALAS' experience to November 30, 1990, categorized by area of practice:

Claims by Area of Practice—1979 Through November 30, 1990

Category	Indemnity/Cost/ Claims	Percent of Total Claims	Total Incurred Losses (Payments and Reserves) ⁴⁸¹ at November 30, 1990	Percent of Total Incurred	Average Claim ⁴⁸²
Corporate Banking	750	34.8 %	\$173,145,000	47.4 %	\$ 230,860
Securities	150	7.0	80,852,000	22.1	539,013
Litigation	753	34.9	38,635,000	10.6	51,308
Estate Trust					
Probate	114	5.3	35,959,000	9.9	315,429
Real Estate	147	6.8	18,267,000	5.0	124,265
Tax ERISA	85	4.0	10,760,000	3.0	126,588
Patent Trademark/ Copyright	16	0.7	4,474,000	1.2	279,625
Divorce	47	2.2	2,309,000	0.7	49,127
Bankruptcy	35	1.6	470,000	0.1	13,428
Laber/Workers Compensation	17	0.8	6,000	—	3,882
Bar Association	9	0.4	—	—	—
Administrative Law	4	0.2	—	—	—
Admiralty	1	—	—	—	—
No Coverage	27	1.3	—	—	—
Total	2,155	100%	\$364,937,000⁴⁸³	100%	169,344

480. Robert E. O'Malley, et al., *Preventing Legal Malpractice in Large Law Firms*, C641 ALI-ABA 42 (1991). The entire chart has been reproduced. It includes the two paragraphs below the chart, except notes 482, 484 and the "Average Indemnity/Costs/Claim" column. See also O'Malley interview (cited in note 6) (citing "proprietary information," ALAS will not give out any more information).

481. O'Malley, et al., C641 ALI-ABA at 42 ("[i]ncluding supplemental reserves, but excluding claims management costs of \$14,703,000").

482. There is no information available on the percentage of claims that are dismissed, incur no indemnity payment, or are still pending. The number is arrived by the Author by dividing total incurred losses (which probably includes reserves for estimated future indemnity and defense costs, actual indemnity and actual defense costs paid) by the number of claims and is a "best guess" figure based on such limited information.

483. O'Malley, et al., C641 ALI-ABA at 42 n.2 (cited in note 480) (stating that "ALAS' share, after reinsurance, of total incurred losses is \$146,469,000, excluding claims management costs of \$7,486,000. This totals to \$513,955,000, which is ALAS' aggregate net incurred loss").

Claims involving corporate and banking matters represent the largest amount of loss. These claims principally have resulted from assertions by clients of faulty advice and drafting of documents, and charges of conflict of interests arising out of the Firm's representation of more than one party to a transaction.

Claims alleging violations of Federal and state securities acts continue to be troublesome. While representing only 7% of claims reported, they account for over 22% of ALAS' net incurred losses. As of November 30, 1990, 17 of these claims have been settled at a cost of approximately \$27.4 million, of which ALAS' share was \$7.6 million.⁴⁸⁴ A common factor in almost all of them is the insolvency or financial difficulty of the issuer of the security.

484. Reske, 79 A.B.A. J. At 16 (cited in note 141). Add the 1993 \$75,000,000 paid by an ALAS' insured for one securities claim then 18 ALAS claims settled for \$102.4 million or an average of \$5,688,888 for each securities claim or lawsuit that settles.

Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act

Thomas A. Piraino, Jr.

47 Vand. L. Rev. 1755 (1994)

Traditionally, the courts have assumed that, under Section 1 of the Sherman Act, antitrust conduct must be judged under either of two opposing standards of analysis: a per se rule that deems certain conduct illegal on its face or a rule of reason that inquires into all conceivable circumstances before determining the legality of a particular restraint. This Article argues that, instead of being divided into such opposite standards, Section 1 conduct can be arrayed along a continuum. The Article proposes a simple three-part continuum based on the degree of analysis necessary to determine a particular restraint's impact on competition. Conduct on the continuum would range from the most suspect to the least suspect, with more ambiguous restraints in the middle of the continuum. Conduct at the most suspect end of the continuum would be presumptively illegal; conduct at the least suspect end would be presumptively proper; and conduct at the middle of the continuum would require a more detailed market power analysis. Such an approach would simplify the analysis of restraints that are challenged under Section 1 of the Sherman Act, thus conserving judicial resources and giving greater guidance to business on the legality of particular conduct.

The Article provides specific examples of how particular competitive restraints would be analyzed under the proposed continuum. Horizontal price fixing, territorial allocations, and group boycotts would be classified at the presumptively illegal end of the Section 1 continuum. The courts could determine the legality of such conduct on its face. Tying and exclusive dealing arrangements and certain joint ventures among competitors would lie at the middle of the continuum, where a more detailed inquiry would apply. The plaintiff should be required to prove the market power of the parties to such restraints, and, once proven, the court should balance such market power against any efficiency arguments raised by the defendant. Vertical restraints imposed by manufacturers on their distributors would occupy the presumptively legal end of the Section 1 continuum. The courts could determine the legality of such conduct on its face and without a market power inquiry. Thus, the continuum of the Section 1 analysis would come full circle, with a presumption of legality that would be as simple for the courts to apply and the litigants to understand as the conduct deemed presumptively illegal at the beginning of the continuum.

