External Control over the American Bar

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I. INTRODUCTION

At one time lawyers were largely unregulated.1 That time has long passed. Today, law is a highly regulated industry, and lawyers, as the main constituents of that industry, are likewise heavily regulated. This regulation comes in many forms: professional codes of conduct;2 civility codes;3 continuing legal education requirements;4 and requests and pleas for lawyers to internalize self-regulating norms of behavior.5 Less obvious examples include professional restrictions on advertising and self-promotion,6 ethical restrictions on lawyer contact with media,7 and professional efforts to maintain a legal monopoly by excluding non-lawyers from providing services traditionally provided by lawyers.8

How successful the bar's efforts have been is open to debate. That debate, however, usually focuses on professional regulation, including judicial sanctions, as the sole form of professional regulation. That approach, however, is narrow and myopic. Other institutions, private and public, also regulate the practice of law, to varying degrees of success. To the extent internal and external regulation is complementary, the lawyer's day to day activities and duties are not materially affected. When the dual forms of regulation are not complementary, the lawyer can be placed in a difficult and challenging position of determining which regulatory regime should be respected.

In this article I catalogue ways in which external regulation can pull a lawyer in different directions from those suggested by the professional model. The purpose here is solely descriptive. I do not offer normative solutions for the dilemmas lawyers confront in everyday practice. It is necessary first to identify the problem and its scope before proceeding to prescribe solutions.

II. THE NATURE AND SCOPE OF EXTERNAL REGULATION

I believe that it is a justifiable assertion that lawyers are generally familiar with the professional codes. Since the mid 1970s, instruction in professional responsibility has been required as a condition of accreditation at American Bar Association ("ABA") approved law schools. This instruction requirement is backed-up by a standardized multiple choice examination in the subject matter of professional responsibility, which all but two states require bar applicants to pass. Finally, most jurisdictions have continuing legal education requirements which often have a mandatory professional responsibility component.9 Lawyers may not know the content of the codes in exquisite detail, but they know the general duties imposed by the codes, i.e., that lawyers have a duty to maintain client confidences,10 a duty to avoid conflicts of interest,11 a duty to avoid ex-parte communications with represented parties,12 restrictions on advertising for and soliciting of clients,13 etc. Admittedly, lawyers may operate under some misapprehensions as to what the professional codes require, but the generalized knowledge that lawyers have allows competent and responsible lawyers to recognize situations when an issue of professional responsibility may arise; lawyers can then reflect and conduct further study to resolve the issue. Situations raising the need for study and reflection are the staple of both law school courses on professional responsibility and everyday practice: (1) the inside tip;14 (2) the former client who is now an adverse party;15 (3) the phone call from a former employee of an adverse party;16 (4) a written offer by a lawyer to speak at a business luncheon that will be attended by individuals

who are potential clients.17 Each of these situations raises questions that can be answered, albeit not always clearly, by reference to the professional codes. Yet, lawyers frequently confront situations where the answers to questions regarding the means and methods by which lawyers practice law is found not in the professional codes but in a statute or regulation, in decision law applying general law doctrine, or in insurance policies that exclude or condition coverage for certain behavior(s) by lawyers. In many instances this external regulation complements the professional codes, but increasingly these external regulations are mandating conduct not required by the professional codes, and, potentially, conduct proscribed by the professional codes. In this article, I will illustrate this development through two extended examples. The first involves a private actor-legal malpractice insurers. The second involves a public actor-legislators.

A. REGULATION OF LAWYERS BY PRIVATE ACTORS: INSURERS

Lawyers are frequently told that legal malpractice insurance is a necessity. Sometimes the obligation is framed as a professional obligation, as evidenced by mandatory coverage requirements,18 mandatory disclosure requirements,19 or by exhortations that malpractice insurance is a professional obligation.20 Other times, malpractice insurance is presented as a business necessity, as reflected in the often cited figure that the average lawyer will be sued for malpractice three times over his career.21

The upshot of this is that over the past 50 years, the penetration of the legal market by malpractice insurers has increased-no doubt reflecting the increased risk of legal malpractice liability to lawyers.22 The degree of penetration varies from location to location23 and among practice groups;24 nonetheless, malpractice insurance has become as necessary as an office for most lawyers in private practice. Malpractice insurance does not, however, come without strings. Lawyers frequently complain about the cost and availability of malpractice insurance;25 they less frequently object to practice constraints that are imposed by insurers as a condition of policy coverage. These conditions invariably prevent lawyers from acting in ways that are professionally permissible, but, to the insurer, present too great a risk of malpractice exposure.

When a lawyer approaches an insurer for coverage, the insurer will require that the lawyer complete an application for insurance. The application will seek information regarding the lawyer's areas of practice and the percentage of the lawyer's time allocated to each practice area checked, number of years the lawyer has practiced, history of malpractice claims and disciplinary actions, relations with and identity of major clients, etc. What is the insurer looking for? The insurer seeks a safe, profitable distribution of the risk. A malpractice insurer, unlike a single lawyer, can look at the frequency and severity of malpractice claims in the aggregate. It can calculate the aggregate risk presented by malpractice claims and by doing so prepare a product that allows it to distribute the risk (malpractice claims) to its policyholders and retain a profit for itself.26 However, not all lawyers present the same risk. Fairness to policyholders demands that like risks be placed together (homogeneity) so that cautious lawyers are not forced to pay for the greater costs imposed by riskier lawyers. The system is not perfect for no class of insureds is perfectly homogeneous; the goal is a rough homogeneity within the boundaries permitted by the state.27

The application enables the insurer to evaluate the risk profile presented by the lawyer applicant. Assuming the insurer asks the proper questions and assuming the lawyer answers the questions accurately,28 the insurer can roughly gauge the riskiness of the underwriting and price the policy accordingly. A lawyer who wishes to reduce insurance costs can determine how his answers to the application influence the insurer's pricing decision and, by changing his practices, the lawyer can reduce his insurance costs.29

The insurer's attitude towards risk can create tensions between the professional codes and the coverage provided by

the malpractice policy. More importantly, the precise limitations attached to coverage have a more penetrating and a more directing impact on the actual practice of law by lawyers than the professional codes. Increasingly the manner and method by which lawyers practice law is determined by insurers' requirements rather than professional guidance.30

1. FIELD OF PRACTICE CONSTRAINTS

The license to practice law is unlimited. Unlike other professions, notably medicine, law does not require specialization in practice areas;31 indeed, there are significant segments of the bar opposed to even modest efforts at specialization, such as certification.32 This generalist approach is approved by the professional codes, which allow even the novice lawyer to represent a client in a matter of some complexity and difficulty as long as the lawyer conducts sufficient research and learning to provide competent representation.33 The implicit assumption under the professional codes is that a lawyer, by dint of admission to the bar, has sufficient skill and ability to self-learn a subject, law school grades notwithstanding![34]

Why does the profession permit, if not encourage, generalization over specialization? The tendency, particularly among elite law firms, to develop specialties and lawyer-specialists has been decried as a diminution of the spirit of professionalism that once animated the bar.35 I do not wish here to debate the merits of specialization. Nor do I deny that the recent trend has been toward specialization, much of which is driven by concerns divorced from, but not completely unrelated to, insurance concerns, such as law firm efficiencies and the increased complexity of modern law. Nonetheless, "generalization" is still perceived as a virtue by large segments of the bar because of the world view it promotes and the freedom to lawyers (and derivatively clients) it provides. The ideal lawyer remains for many (and for the professional codes), the classically trained liberal arts major, familiar and conversant with a wide range of ideas, techniques, and skills. This is a view of law practice that insurers neither share nor embrace.

Insurers see the practice of law as fields of risk; some risks are good (i.e., predictable); others are not (i.e., unpredictable, at least within margins the insurer is comfortable with). The insurer's key concern is not cost as much as the accuracy of its prediction of probable costs. If the insurer can predict costs accurately, it can price the policy.36 The insurer's profit is after all determined by revenue stream (premiums plus return on investment of premium) less costs (claims and administration). If the insurer misjudges the frequency or severity of claims, it will not have collected sufficient revenue to cover its costs satisfactorily.

An insurer can control the risk of misjudging its costs in several ways. First, it can provide a cushion by charging a higher premium. This signal, however, is very visible and a buyer of insurance (the lawyer) in a competitive market can shop for a better price. Moreover, because price is such a visible signal, when the market becomes less competitive (hard), many lawyers will drop out ("go bare"), thus, decreasing the number of buyers among whom insurers seek to redistribute the risk.37 This unraveling can make the market for insurance quite fragile for both buyers and sellers.38

Insurers have, however, other methods of controlling risk that are less visible and, for many lawyers, less critical to the decision to insure than price. Area of practice controls is one such device. The insurer, having identified certain practice areas as "high risk," i.e., personal injury, real estate, and intellectual property,39 can differentially charge lawyers who practice in these fields.40 By the same token a lawyer who wishes to lower his premium can do so by agreeing not to practice in these "high risk" areas. This process is reinforced by insurer aversion to insuring lawyers who "dabble" in a number of fields.41 The result is specialization as lawyers withdraw from practicing in certain fields in order to reduce insurance costs while other lawyers specialize in those fields and use the volume of business

their practice now generates, (aided by the exiting of competitors due to insurance costs), to defray the higher insurance costs applied to these "high risk" practice areas. Because this "specialization" complements emerging market trends, there is a diminished likelihood of lawyer evasion of policy requirements through misrepresentation or defection.

I do not mean to suggest that insurance costs are driving this move to specialization, for there are other reasons for lawyers to specialize. Insurance costs clearly complement specialization, however, and the rank order of causes of specialization are less important than the identification of forces-all of which are external to the professional codes-that are, in the aggregate, moving the modern lawyer to becoming a specialist. Thus, while one cannot dismiss the caution urged by respected commentators that one not overvalue the role of insurers as regulators,42 one must also be careful not to allow legitimate reservations to create the illusion of insurer ineffectiveness. Control does not depend on motivation. It is not necessary that insurers seek to advance a public interest in making decisions whether to accept a risk; rather, what is critical is that their decisions affect insured behavior. If insurer action did not affect insured behavior to some extent, insurer action would be purposeless behavior. Insurer action may be wrongheaded, or pigheaded, but I do not understand opponents of this view to be arguing that it is purposeless or ineffectual on its own terms.

2. ASSOCIATION CONSTRAINTS

The professional codes have little to say about how lawyers organize themselves to practice law. In general, the codes concern themselves with prohibitions on association with non-lawyers,43 directives that the form of association not be misleading,44 and the supervision of junior lawyers by senior lawyers within the association.45 Somewhat ironically, the most extensive regulation of lawyer association under the professional codes occurs when lawyers interact without formal association, i.e., referrals.46

While the historic, ideal form of practice that underlies the professional codes is the solo practitioner, that form of practice probably belongs today on the endangered species list. Most lawyers now practice in associations.47 Some of these associations are formal, i.e., law firms; others are informal, i.e., strategic alliances, such as joint representation agreements.48 The line between formal and strategic is not, however, hard and clean. Some associations represent a mixture of the two, a mixture that may be intended or inadvertent.

The consequence of this rise in associational practice is an expansion and variation of the structures through which lawyers practice law. It's not just partnerships anymore. Lawyers practice in professional corporations and in limited liability entities, such as Limited Liability Partnerships (LLPs) and Limited Liability Companies (LLCs).49 Within these structures, lawyers can be owners, employees, or independent contractors. Each of these categories has, in turn, its subcategories. For example, owners may be more a term of art than a term of legal significance depending on the context.50 Moreover, as structures expand, the very notion of ownership must be defined and understood within the context of the form of management developed to organize and run the structure. The owner's role is to select representatives (or a representative) who will actually run the firm. Law firms today, at least the very large firms that constitute the privileged elite, resemble public corporations more than associations of professionals.51

It is difficult to tell whether lawyers are pushing or being pulled by this development. What is not difficult to tell is the insurers' reaction. Insurers dislike uncertainty because it complicates their need to predict costs accurately. Formal structures themselves do not present a problem, but loose, unstructured associations do. The reason is the doctrine of respondeat superior.52 The firm is liable-the extent of liability depending on firm structure53-for the

malpractice of its constituents, whether those constituents be owners, employees, or independent contractors.54 In dealing with a formal structure, the insurer can price the policy, in part, by identifying the risk presented by identifiable constituents. In less formal associations, that calculation is more difficult and the insurer does not want to assume coverage for the actions of a lawyer who is not identified as a constituent and charged an appropriate premium for the risk presented.55

How does this work out in practice? Assume five lawyers practice independently but share a suite of offices and employ a receptionist, the costs of whom is shared by the five lawyers. Each lawyer has her own office and employs her own legal assistants. Each lawyer has access only to her own office, but each lawyer has shared access to the common areas, such as library and work stations where client work and files are kept. The professional codes do not prohibit this association as long as consumers are not misled56 and client confidences are protected.57 Insurers, however, are not comfortable with the arrangement.

For insurers, the risk presented by the above relationship is that a trier-of-fact will find that the five lawyers are practicing as a de facto partnership.58 As such, each lawyer could be liable under principles of respondeat superior for the malpractice of the other lawyer(s) in the suite. In effect, an insurer collecting a single premium from lawyer A may be assuming the risk presented by five lawyers rather than one. How does the insurer respond to this problem? First, the insurance application will elicit information regarding the identity of other lawyers who practice in the same office or suite of offices as the lawyer-applicant. In this case, lawyer-applicant A would have to disclose her arrangement with the other four lawyers. second, the insurer could decide to decline coverage, exclude coverage for acts of malpractice by the other four lawyers,59 or condition coverage on all five lawyers becoming insureds of insurer. Because each of the five lawyers faces these same options in her dealings with insurers, the efficient solution is for each lawyer to insure with the same insurer. Once this point is reached, further efficiencies may be achieved if the five lawyers organize themselves into a formal structure. The cost of insuring a firm of five lawyers will invariably be less than the cost of each lawyer purchasing a separate policy. This is not to suggest that insurance concerns drive associational concerns or even constitute a tipping point. Insurance can be a significant cause of an end effect, but whether insurance causes behavior in the particular case varies from situation to situation.

3. BEST PRACTICES

The professional codes have relatively little to say about the actual day-to-day practice of law by lawyers. The codes demand that lawyers be competent, but the codes are noticeably general when it comes to defining competence.60 This generality is compounded by silence as to how a lawyer is to achieve competence. Lawyers are told to avoid conflicts of interest and the professional codes go to some length in defining when a conflict of interest exists,61 but the codes do not specify how the lawyer should organize himself so that he is alert and able to recognize conflicts of interest so that he may avoid them.62 Insurers are not so reticent. Many insurers today police how lawyers practice in two ways. Proactively, insurers encourage lawyers to participate in law office audits. These audits serve to identify the practices the lawyer actually has in place and once those practices are identified, to replace deficient practices, i.e., those that raise the risk of a malpractice claim, with practices that reduce that risk.63 Alternatively, insurers refuse to insure lawyers who fail to use or implement law office procedures demanded by insurers as a condition to extending coverage.

a. Written Retainers

Insurers, unlike the bar, demand that lawyers use written retainers in all retentions. The bar currently only requires written retainers in contingent fee retention.64 Even here the bar requirement is soft. Failure to use a written

retainer does not appear to constitute an offense subjecting the lawyer to discipline. The usual consequence for not having a written agreement for a contingent fee is that the lawyer may not seek a recovery on the contract for the contingent fee; rather, the lawyer is relegated to an action in quantum meruit for a reasonable fee.65 The bar's casualness is not matched by insurers whose approach is governed by malpractice experience. The popular impression from jurors is that lawyers are anal retentive and write everything down in detail. A lawyer who cannot produce the expected writing has a credibility problem with the jury and a lawyer in a malpractice action with a credibility problem is not in a desirable position, particularly for an insurer with coverage exposure.66

Insurers appreciate that the written retainer can reinforce the lawyers' position regarding the scope of the retention, the goals of the retention, and the client's expectations at the time the lawyer was retained. In the fog of disappointment over the handling of the matter, the client's recollections as to these issues may "evolve" over time in a manner that strengthens the client's current claim.67 A written retainer can counterbalance the all too human tendency to see the past creatively.68 A lawyer who cannot show on the insurance application that written retainers are provided as a matter of course for all retentions is unlikely to have the application for malpractice insurance approved at usual and customary rates.

b. Conflict-Checking Procedures

The bar sets forth in some detail rules addressing the issue of conflicts of interest that may impair the lawyer's professional judgment and professional independence. One may critique the content of the conflicts rules, but this is not an area as to which the bar has been silent. The bar has, however, been silent as to the actual practice and methods that lawyers use (or don't use)69 to determine if a conflict of interest exists. Insurers, on the other hand, pay particular attention to the lawyer's conflicts checking system. Insurers know from their courthouse experience that evidence that the lawyer failed to address a conflict can have a serious impact on the lawyer's credibility and the jury's evaluation of the lawyer's integrity. The law may require that the conflict contribute or cause the harm for the conflict to be directly actionable,70 but that is not the sole consideration. Even if the conflict did not contribute or cause the loss, the collateral damage to the lawyer's position on the malpractice claim may be immeasurable. A lawyer who ignores (or disregards) a conflict may be seen by the jury as a lawyer who is inattentive and cavalier in representing the client. That type of lawyer is more likely to be found to have committed malpractice than a lawyer the jury perceives to be careful and prudent regarding conflicts. Malpractice claims are not always cut and dry, particularly those that go to trial.71 In a close case, when much turns on the credibility of the respective parties, evidence that the lawyer missed a conflict can be critical. While each side will seek to "spin" that fact, (the client arguing that the mistake was knowing and deliberate; the lawyer that it was innocent or inadvertent), the fact remains that a conflict was bypassed by the party responsible for avoiding conflicts. That fact cannot be helpful to a defense predicated on the lawyer having exercised due care on the client's behalf in the matter that forms the basis of the malpractice claim.

How do insurers respond to this problem? Insurers may require not only that the lawyer use a computerized conflicts checking system, but that the lawyer demonstrate that there are trained personnel and office procedures in place for using the system as soon as possible with each new retention72 or extension of existing retentions, i.e., new parties brought in through the opposing parties' use of modern, liberal joinder rules.73 Lawyers who use a labor-intensive card catalogue system for conflicts checking may find that they are denied coverage or charged a higher premium because they do not have an insurer-approved method of conflicts checking.

c. Calendars

For general practice litigation attorneys, the number one malpractice risk exposure is failure to file a client's claim within the applicable period of limitations, causing the client to lose a claim.74 While this type of claim is often difficult for the client to establish because the client must show the now-time-barred claim would have been successful if timely filed,75 this is little salve to the insurer who must fund an expensive defense.76

Missing an applicable limitations period that could have been met through reasonable care is close to per se malpractice in the eyes of the jury.77 Because the bar's concern is competence, not negligence, the bar has not specified, nor attempted to specify, what procedures a lawyer must or should have in place to assure a professionally acceptable level of competence. A missed statute of limitations, unlike many other types of legal malpractice that raise nuanced and subtle questions regarding a lawyer's tactics or judgment over the course of a representation,78 raises a discrete, particular, and relatively routine claim.79 This is not to say that limitations periods cannot raise sophisticated and difficult issues that directly address whether the period was missed.80 The critical fact is, however, that "failure to timely file" cases involve lawyer error that is easily correctable through the use of calendar systems.

Calendar systems provide lawyers with advance notice of due dates for matters requiring legal action. The advance notice is provided by "ticklers" that identify that an action date is approaching. The "tickler" can be preset to the amount and frequency of notices, i.e., a single (e.g., 10 day or 7 day) notice or multiple (e.g., 30 day, 7 day, 1 day) notices. Calendar systems help insure that the lawyer's attention and the client's file are brought together sufficiently in advance of the date action is required so that a conscientious lawyer does not fail to do the work. Calendar systems cannot ensure good work, but they permit lawyers the opportunity to do good work through appropriate time management. Not surprisingly, insurers are true believers in the efficacy of calendaring, and it is inconceivable that a policy would be written today for a firm that did not have a calendaring system and trained personnel and office procedures to insure that it is implemented properly.

d. Client Trust Accounts

This is an area where, on the surface, the bar regulates quite comprehensively. Client trust accounts have long been an area of paramount concern to the bar,81 perhaps to the exclusion of other pressing concerns.82 Client theft is not covered by the standard legal malpractice policy;83 nevertheless, the decisions here are not uniform and theft often accompanies lawyer dereliction of duty, which is covered.84 More importantly, the insurer's (and the bar's) concern here is not solely with the lawyer, but with non-lawyers to whom the lawyer entrusts maintenance of the client trust accounts. It is an unfortunate aspect of life that those in whom one is disposed to place the utmost trust occasionally prove to be undeserving of that faith and confidence. Yet, the professional duty of the lawyer regarding client trust accounts is non-delegable and, if the lawyer's trust is abused or misplaced, it is the lawyer (and her insurer) who must respond, the embezzling and faithless employee now long gone or insolvent.85

Insurers respond to this problem by being proactive. The bar will respond to complaints of lawyer misconduct in this area, but that is the problem. The bar is reacting after the harm has been done. Insurers do not want to be in that position because, if they are, there are possible financial consequences to the insurer.86 Thus, the insurer has incentive to be proactive and to satisfy itself before coverage is extended that the lawyer seeking coverage has adequate controls in place to protect client trust accounts from employee pilfering.

4. DEALS WITH CLIENTS

The bar cautions but does not forbid lawyer-client transactions.87 The bar's approach is both substantive and procedural. The terms of the transaction must be "fair and reasonable to the client."88 This requirement is similar

to that which a court will apply in determining whether the transaction is enforceable.89 The lawyer must also fully disclose the terms of the bargain to the client, give the client the opportunity to confer with independent counsel regarding the transaction, and obtain the client's consent; the notice, disclosure, and consent must be in writing.90 In effect, the client must be given sufficient information by the lawyer regarding the transaction and the terms on which the lawyer acquires the interest so that the client can give, and does give, his informed consent.91

While the rules are strict and appear to discourage lawyer-client transactions, the reality is otherwise. The rules prevent lawyers from taking naked advantage of clients, but the law for lawyers is not, on this point, meaningfully different from the law applicable to transactions not involving lawyers.92 The rules do not prohibit lawyers from striking advantageous deals with clients and as long as such deals can be made, they will be made.93

For insurers, deals with clients are often the tip of the malpractice iceberg. A lawyer-client transaction increases the surface area on which client dissatisfaction may grow, and a client dissatisfied with a lawyer because of a deal gone sour may transpose that dissatisfaction to the representation itself. We tend to think that actual malpractice coincides with claims actually brought. In other words, malpractice claims that result in client recoveries represent a subset of all representations and in this subset of malpractice claims there is a higher proportion of actual malpractice than outside the subset. This belief has intuitive attractiveness: we may assume that if clients felt they were the victim of malpractice they would sue; therefore, the set of claims represents a higher proportion of incidents of actual malpractice than the set of non-claims.

There is, however, no perfect correlation between client perception and actual malpractice. A client must perceive a wrong to bring the matter to a lawyer's attention,94 but what influences another lawyer's decision to accept and prosecute the malpractice claim against the client's former lawyer? We like to think that lawyers serve a gatekeeper function separating claims of actual malpractice (or at least contestable malpractice) from claims that do not evidence a failure of care. The gate-keeping function, however, is more complex, nuanced, and subtle than simply separating the wheat (meritorious claims) from the chaff (non-meritorious claims).

I am not aware of any systematic, empirical study of legal malpractice claims along these lines, but there have been several studies in the analogous field of medical malpractice that presents some disturbing conclusions. Several studies have been conducted to fix the incidence of medical malpractice per patients treated. The studies involved a number of methodologies, but the most widely cited was conducted by the Harvard Medical School and consisted of a team of physicians, nurses, administrators, lawyers, etc., who examined all patient medical records at specific hospitals that reflected treatment during a particular time period.95 This study, and others, have been presented elsewhere, and the reader is invited to review those other materials.96 My use of the studies is limited. A part of the Harvard study was designed to measure the fit between medical malpractice as identified in the study and medical malpractice as identified by the legal system. The study concluded that approximately 1% of medical interventions resulted in a determination by the study team that medical malpractice had occurred.97 The study also looked at legal claims that were brought for medical malpractice arising out of the same body of records reviewed by the team. The study concluded that only a small part of the litigated cases involved actual malpractice as identified by the team.98 More significantly, only a small part of the actual malpractice cases identified by the team resulted in litigation.99 On the other hand, the study found that many of the malpractice claims actually in litigation involved patients whose medical records disclosed no evidence of preventable medical error.100 The message here, assuming the accuracy of the teams' identification of actual medical malpractice, is that: (1) most actual medical malpractice does not result in litigation; and (2) most actual litigation does not involve actual medical malpractice.101

Let us assume that there is convergence between legal and medical malpractice on the issue of who is harmed and

who complains. This is admittedly a complex issue in its own right, and I make no effort to resolve it here. There is much legal malpractice that goes unreported and much non-malpractice that gets litigated. Insurers have little control over the latter; they must defend their insureds against tendered claims that are within coverage.102 If, however, many actual malpractice claims are not prosecuted, insurers (and insureds) are content to let sleeping lawsuits lie. Certainly, insurers do not want their insureds engaging in conduct that might encourage a client to complain who, in the absence of that insured's conduct, would not complain. Do "deals with clients" encourage clients to sue lawyers for malpractice regardless of the connection between the malpractice and the deal?103

There are many reasons why clients sue professionals, but high on the list is a breakdown of the professional relationship. Many clients do not complain because they like their doctor or their lawyer.104 Keeping clients happy during the professional relationship is at least as important as the result achieved by the representation, perhaps even more so in litigation because clients are often dissatisfied with outcomes.105 If there is a mantra being uttered in professional circles today, it is client satisfaction as demonstrated by keeping clients informed about the progress of the representation and returning client phone inquiries reasonably, i.e., within 24 hours. The view is that a client who believes that he is respected by the professional is less likely to sue for malpractice if the representation does not achieve for the client all that the client hoped it would.

Because "deals with clients" increase the risk of dissatisfaction, "deals with clients" increase the risk of litigation, which costs insurers money; hence, insurers would prefer, all other things being equal, that lawyers not do "deals with clients." Insurers can achieve this goal by refusing to insure lawyers who engage in transactions with clients or by pricing a differential premium based on whether the lawyer does or does not engage in "deals with clients."106 Insurers may also include exclusions in the policy that negate coverage if the claim is brought by a client with whom the lawyer does deals or as to a claim related to a deal the lawyer has done with a client. Although the former is more effective from the insurer's vantage point, either form of exclusion strongly deters lawyers from doing "deals with clients" even though those "deals" would not per se involve the lawyer in a violation of the bar's professional rules.

5. FEE DISPUTES WITH CLIENTS

The bar does not preclude a lawyer from suing a client over a dispute related to the representation. Invariably, these disputes involve the failure of the client to pay as promised in the retainer for services rendered. While the bar does impose some constraints on the claim itself, most prominently that the fee arrangement not be excessive,107 the lawyer's right to the fee, or alternatively, compensation,108 is not questioned.

Lawyer-client fee disputes are not uncommon. To my knowledge, no studies have quantified or measured the frequency and severity of fee dispute litigation, but the issue has generated an active response from the bar in the form of mandated mediation and arbitration of fee disputes.109 Generally, the client has the option of participating or bypassing mediation or arbitration; the lawyer does not. '10 The client also controls, in some cases, whether arbitration of fee disputes is binding. Fee disputes between lawyers and clients contribute to the poor public image of lawyers as greedy and rapacious; thus, the bar's effort to create alternative dispute resolution mechanisms to address the problem may reflect the bar's concern over lawyer image rather than any perceived unfairness in the use of litigation to collect fees.

Insurers again have a different approach to this issue. Insurer studies of malpractice litigation indicate that approximately 25% to 40% of legal malpractice claims are asserted as counterclaims to fee claims initiated by lawyers.111 The insurance agreement does not obligate the insurer to defend or cover the fee claim; it does, however,

require the insurer to defend and possibly cover the malpractice claim regardless of the form in which the malpractice claim is asserted.112

The 25% to 40% figure is, of course, a soft number. We do not know how many of these malpractice claims would have been asserted regardless of the instigation of litigation by the lawyer for the fee. On the other hand, statutes of limitations for malpractice claims tend to be short and the availability of tolling or other excuses to the running of the limitations period is a complex and difficult issue.113 From the insurers' viewpoint, malpractice claims delayed means a greater likelihood that claims will not be paid or paid less because the claim is time-barred or that the statute of limitations defense will result in a reduction of claim value for settlement purposes. Every time a malpractice claim is provoked by the initiation of a fee claim, the insurer confronts a malpractice claim that (1) might not have been asserted at all; (2) if asserted later in time might have been quickly disposed of by summary adjudication on limitations grounds; or, (3) might have been compromised by trading the limitation's defense for a reduction in the value of the claim. Indeed, we can envision the insurer's worst nightmare when a malpractice claim that is time-barred and could not be asserted in its own right is reinvigorated by the fee claim, which may have a longer limitations period. In this context, the malpractice action may be asserted as an offset against the fee claim, and while no positive recovery is available against the lawyer, the insurer may still have the duty to defend its insured.114

The primary way insurers respond to the risk that fee litigation presents to the frequency and severity of malpractice litigation is to screen lawyers through the application process to identify lawyers who sue clients for fees and those who do not. The insurer can then decline to insure or differentially price the former from the latter. A lawyer will then have to factor into the decision whether to sue the client for unpaid fees not just the direct costs of the fee dispute, but the indirect costs to the collateral issue of malpractice coverage costs. Precise calculation is not possible, but some lawyers will likely decide against initiating the fee dispute. To the extent they do, insurers benefit.

Screening for lawyers who sue clients for fees is, however, inexact. First, the application process only identifies lawyers who have sued clients for fees, not those who merely intend to do so in the future if the situation arises. Second, insurers tend to investigate their risks only when the insurance is first placed, not when it is renewed. If the lawyer's risk profile changes after coverage is obtained, the renewal process may not disclose it. Insurers could protect themselves by writing policy exclusions for malpractice claims asserted in fee dispute litigation initiated by the lawyer or engaging in a more active analysis of the lawyer's practice, akin to the initial review when coverage was sought, at the time of renewal. To date this has not been the practice of insurers. They have tended to rely on the initial application process to screen for poor or substandard risks. After the policy is placed, the industry norm is to rely on loss experience as the sole criterion for renewal at the market price. The market price is, however, subject to many factors that transcend the frequency and severity of fee claims by lawyers.

Although the screening of lawyers based on their willingness to sue clients for fees is inexact, one can discern a general insurer preference for lawyers who do not. This preference is manifested in either the insurer's willingness to provide coverage or to do so at lower cost to the lawyer who refrains from suing clients. Moreover, the market for legal malpractice insurance is not as stable as the market for general liability insurance. Insurers enter and leave markets with much greater frequency than observed in the broader liability insurance markets. Thus, the insurer of the lawyer today may not be providing coverage tomorrow and this will force the lawyer to reenter the market to obtain coverage. Most significantly, when the lawyer does so, the market may be tighter, meaning there are fewer insurers willing to provide coverage. In this "sellers market," a lawyer with a poor risk profile, i.e., one who sues clients for fees, may find himself uninsurable or insurable only at great cost with substandard coverage through non-admitted insurers. Given these realities, the careful lawyer will tend to resist suing clients for fees if the lawyer

wishes to obtain malpractice insurance at preferred rates.

6. REFLECTIONS ON INSURER CONTROL OF LAWYER CONDUCT

One of the important directives of the legal profession, perhaps the prime directive, is the ideal that lawyers should exercise independent, professional judgment on behalf of their clients. From this vantage point, it is difficult to say whether the relatively recent intrusion of malpractice insurers into the way lawyers practice115 has been beneficial or harmful. The answer seems to be "it depends," and what it depends on is the viewer's conception of what the practice of law should entail, what lawyers should do, and how they should interact with their clients and others.

Many lawyers and others will find that what insurers demand of lawyers-from "field of practice constraints" to "best practices" to inhibiting "lawyer fee litigation"-is beneficial not only to clients but also to lawyers. "Field of practice" constraints encourage lawyers to develop proficiency and competency in discrete, manageable areas of the law. "Best practices" allow lawyers to manage their practices in ways that help reduce the risk of malpractice or professional misconduct. Discouraging "fee litigation" improves the image of lawyers and prevents lawyer-client disagreements from turning into larger confrontations.

Encouraging specialization discourages generalization and sends the message that a lawyer's most important trait is her knowledge of the law and how the law operates in a particular field. The view that the client is best served when the lawyer's advice comes from a wellspring of a broad practice116 is essentially rejected. The practice of law comes to resemble the practice of medicine not just in fact but in ideal. What is lost is not so much the ability to test either view-for neither view is probably provable-but the ability of clients to choose a lawyer who provides them with the type of experience or expertise (generalist or specialist) that the client wishes. Specialization is not compatible with generalization much like non-smoking is incompatible with a tolerance for smoking. The world views are too distinct to permit for peaceful co-existence.

In the past, the bar encouraged "generalists," but it permitted (or at least tolerated) "specialists." The trend toward specialization117 within the bar and outside the bar reflects a growing hostility to the idea that a generalist can practice law competently. Law is seen as too deep, too complex, too nuanced, and too subtle to permit lawyers to know more than a small part of it. Acceptance of this view tends to generate hostility to the opposite view that what lawyers provide is judgment and rationality and that the law to be applied can be learned or accessed by association with others on an "as needed" basis.

"Best practices" also has its "dark side." This may on the surface seem surprising. After all, what could be the objection to written retainers, computerized conflict checking, and calendars? Don't these all work to the client's benefit, and, it may be added, to the lawyer's, at less cost and with great benefit?

I must concede that I find no objection to each individual "best practice" when that practice is seen in isolation. Unfortunately, the practice of law is not limited to calendar or computerized conflicts checks; the practice of law is the aggregate of all of the individual "best practices" and, in the aggregate, "best practices" can make the practice of law rather formal and distant. I am not so old that I do not remember when most client representations were based on an oral agreement. Of course, times were different, or so it seemed. Perhaps that was the difference; we didn't know about or acknowledge, as we do today, the seamier side of the practice. Perhaps it was the less competitive, less overtly business climate that acted to dampen and downplay lawyer-client disagreements. Lawyer-client relationships may have been less contentious because the alternatives were less visible.

I am not suggesting that the past was a "golden era" of lawyer-client relationships, far from it. We must be careful to

distinguish memory from nostalgia.118 The past was, however, less formal; lawyer-client relationships were more trusting and less adversarial. Did this lead to exploitation? Yes, but the cure of required formality, less trust, more adversarialness does not negate opportunities for exploitation; the cure simply opens up new and different pathways for exploitation.

Suggesting that constraints on fee litigation can have negative consequences will, no doubt, strike some as heretical. Of course, going unpaid is a negative consequence for the lawyer and a positive consequence for the client, so viewpoint is important. The problem is not, however, just that the lawyer loses a fee; rather, the question becomes what will lawyers do if they decide that they will not (or cannot) sue clients for unpaid fees? First, lawyers will likely try to be more selective as to whom they agree to represent. If a client is unlikely to pay his fees, it ill serves the lawyer to agree to the representation unless the lawyer wishes to do so pro bono. The more business a lawyer has, the more selective she can be. The more it appears that a prospective client will not pay the fee or will be unable to pay the fee, the more likely it is that the prospective client will be relegated to retaining less selective (i.e., less experienced) lawyers unless the client can allay the lawyer's concern over non-payment. This leads to the second response: lawyers will insist on larger retainers before they will agree to represent the client. These retainers, called "special" retainers, provide some assurance that the fees will be paid.119 The assurance is more illusory than real because the client must still consent to the withdrawal of fees from the client trust account into which the special retainer is put;120 consequently, the client can prevent a withdrawal by withholding consent, although this might require a specific objection by the client. Nonetheless, because the client has already parted with the fund, the lawyer has more leverage vis Ãi vis the client,121 and that leverage may permit a settlement of the fee dispute without the need for formal dispute resolution.

A third consequence of discouraging fee litigation will be that lawyers will seek to drop clients who have failed to timely pay their fees sooner than they otherwise would have. If a lawyer is going to have to eat the fees, better that the meal be an appetizer rather than a banquet. While fee litigation is frowned upon, this does not mean that clients who fail to pay fees are favored.122 If lawyers are discouraged from suing clients for unpaid fees, a likely consequence is that courts will give lawyers greater discretion and more leeway to terminate the representation when fees are not paid consistent with the terms of the retention.123 There is a basic fairness to this approach. If the lawyer can sue for the fees, the lawyer has some leverage and the court may believe that the unpaid and even yet to be earned fees will be paid, or at least substantially paid; consequently, there is less reason to relieve the lawyer of representation. On the other hand, if the lawyer is discouraged from suing for unpaid fees, the leverage now lies with the client and the longer the representation, the more leverage the client acquires. Unlike the first instance, where the lawyer's leverage is commensurate with services rendered for the client's benefit, in this context the client's leverage is unfair; it grows as the client's indebtedness (and the lawyer's vulnerability) grows. Moreover, when the lawyer is allowed to sue for unpaid fees, a neutral decision maker is interposed to prevent exploitation. Thus, if the lawyer overcharged or otherwise abused the client, the lawyer's fee may be properly reduced, perhaps even negated. That protection is not available if lawyers are discouraged from suing; no neutral decision maker evaluates and controls the client's leverage. In this setting, permitting a lawyer an earlier exit from the representation than would otherwise be the case were fee litigation encouraged is an appropriate response to prevent unjust client enrichment at lawyer expense.

Insurer imposed constraints thus may have a significant impact on the practice of law at the interface between lawyer and client. Moreover, because insurer control is ex ante, it is likely to be broader than needed to address the problem. Ex ante constraints share the property of rules in that they tend to be over-inclusive by nature. Not all retentions need a written retainer, but it is difficult to determine ex ante (or by rule) which retentions do and which do not. The simpler response is to create an across the board requirement. The consequences of these across the

board requirements are either unappreciated or marginalized, but that does not diminish their reality. These prophylactic controls in the end regulate more than is necessary because less may prove ineffectual. Whether this will prove to be wise is unclear; that it will change the way lawyers practice is clear.

A discussion of insurer control over lawyer practice must address whether insurer control is an illusion or is real. If, in fact, insurer control is as exceptional as bar discipline, then one may rightly ask whether the issue is meaningful. Replacing, or supplementing, one form of ineffective control over day-to-day lawyer behavior with another equally ineffective method of control will hardly raise an eyebrow, nor should it.

Professor Hyman has argued that efforts to induce lawyers to implement effective risk reduction techniques may be met with lawyer resentment or inattentiveness.124 Of course, no system of risk reduction attains an absolute elimination of risk, and Professor Hyman's critiques do not turn on the inability to achieve the impossible. Rather, Professor Hyman doubts that insurers will ever play a significant role in regulating lawyers for four reasons: (1) lack of market penetration;125 (2) demand for malpractice insurance is likely to be limited to large firms that have already adopted loss prevention techniques desired by insurers;126 (3) insurers are not particularly interested in attorney conduct in general; rather, their focus is likely to be directed to practices that affect liability;127 and (4) insurers lack market power to mandate adoption of loss prevention measures.128

There is some force to Professor Hyman's critique: it would be a mistake to assume that loss prevention systems in place correlate to loss prevention systems being effectively used. On the other hand, to discount insurer control is to assume that insurer loss prevention underwriting efforts are largely misguided and generally ineffectual. I think neither position is sustainable, and the truth lies somewhere in between.

Professor Hyman's first point is that insurer control depends on market penetration. An uninsured lawyer is assumed to be impervious to the loss control mechanisms suggested or required by a malpractice insurer. The percentage of lawyers that practice without coverage ("go bare") is one of the profession's mysteries. Professor Hyman suggests that the number is between 25% to 55% and that this "average" masks the fact that "lawyers in solo practice and small firms are overwhelmingly uninsured."129 Professor Hyman may have overstated the case.

There is no question but that some uncertainty envelops the issue of the extent to which lawyers carry malpractice insurance.130 The assumption is that coverage is directly proportional to firm size given that larger firms are more attractive targets, handle larger matters, and are, therefore subject to greater malpractice risks.131 Yet, malpractice coverage penetrates even to smaller firms. Johnston and Simpson report an Illinois bar study that 83% of the lawyers claimed to have malpractice coverage (63% among solo practitioners).132 The authors further report that penetration is approximately 90% for Virginia lawyers and 98% for North Dakota lawyers.133 According to a Montana survey, 86% of the respondents reported that they have malpractice insurance. While there has been no rush to join Oregon's mandatory insurance club, several states are exploring or have implemented insurance disclosure requirements,134 which tend to encourage lawyers to obtain coverage rather than have to disclose to clients that they are uninsured.135

Although the number of states reporting insurance coverage for lawyers is small, it does evidence that, as we begin the twenty-first century, the number of lawyers that carry malpractice insurance has risen significantly from the insurance market penetration of the 1960s and 1970s when the data first began to be collected. This increase has been assisted by the general "soft" insurance market for the 1990s and it is unclear whether the recent "hardening" of the market for legal malpractice insurance will cause insurer market penetration to fall substantially.

Even if there is a fall off in the number of lawyers who do carry malpractice insurance that does not mean that insurer loss avoidance practices will be ignored. These best practices have largely been incorporated into the law office practice lexicon;136 thus, there is an independent agent encouraging lawyers to adopt practices consistent with insurer underwriting standards. Second, even if a lawyer drops malpractice coverage due to a hardening market, this does not mean that the lawyer is out of the market forever. A lawyer who decides that malpractice is unavailable for the short term may, nonetheless, want to maintain practices that identify her as a preferred risk when she decides to reenter the market for insurance.

Professor Hyman's second point is that insurer control is redundant because insurance market penetration is most pronounced at the large firm level and those firms already impose loss avoidance techniques desired by insurers. We can even expand on Professor Hyman's point by noting that many large firms essentially self-insure through ALAS, a risk retention group.137 For many large firms, the line that separates insurer from insured is largely formal.

I do not dispute Professor Hyman's point that large firms represent the best market for insurers in terms of market penetration. Large firms have, however, long been trend setters in the American bar. Moreover, as noted previously, market penetration in the solo and small firm market appears to be rising; hence, the difference that Professor Hyman observes may be disappearing. Finally, the issue of what constitutes a "large" firm may be surprising. One study found that 99% of firms with more than ten lawyers carried malpractice insurance.138 The trend over the past 50 years has been for firms to grow and the number of solo practitioners to decrease.139 Fairly soon, most lawyers may be in firms and most firms may be "large."

Even if insurer market penetration was disproportionately found among large firms, I do not believe that this undermines the thesis of insurer influence and control over lawyer ways and means of practice. This is not an area where one can identify, much less prove, the existence of "but for" causes. Large firm loss avoidance and insurer risk reduction here dovetail. This looks more like a case where an effect ("best practices") is the product of complementary substantial factors rather than the result of a single, primary cause.

Professor Hyman's third argument is that insurers are not interested in professional regulation in general; rather, their concern is with attorney practices that affect loss exposure. The issue is not that insurers have the desire or wish to regulate lawyers; Hyman and others140 are correct in asserting that insurers do not have that desire or wish. Given, however, the bar's failure through self-regulation to assure an acceptable minimum level of competence,141 a void has been created that insurers have sought to fill to the extent needed to advance the insurers' self-interest. That, from the profession's perspective, is the problem: insurers cannot be expected-nor should they be-to concern themselves with the bar's professional agenda. Consequently, the insurers' agenda may vary from what the bar would prescribe. Yet, it is difficult for the bar to challenge the insurers' agenda given the bar's historic reluctance to provide specific standards and benchmarks in this area.

Professor Hyman's last concern is, I believe, the most central. He argues that insurers have neither the will nor the power to control lawyer behavior. According to Professor Hyman, even if insurers "could condition insurability on the adoption of [loss prevention measures], insurers will find it difficult to monitor whether firms are only engaging in 'paper' compliance."142

Insurance monitoring, or the lack thereof, is simply the response to the problem of moral hazard, i.e., the tendency of insureds to exercise less than the optimal level of care because they have insurance.143 There is always a risk that an insured will behave sub-optimally once insurance is in place. Moral hazard does bedevil insurers; yet, Professor Hyman does not demonstrate why moral hazard is of greater concern in the legal field than in other fields, e.g.,

employer liability, product liability, construction defect, etc. The fact that there will be some lapses by lawyer insureds due to the absence of insurer monitoring does not mean that there will be no compliance by lawyer insureds. Neither Professor Hyman nor I can identify what the actual levels of lapse and compliance will be, but I believe there is a relatively easy way to determine if compliance levels are satisfactory to insurers. If insurers continue to require, or give preferential ratings, to lawyers who claim to have adopted insurer identified "best practices," that is strong evidence that insurers see paper compliance as a satisfactory indication of actual compliance. If there is widespread lawyer reluctance to implement "best practices" as Professor Hyman argues, then insurers will see this in their claims and loss experience and act accordingly. To date, insurers have not acted consistent with Professor Hyman's thesis that "best practices" are ineffective.

There is reason, moreover, to believe that monitoring is less necessary in the field of law than in other areas. First, insurance loss avoidance practices are, in general, perceived good practices that lawyers should adopt and apply. While the practices are not cost-free nor devoid of some potentially adverse consequences144 in general, insurer loss prevention rules represent what the practicing bar identifies as good professional practice.145 second, once an attorney has implemented loss prevention techniques, there is a cost associated with change. A calendaring system is not simply discontinued; a computerized conflict checking system is not simply deinstalled. Once systems are in place, inertia applies here as well as in physics: systems in place tend to remain in place until moved by a countervailing force.146 This is not to say or guarantee, however, that the system will be used or used properly.147 Professor Hyman raises a valid point and we should not overestimate the role of insurers in regulating lawyer conduct. That said, I do not believe, however, that the concession means that insurer regulation will be inconsequential, unobtrusive, or ineffectual.

The converse to Professor Hyman's thesis is that reducing lawyer exposure to risk by acquiring insurance should increase risky behavior on the part of lawyers. Similarly, the introduction and rapid acceptance of limited liability entities should lead to an increase in risk and a decrease in loss avoidance as lawyers can avoid associational liability. There are no reports that limited liability has encouraged risky behavior. The view so far is that limited liability entities have not had an impact on lawyer behavior. As one commentator noted: "law firm behavior is not shaped by limited liability status, but rather by the willingness of individual attorneys to submit to and to perform supervision and review."148

The fundamental difference between insurer regulation and bar regulation is that insurance necessarily accepts that there will be losses and simply redistributes those accepted losses onto a wider base.149 Insurer control is not designed to create or encourage professional behavior-Professor Hyman is surely correct here; rather, insurer control is designed to enable the insurer to accurately price risk. Accepting that insurers have little incentive to act as regulators of the profession does not, however, diminish the impact that insurers have on the legal profession in those areas where insurers have identified an interest in exercising control.

B. REGULATION OF LAWYERS BY PUBLIC ACTORS OTHER THAN THE BAR: LEGISLATORS

In the United States, one of the fundamental arguments for the professional independence of lawyers is that lawyers serve as a bulwark against governmental excess that could result in a narrowing of the rights and privileges enjoyed by Americans.150 This view animated both supporters and opponents of the professionalization of the bar during the twentieth century. Proponents argued that professionalization would strengthen lawyers as advocates against the wrongful exercise of governmental power.151 Opponents feared that professionalization might co-opt lawyers into becoming government agents rather than client advocates.152

Although lawyers are officers of the court and thus subject to the control of courts, by and large direct judicial regulation of the bar has been relaxed and distant.153 The judiciary, while retaining nominal power, has largely delegated responsibility for professional control to the bar. Moreover, at the same time, the judiciary largely protected the bar from intrusive invasion by other governmental actors.154 The bar's insularity was no doubt aided by the homogeneity of its members, who were overwhelmingly white and male, and the dominance of lawyers in the legislative branches during this period.155

In the latter half of the twentieth century, however, the bar's insularity from external control by governmental actors came under sustained (and increasingly successful) challenge. I believe there are several reasons for this sea change in attitudes towards regulation of the practice of law beginning with the success of lawyers and the growth of law. As both lawyers and law became more central to the American experience, as government became more a part of each American's experience, lawyers became more pervasive, more central, and, most importantly, more visible and more powerful.156 Visibility and power have consequences; most significantly, they create and identify targets. Moreover, the accretion of power by lawyers meant that there were an increasing number of friction points where the exercise of power could create antagonism and resentment. Finally, the bar lost its homogeneity; increasingly, the bar's membership began to look more like the larger society in which lawyers practice. With this loss of homogeneity, the insularity and collegiality of the bar began to dissolve. In the past, lawyers refrained from bringing malpractice actions against other lawyers. Lawyers simply did not sue other lawyers. That is no longer the case. Legal malpractice has moved from obscurity to practice specialty.157

In this section, I wish to explore one way the dissolving of the bar's insularity has resulted in lawyers being increasingly subject to external control by public actors: the increasing tendency of legislators to enact laws that govern lawyer behavior. As we begin the twenty-first century what we see is an increasing willingness on the part of public actors to regulate lawyers.158 A consequence of control is that public actors can define how lawyers may practice. That control over lawyer practice may come to erode the ability of lawyers to serve as a bulwark against the aggrandizement of government power vis Ã vis the individual.

Lawyers used to dominate legislatures; now they hardly make an appearance,159 except as lobbyists. At the same time that lawyer-legislators have become almost an endangered species, legislatures increasingly involve themselves in how lawyers practice. I will address this development using three examples: (a) business practices; (b) discrimination; and (c) confidentiality. I do not, however, want to overstate the point. To date, legislatures have yet to consistently or significantly intrude into the field of lawyer regulation. Inroads are, however, visible and once the path is established it becomes ever easier to take the path again.

1. BUSINESS PRACTICES

Most states have enacted Unfair Business Practices statutes and Consumer Protection Acts.160 Historically, these statues were not applied to the lawyer-client relationship, which was seen as generally outside consumer protection legislation.161 Law for the masses was not law for lawyers. This has changed. With increasing frequency, general consumer protection laws are being applied to the lawyer client relationship.162 The most common application of consumer protection legislation is to attorney advertising163 and billing practices.164 The jurisdictions are split whether the legislation applies to the lawyer's professional conduct;165 nonetheless, the developing trend is to apply consumer protection legislation to lawyer conduct that previously would have been subject to only professional regulation.166

In California, aggrieved individuals and groups have developed a practice of seeking legislative solutions to issues

that were once seen as entirely within the purview of the bar. For example, when a California lawyer was charged with the looting of estates by inducing elderly clients to name him as sole heir and executor of the client's testamentary devise,167 the legislature enacted a new law addressing when a drafter of a legal document could name himself as a beneficiary under that document.168 This was done even though the California bar has a specific rule on this topic.169 Similarly, a legislative directive was used to induce the California bar to adopt a rale on pretrial publicity,170 to which the bar complied.171 The legislation was in response to widespread complaints of lawyer misconduct during the well publicized trial of OJ. Simpson.172

The bar does respond to matters of public notoriety. For example, inquiries were opened when questions of professional misconduct were leveled against members of O.J. Simpson's defense team.173 Recently, several California lawyers were subject to public scrutiny apparently instituted by a local radio station. The matter involved the filing of lawsuits alleging unfair business practices by small businesses, followed by quick settlements. Within a short period of time, and on the heels of prosecutorial investigations, the California State Bar announced that it would institute proceedings to discipline the lawyers,174 which it did.175 Yet, particularly in cases of public notoriety, it is difficult to determine whether the bar is acting on its own volition or being pushed and prodded by political actors. California may be atypical because of the hold the legislature has over the bar's annual dues bill, but the bar does trim its sails to the dominant political winds even as to matters of core concern to the profession.176

Congress has also demonstrated a willingness to regulate lawyers. In the Sarbanes-Oxley Act of 2002, Congress expressly directed the securities Exchange Commission to draft regulations addressing a lawyer's obligations to report material violations of securities laws up the corporate ladder,177 an obligation previously addressed only in the professional codes.178 The extent to which lawyers have a duty to investigate misbehavior after becoming aware of evidence of a material violation is unclear.179 That uncertainty is further complicated by the practical dilemma lawyers find themselves in when a lawyer must decide how to implement a duty of uncertain scope. If the lawyer probes too deeply, the lawyer risks marginalization by the dominant business side of the entity.180 If the lawyer fails to probe too deeply, the lawyer risks civil and criminal sanctions:

The Enron and Worldcom debacles have led to significant new developments in the area of enforcement and disclosure. First, pursuant to the Sarbanes-Oxley Act enacted July 30,2002, the sec has adopted a rule that requires "an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof)." The Sarbanes-Oxley Act also requires that the rule stipulate that if the chief counsel or the CEO fail to respond appropriately by adopting remedial measures or sanctions, the attorney must report the securities violations or breaches of fiduciary duties to (i) the audit committee of the board of directors, (ii) another board committee not comprised solely of inside directors (those directors that are employed by the corporation), or (iii) the board as whole. Thus, as indicated by the wording of the statute, in the absence of appropriate action by the CEO, the attorney must disclose the violations to at least some outside directors. However, the sec has postponed action on a rule that would require attorneys to resign and report wrongdoing to the SEC.181

In the Aviation Disaster Family Assistance Act of 1996, Congress specifically barred lawyers from making unsolicited contacts to survivors or victims' families for 45 days from the date of an airplane accident.182 Congress enacted this bar notwithstanding that attorney advertising is extensively regulated by the bar and many forms of personal solicitation are directly prohibited.183 Nonetheless, Congress went far beyond the professional codes to ban flatly any contact (direct or indirect) initiated by a lawyer or the lawyer's agents. Congress was likely responding to wide-scale reports of improper client solicitation at air crash sites. One report involved a solicitor who masqueraded as a priest and attempted to encourage victims to retain a particular lawyer while the fake priest

purported to minister to the victim's needs. '84

2. DISCRIMINATION

Prohibition on racial or gender-based discrimination is pervasive in the United States at the federal, state, and local levels. Many jurisdictions extend the ban to discrimination based on age, sexual orientation, and physical appearance.185 Traditionally, lawyers did not concern themselves with these provisions.186 The special nature of the attorney-client relationship, the need for the attorney to "identify" with the client,187 and the demands of a personal relationship with the client supported the view that a lawyer should have absolute discretion over whom to accept as a client and whom to reject.188 American lawyers have long claimed this right, and it is acknowledged in the professional codes.189

A number of recent events suggest, however, that legislatures may become more involved in this area. One area where this may occur is through the application of anti-discrimination statutes. For example, in Stropnicky v. Nathanson,190 the question arose whether a lawyer's refusal to accept a male as a client constituted impermissible gender-based discrimination. I believe most family lawyers would agree that historically the bar in this area has organized informally around separate bars for wives on the one hand and husbands on the other. Again this is not to say that no lawyers represented both husbands and wives as clients, but many lawyers limited their practice to one spouse (husband or wife), much as personal injury lawyers traditionally either represent plaintiffs or are retained by insurers to represent defendants. The distinction has been largely self-policed and informal. In Stropnicky, the disappointed male prospective client sued and won! The Massachusetts Commission Against Discrimination held that the state's anti-discrimination statute applied to the selection of clients by lawyers and this position was affirmed by the Massachusetts Superior Court.191

Can a lawyer avoid (i.e., evade) anti-discrimination statutes by arguing that the lawyer considers the representation "imprudent" or "repugnant"? Imprudent or repugnant is different from frivolous. For example, does Stropnicky mandate that a lawyer represent the Klan or a Nazi? Does it matter whether the lawyer is black or white, Christian or Jewish? Does it matter whether the lawyer's decision is not based on race, ethnicity, or religion, but rather is ideological? Does it matter whether the basis of the lawyer's objection is that the lawyer finds representing the Klan or Nazis offensive? In fact, the more meritorious the legal claim asserted by the prospective client, the more offensive the representation may be for the lawyer. Does anti-discrimination legislation trump what would otherwise be, for the lawyer, a disqualifying conflict of interest between the lawyer's political beliefs and the client's interest?

If the lawyer may decline representation on the ground that the client is offensive, whether pre-textual or genuine,192 the Stropnicky decision is less than breathtaking; for a lawyer can easily transfer his reasons for rejecting the client from the impermissible (race, gender, religion) to the permissible (ideological). Is rejecting a client in a marital dissolution action because he is male the same or different from rejecting a client whose representation is inconsistent with the lawyer's expressive view that females are systematically mistreated by marital dissolution laws? Where does "client" end and "cause" or "matter" begin? The Stropnicky decision is silent as to whether the professional grounds for withdrawal, even if the client would be materially harmed by the withdrawal, are applicable.

I believe there is great danger that law as espoused in Stropnicky could prove to be breathtaking. The larger issue at stake-the necessary identification of the lawyer with the client and the client's position, which may justify giving lawyers the privilege to discriminate193-is not a position that will, I believe, resonate with the average legislator. Most non-lawyers believe that lawyers over-identify with their clients. The justification for lawyer discrimination-

the need for empathy, loyalty, trust, and acceptance between lawyer and client-is unlikely to be embraced by legislators as a dominant professional need. I believe most legislators will see that much of all professional practice is mundane and hardly requires any special bonding between client and lawyer, such as might require an exception to the application of anti-discrimination laws to client selection. Is there anything exceptional about drafting incorporation documents, handling a personal injury or breach of warranty claim, or representing a client at a closing? Should a lawyer be allowed to reject a prospective client in these routine matters simply because of the client's race, ethnicity, or gender? The emerging trend is to apply anti-discrimination laws to a professional's decision whether to accept a client194 and that trend will run up against the longstanding position of the bar that has vested absolute discretion on the part of lawyers, except in the case of court appointments, as to whom to accept as a client.

3. CONFIDENTIALITY

Traditionally, lawyers have enjoyed a right and obligation to protect client secrets and confidences from disclosure unless the client consents to the disclosure. This right and obligation rests on two prongs: (1) the attorney-client evidentiary privilege; and, (2) the professional duty to maintain client confidences and secrets.195 These distinct obligations applicable to lawyers augment the general common law duties of agents (lawyers) to protect communications with principals (clients) from improper disclosure.196 The bar has long jealously guarded its prerogatives in this area from dilution or constriction. Increasingly, however, the bar has found its prerogative of confidentiality under sustained attack. Much of this is due to the highly emotional contexts in which the prerogative is asserted. The New York buried bodies case197 is one example of a problem that appears with some frequency.198 Much of the criticism also follows from the low repute of lawyers in today's culture and the pervasive belief that lawyers use the prerogative to "play the system" for the benefit of their clients and themselves. Recent financial collapses of large well known companies and disclosures that these companies, and many others, engaged in financial legerdemain have raised questions whether lawyers were aware of the wrongdoing, but looked the other way to maintain the relationship and the fees the clients provided.

The primary arguments for the prerogative are consequentialist and moral. The consequentialist argument is that confidentiality encourages clients to confide in their lawyers and this resulting full disclosure better allows the lawyer to represent the client and, most importantly, dissuade the client from engaging in unlawful conduct.199 Dissuasion occurs either because the client did not appreciate the wrongfulness of the conduct or, if she did, the lawyer is able to persuade the client to act lawfully.200 The consequentialist argument rests on the necessary assumption that lawyers, as a group, can be trusted to dissuade or at least attempt to dissuade, their clients from acting unlawfully rather than using their knowledge to facilitate the client's wrongful objectives. In the modern climate, popular trust of lawyers is hard to find, and it will be difficult to persuade the now dominant non-lawyer legislator that the prerogative furthers the consequentialist goal of dissuasion of illegal conduct.201

The moral argument for the prerogative rests on the idea that respect for personal autonomy and liberty prevents the disclosure of information that could embarrass or harm the individual.202 This argument rests on the willingness to view the client as a person deserving of the protection afforded by the prerogative. The difficulty is that challenges to the prerogative are made in the context of persons whom society views with abhorrence and disdain. Arguing that child molesters, murderers, or corporate officers who mulct their companies for their personal profit are deserving of a privilege of confidentiality is a difficult argument to make outside of academic journals. The academic scholar's ideals founder against the harsh realities of the world. The consequentialist argument for the prerogative dominates today,203 but, as noted previously, it is uncertain whether advocates of the prerogative can successfully use even the consequentialist argument to preserve the prerogative.

Given the difficulty in showing a direct, visible benefit associated with the : prerogative, it is not surprising that the broad view of the prerogative asserted by the bar is under challenge. The bar, particularly the American Bar Association, has sought to define the prerogative so that exceptions are few and what exceptions exist are within the lawyer's sole discretion to invoke. Thus, ABA Model Rule 1.6 limits disclosure of client confidences to three situations: (1) when the client consents; (2) when disclosure is impliedly authorized; and, (3) when a specific exception is identified.204 Even if an exception applies, the Model Rule gives the lawyer unfettered discretion whether to invoke the exception,205 except as to the requirement to comply with a court order of disclosure.206

The bar's approach has, however, met with increasing resistance. Within the states, the definite trend has been to expand the exceptions to the prerogative, to limit the discretion available to lawyers to withhold disclosure,207 and to encourage lawyers to disclose client confidences when there are plausibly good grounds for doing so.208 While historically this resistance to mandatory non-disclosure has been spearheaded by state supreme courts, increasingly legislatures are entering the fray. California, for example, twice recently adopted a statute qualifying the lawyer's former absolute right and duty to protect client confidences.209 While in each case, the inroads were minor, the significant fact was that the legislature was adopting a position at cross purposes with a claim that the public would be better served by secrecy. As noted previously, these are precisely the types of cases that will appear to non-lawyer legislatures as examples of the misuse and misapplication of the prerogative and, thus, most deserving of retrenching the prerogative. Moreover, where once lawyer-legislators could serve as a brake on such concerns, that is no longer the case.210

4. REFLECTIONS ON LEGISLATIVE INTRUSION

Legislators have not addressed issues of day-to-day concern to lawyers with the same penchant for detail as have insurers. That is not surprising, but it should not give rise to any false assurances that legislators will remain on the sidelines or only deal with matters of peripheral concern to the bar. The legislative agenda remains one that is potentially at cross-purposes with the key values of the profession, such as client selection, client confidentiality, and client representation.

As government expands and as lawyer roles increase, one can expect that there will be increased flashpoints between legislators and the bar over lawyers' professional and public duties. For example, will statutory whistleblowing protection operate to trump the bar's requirements of confidentiality?211 In one California case involving a governmental lawyer who disclosed misconduct by a departmental head to legislative committees,212 the legislature made it patently clear that it would not look kindly on bar disciplinary action against the lawyer.213 A bar investigation was quickly begun and just as quickly ended with a decision not to recommend that the lawyer be disciplined.214

It is hard to hazard a prediction as to where legislative intrusion is heading, and I do not want to indulge in unsupportable assertions. It is, however, difficult to detect in today's political rhetoric any acceptance of the traditional boundaries that marked the domain of self-regulation. Courts may continue to assume ultimate responsibility for lawyer litigated-related conduct,215 but it is uncertain whether courts will protect lawyers from regulation in other areas, particularly when those non-litigation roles encompass what many will perceive to be non-traditional lawyer roles, i.e., lawyer-lobbyist or lawyer-agent.216 As lawyers assume ever more central and visible roles in public and private activities, it becomes increasingly unlikely that lawyers, as a class, will be able to escape general regulation of their activities. The days of self-regulation may be numbered. Self-regulation may become a victim of lawyer success or, as some critics would have it, lawyer excess.

III. CONCLUSION

Who should regulate lawyers is a topic that has and no doubt will continue to interest the bench, bar, and academy. This focus on best policies should not, however, blind us to the everyday realties of who does regulate lawyers. When the subject is considered, the usual suspects-bench and bar-are rounded up and brought out for their share of ridicule or praise. Lost in the noise is the fact that these traditional actors are increasingly being supplanted by non-traditional actors-insurers, legislators, and others217-who do not share a common background with those they regulate and may have an agenda altogether different from that of the organized bar.

How far this trend of non-traditional regulation will extend is difficult to predict. I detect no evidence of abatement; in fact, success is likely to encourage more regulation, not less.218 The increased divisiveness between the bar and its traditional allies-the bench, the legislature, and the academy-suggests that the , bar will be poorly positioned to withstand increased assaults on its once cherished and well protected prerogative of self-regulation. The day may soon be at hand when lawyer regulation will look little different from that experienced by non-professional occupations. Whether that will prove to be socially and politically beneficial remains to be seen.

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