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When Lawyers Screw Up

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BOOK REVIEW

When Lawyers Screw Up

LESLIE C. LEVIN*

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INTRODUCTION

Lawyer malpractice can have devastating consequences. The failure to handle a criminal case competently can lead to a wrongful conviction. A missed deadline in a personal injury case can preclude a seriously injured client from recovering damages. Lawyer malpractice can result in huge tax liability, the loss of major business, and the dissolution of companies. In some cases, the harm caused by

* Joel Barlow Professor of Law, University of Connecticut School of Law. I am grateful to Carol Bernick and Mark Dubois for sharing their vast knowledge of lawyer malpractice claims and lawyer discipline, respectively. I also thank Jon Bauer, Susan Saab Fortney, and Herbert Kritzer for their very helpful comments on an earlier draft of this essay. © 2019, Leslie C. Levin.

malpractice—such as the loss of liberty or deportation—is incalculable. Lawyer professional liability (LPL)¹ is difficult to detect and hard to prove. Moreover, even if a plaintiff can prove liability, it may be impossible to recover damages if the lawyer is uninsured. Lawyer malpractice undermines the public’s trust in lawyers. Yet until recently, little has been known about the incidence of LPL claims, their resolution, their cost, and the ways in which LPL insurance affects lawyer behavior and clients’ recoveries.²

In their book *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims*,³ Herbert Kritzer and Neil Vidmar significantly advance our understanding of these issues. They provide a detailed portrait of lawyer malpractice in the United States and demonstrate why it is so hard for victims to recover damages. Theirs is not an easy undertaking. Legal malpractice often goes undetected. Even when a client learns of lawyer malpractice, the problem is sometimes resolved informally without notifying the LPL insurer of a possible claim.

The authors focus mainly on what can be learned about legal malpractice from malpractice claims reported to insurers, and from the lawyers and insurers who handle those claims. This, too, is difficult, because insurers often treat their information as proprietary. Kritzer and Vidmar have deeply and creatively researched their topic, drawing on state insurance regulators’ databases, insurance companies’ reports, American Bar Association (ABA) profiles, juror experiments, and interviews. As they acknowledge, the available information is limited and incomplete, making attempts to generate reliable figures challenging. Nevertheless, their book reveals some important and never-before reported information about, *inter alia*, the incidence of LPL claims, their resolution, insurance payouts, and the obstacles individuals, in particular, face when attempting to obtain redress from lawyers who “screw up.”

As the authors explain, the story of lawyer malpractice is really two stories. Just as Jack Heinz and Edward Laumann famously reported in their study of Chicago lawyers that the legal profession is split into two hemispheres—the large

1. Lawyer professional liability can arise from negligence, breach of fiduciary duty, breach of contract, and intentional torts such as fraud and misrepresentation. See SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION* 15 (2d ed. 2015). The terms “LPL” and “lawyer malpractice” are used interchangeably in this article to encompass all of these causes of action.

2. Twenty-five years ago, Manuel Ramos noted that there was little reliable data relating to lawyer malpractice. See Manuel R. Ramos, *Legal Malpractice: The Profession’s Dirty Little Secret*, 47 VAND. L. REV. 1657, 1659 (1994). This has only begun to change very recently. See Tom Baker & Rick Swedloff, *Liability Insurer Data as a Window on Lawyers’ Professional Liability*, 5 U.C. IRVINE L. REV. 1273 (2015); Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412 (2013); Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 FLA. L. REV. 1281 (2016) [hereinafter *Lawyers Going Bare*]; Leslie C. Levin, *Regulators at the Margins: The Impact of Malpractice Insurers on Solo and Small Firm Lawyers*, 49 CONN. L. REV. 553 (2016).

3. HERBERT M. KRITZER & NEIL VIDMAR, *WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS* (2018).

corporate and the individual services market⁴—so, too, are LPL claims and the LPL insurance market. Kritzer and Vidmar organize much of their discussion around these divisions. They provide illustrative examples of claims and legal issues that arise in malpractice cases, dividing them by practice areas serving individuals (e.g., personal injury, divorce) and those involving business matters.⁵ They then address some important preliminary issues concerning lawyer liability and LPL claims in the United States. These include the surprising fact that lawyers are not required to carry malpractice insurance except in Oregon (and very recently, Idaho), a description of the LPL insurance markets for large firm and small firm lawyers, the bases for lawyer liability, and the legal challenges plaintiffs confront when bringing a malpractice claim.⁶ They also describe the disconnect between lawyer malpractice and lawyer discipline.⁷ One consequence is that even if a lawyer is disciplined for behavior that constitutes malpractice, a client cannot recover damages for the harm caused without pursuing a separate malpractice claim.⁸ And if that client sues, there is no guarantee of success.

It can be difficult and expensive for plaintiffs to prove legal malpractice.⁹ Statutes of limitations preclude recovery in some jurisdictions because the statute is short or the harm is not discovered until long after the occurrence.¹⁰ It is usually necessary to hire one or more expert witnesses.¹¹ Where the malpractice occurred in a litigation matter, plaintiffs must demonstrate that they would have won that case if it had gone to trial (proof of the “case-within-a-case”).¹² Where malpractice occurred in criminal cases, plaintiffs in many jurisdictions must show their actual innocence to prevail.¹³ Even when plaintiffs prove their case, there is

4. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982). When the authors again studied Chicago lawyers in 1995, they found that while the divisions remained, the “hemisphere” metaphor was no longer entirely apt because the corporate fields had grown more rapidly, with 64% of lawyers’ time devoted to the corporate sector, and 29% of lawyers’ time devoted to personal and small business client work. JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 43 (2005).

5. KRITZER & VIDMAR, *supra* note 3, at 19.

6. *Id.* at 38–46, 54–60.

7. See *id.* at 57–59.

8. See *infra* note 142 and accompanying text.

9. See Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 491–502 (2008); Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2033, 2044–48 (2017); Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 SAN DIEGO L. REV. 401, 424–26 (2000).

10. KRITZER & VIDMAR, *supra* note 3, at 55–56.

11. See RONALD E. MALLIN, LEGAL MALPRACTICE § 37:120 (2018 ed.). These experts are expensive because they are typically lawyers. The preparation is time-consuming and they usually bill on an hourly basis. Fortney, *supra* note 9, at 2040. This can make bringing malpractice actions in low-value LPL cases cost prohibitive. *Id.* at 2053.

12. See KRITZER & VIDMAR, *supra* note 3, at 54.

13. *Id.* at 56; see also Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43, 63–64, 64 nn.131–32 (2008).

usually no recovery for non-pecuniary damages, including the emotional distress associated with lawyers' mistakes.¹⁴

One of Kritzer and Vidmar's major contributions is their detailed portrait of the frequency of lawyer malpractice claims, the manner in which the claims are resolved, and the payments made to resolve them.¹⁵ A malpractice "claim" is a notification to an insurer about a demand by a third party or about an occurrence that could give rise to liability.¹⁶ Lawyers report thousands of LPL claims to insurers every year.¹⁷ The claims rates vary substantially depending upon the size of the law firm. About 3.75 out of every 100 lawyers working in solo and small (two-to-five lawyer) firms report a claim to insurers annually.¹⁸ These figures do not, however, fully reflect the incidence of possible malpractice, because many solo lawyers, in particular, do not carry LPL insurance.¹⁹ The annual claims rate for large firms is about 7.5 out of every 1000 lawyers.²⁰ In Oregon, where lawyers in private practice are required to purchase LPL insurance, the claims rate is substantially higher, with 12 out of every 100 lawyers reporting claims annually.²¹

Most LPL claims do not result in payments by insurers.²² Some claims are "repaired" (i.e., fixed or mitigated) after insurers receive a claim and no insurance payment is required.²³ Nevertheless, Kritzer and Vidmar roughly estimate that annual LPL insurance payouts—including indemnity payments and the cost of defense—exceed \$1.2 billion annually.²⁴ This figure does not represent the full amount paid annually for malpractice claims, as virtually all LPL policies have deductibles or retentions. Those can range from \$1,000 to over \$50,000 in solo

14. See KRITZER & VIDMAR, *supra* note 3, at 50; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53, cmt. g (AM. LAW INST. 2017). Some courts have concluded that even when wrongfully incarcerated criminal defendants can prove malpractice, they cannot recover from their lawyers for their loss of liberty because it constitutes non-pecuniary damage. See *Dombrowski v. Bulson*, 971 N.E.2d 338, 340–41 (N.Y. 2012); *Smith v. McLaughlin*, 289 S.E.2d 7, 18–20 (Va. 2015).

15. KRITZER & VIDMAR, *supra* note 3, at 69–72, 81–83, 94–122. The authors also provide a very useful account of the areas of practice that generate claims in the large and small firm contexts, and the types of conduct giving rise to the claims. *Id.* at 72–80, 84–89.

16. Insurance companies sometimes define "claims" slightly differently so that a direct comparison between companies is not always possible. See KRITZER & VIDMAR, *supra* note 3, at 101.

17. *Id.* at 3.

18. See *id.* at 70. These figures came from two bar-affiliated companies that primarily insure solo and small firms. *Id.*

19. See *id.* at 40–41; Levin, *Lawyers Going Bare*, *supra* note 2, at 1282.

20. KRITZER & VIDMAR, *supra* note 3, at 69 fig.4.1, 71 (reporting claims rates of Attorneys' Liability Assurance Society (ALAS), which insures "larger corporate-sector firms"). The claims rate disparity between large firms and smaller firms may be explained, in part, by the fact that several lawyers typically work on a single case in large firm practice. *Id.* at 72.

21. See *id.* at 70.

22. See *id.* at 100–01, 101 fig.5.5.

23. See *id.* at 99.

24. See *id.* at 121–22 (estimating that payments for large firms total around \$570 million and for small firms total around \$639 million). The authors extrapolate from data available from a few insurers in the large and small firm markets and describe their estimate as "very crude." *Id.* at 122.

and small firms and can be much higher in large firms.²⁵ The figure also does not include claims that are paid out of lawyers' pockets to resolve a matter without ever notifying an insurer. Nor does it include malpractice damages that are never paid because many lawyers are uninsured.

I. THE ACCESS TO JUSTICE PROBLEM FOR LAWYER MALPRACTICE VICTIMS

In *When Lawyers Screw Up*, the authors discuss malpractice in both the large and small firm context, but are especially concerned with the problem that ordinary people often cannot obtain redress when their lawyers make serious mistakes. Individuals are usually represented by solo and small firm lawyers. These lawyers are more likely than large firm lawyers to be the subject of malpractice claims.²⁶ This may be, in part, because these lawyers have fewer back-up systems or colleagues who can help them avoid mistakes. Moreover, unlike large corporate clients which can threaten to take their considerable business elsewhere if the lawyer refuses to "make it right," individuals—often one-shot players in the legal system—rarely have such clout. So their only hope for redress is a malpractice claim. Yet many solo and very small firm lawyers do not carry LPL insurance.²⁷ If there is no insurance, Kritzer and Vidmar's interviews reveal, experienced plaintiffs' LPL lawyers will almost never take on the malpractice case.²⁸ Plaintiffs' lawyers know that even if a case is meritorious, they will not receive their contingent fee because there will be no money to pay the judgment.

It is difficult to determine how many lawyers are uninsured in many jurisdictions, including some states with large numbers of lawyers such as California, Florida, and New York.²⁹ Yet data collected by regulators in a few states suggest the size of the problem. In South Dakota, where lawyers are required to directly disclose to clients if they are uninsured, the figure is relatively low, at about 6%.³⁰ In contrast, in Michigan, more than 20% of lawyers in private practice do not carry LPL insurance.³¹ In Illinois, 41% of solo lawyers do not carry insurance.³² In Texas, a state bar survey revealed that 63% of solo lawyers were uninsured.³³

25. *Id.* at 43–44. ALAS, which only insures firms with over thirty-five lawyers, requires a minimum "self-insured retention" (essentially, a deductible), of \$175,000. *Id.* at 45.

26. *See supra* notes 17, 19 and accompanying text.

27. *See supra* note 18 and accompanying text.

28. KRITZER & VIDMAR, *supra* note 3, at 148.

29. These states do not require lawyers to disclose, even to regulators, whether they maintain LPL insurance. Levin, *Lawyers Going Bare*, *supra* note 2, at 1297–1303.

30. *Id.* at 1298–99.

31. *Id.* at 1301–1301.

32. E-mail from Jim Grogan, Deputy Administrator & Chief Counsel, Ill. Attorney Registration & Disciplinary Comm'n, to author (July 19, 2016, 13:39 EDT) (on file with author).

33. Chuck Herring, *Pro Bono Disclosure Should be Required*, 72 TEX. B. J. 822, 823 n.2 (2009).

Even if individuals can find an attorney who will bring a malpractice case against an uninsured lawyer and they prove their case, they are unlikely to recover damages. Some lawyers are uninsured because they cannot afford LPL insurance.³⁴ Such lawyers are also unlikely to have the means to pay a malpractice judgment. Other uninsured lawyers who have assets shield them in ways that make them judgment proof.³⁵ Uninsured lawyers sometimes declare bankruptcy to avoid paying malpractice claims.³⁶

The problem for legal malpractice victims is not limited to uninsured lawyers. Even if the lawyers who commit malpractice are insured, experienced legal malpractice attorneys decline to take on cases when the damages are low.³⁷ Given how difficult and expensive lawyer malpractice cases are to prove, if the likely recovery is only \$50,000, plaintiffs' lawyers will earn little for their time and effort.³⁸ They will rarely agree to take a low-value case, and will only do so if they think they can settle quickly with an insurer.³⁹ Lawyers not experienced with LPL cases may take on a low-value matter, but non-specialists often do not understand the challenges of bringing such a case and are less likely to be successful.⁴⁰

Kritzer and Vidmar describe this as an access to justice problem.⁴¹ In many ways it is.⁴² LPL cases are much too complex for unrepresented litigants to handle successfully on their own. If individuals cannot obtain competent legal representation to pursue their LPL claims, they cannot effectively access the courts. If lawyers are not required to pay for the harm they cause clients, justice is also denied. The authors' portrait of lawyer malpractice—including the significant challenges victims face when pursuing their claims—highlights a serious

34. See, e.g., Levin, *Lawyers Going Bare*, *supra* note 2, at 1290, 1292.

35. *Id.* at 1316, 1324. For example, lawyers may transfer their homes and other assets into a spouse's name. See *Legal Malpractice*, LAW OFFICE OF DANIEL L. ABRAMS, www.lawyerquality.com/legal-malpractice/ [<https://perma.cc/E3HR-KANR>]. They may also transfer their assets into trusts. See Jeffrey M. Verdon Law Group, LLP, *Asset Protection Planning and Strategies for Lawyers, Accountants Financial Planning and Investment Professionals* (Sept. 21, 2016), www.epcdv.org/images/Sep2016_EPCDV_Presentation.pdf [<https://perma.cc/UGU7-XVVU>].

36. Levin, *Lawyers Going Bare*, *supra* note 2, at 1316.

37. See KRITZER & VIDMAR, *supra* note 3, at 147–48 (reporting that experienced LPL lawyers had minimum potential damages thresholds from a low of \$100,000 to a high of \$5 million).

38. Lawyers will typically only recover a one-third contingent fee in these cases. *Id.* at 150.

39. *Id.* at 148. My interviews with two experienced LPL lawyers in Oregon—where all lawyers in private practice are insured—revealed they might consider taking a case with a value as low as \$50,000 if they could settle quickly. It is unclear whether the lawyers the authors interviewed would do so. Of course, this is not only a problem with low-value lawyer malpractice cases, but also in personal injury cases.

40. See *id.* at 155, 158–60, 163–65.

41. *Id.* at 6.

42. Scholars define “access to justice” in various ways. See, e.g., Mathew Good, *Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions*, 47 ALBERTA L. REV. 185, 187–88 (2009); Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L. J. SUPRA 75, 78 n.13 (2013). Kritzer and Vidmar focus specifically on the inability of individuals to obtain legal representation and redress for lawyer malpractice. KRITZER & VIDMAR, *supra* note 3, at 169–70.

problem. States have failed to adequately protect the public's interests when lawyers commit malpractice.

Consider the issue of whether lawyers in private practice should be required to maintain LPL insurance. Canada, Australia, England, and most other European countries require such lawyers to carry LPL insurance.⁴³ The authors report that in Missouri—the only state for which such data are available—the median claim payment for solo lawyers was \$24,351, and for lawyers in two-to-five lawyer firms was \$34,034.⁴⁴ If U.S. solo and small firm lawyers—those most likely to be uninsured—were required to maintain \$100,000 per occurrence of LPL insurance, it would cover the majority of claims against them. That insurance can be purchased in most jurisdictions by most lawyers for \$3,000 or less annually.⁴⁵

In many states, professionals such as physicians and dentists, and some other service providers—including real estate brokers, pest inspectors, and massage therapists—must carry liability insurance to maintain their licenses.⁴⁶ In the United States, where insurance is required to own a car, why are lawyers not required to carry LPL insurance?⁴⁷ Or, at a minimum, why are there not some other mechanisms to better enable victims of lawyer malpractice to recover when lawyers cause them harm?

II. THE POLITICS OF LAWYER MALPRACTICE REGULATION

The answer to why more is not done to protect the public is largely because state courts—which maintain primary responsibility for regulating lawyers—tend to defer to the legal profession's recommendations. The legislature, in turn, tends to defer to the state courts. There are structural and other reasons why this occurs.

Courts are inherently reactive institutions.⁴⁸ They do not have the time or resources to do their own fact-gathering. They often rely on the legal profession to study issues and make recommendations.⁴⁹ So, for example, state courts generally rely on the ABA's recommendations concerning the rules that should govern

43. See KRITZER & VIDMAR, *supra* note 3, at 171.

44. *Id.* at 114. The mean claim payment for solo lawyers was \$52,678 and for two-to-five lawyer firms was \$110,994. *Id.*

45. Levin, *Lawyers Going Bare*, *supra* note 2, at 1320. LPL insurance can be purchased in some instances for as little as \$750 annually. KRITZER & VIDMAR, *supra* note 3, at 44.

46. Levin, *Lawyers Going Bare*, *supra* note 2, at 1283 n.5; see also KRITZER & VIDMAR, *supra* note 3, at 171 (noting that many state legislatures impose insurance requirements on other professionals).

47. This point has been made by other commentators. See, e.g., Robert J. Derocher, *State by state, mandatory malpractice disclosure gathers steam*, B. LEADER, March–Apr. 2004; James E. Towery, *The Case in Favor of Mandating Disclosure of Lack of Malpractice Insurance*, 14 PROF. LAW. 22 (2003).

48. See BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 136 (2011).

49. See, e.g., TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES AND PROFESSIONAL EMPOWERMENT* 212–14 (1987); Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 213 (1996).

lawyers' professional conduct.⁵⁰ It is no secret that the legal profession's recommendations often favor its own interests.

Theories of regulatory capture help to explain why lawyers' interests often prevail over those of the public. Capture is a process by which regulation "is consistently or repeatedly directed away from the public interest and toward the interest of the regulated industry by the intent and actions of the industry itself."⁵¹ Capture can occur when regulators "depend too much on the industries they regulate for information, political support, or guidance."⁵² Capture also occurs because the cultural or social influence of repeated interaction with the regulated industry may cause the regulator to think like the regulated industry and fail to "easily conceive another way of approaching its problems."⁵³ James Kwak explains how this "cultural capture" occurs through shared identity, perception of status, and social relationships.⁵⁴ He notes:

some factors that should make cultural capture a particularly important channel of industry influence are a high degree of similarity between industry representatives and regulators; an industry with a notable social purpose with which regulators can identify; an industry with high social, cultural, or intellectual status; many social connections between industry and regulators; and technically complex issues for which it is not clear how the benefits of policy alternatives are shared.⁵⁵

It is not difficult to see regulatory capture in the context of judicial regulation of the legal profession. Courts have become dependent on the legal profession to analyze issues and to make recommendations concerning lawyer regulation. State judges are also politically dependent on lawyers for judicial campaign contributions⁵⁶ and for recommendations that enable them to attain or retain their

50. All U.S. jurisdictions have adopted some version of the ABA Model Rules of Professional Conduct. See ABA, State Adoption of the ABA Model Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html [https://perma.cc/ZW8H-JFMQ].

51. See Daniel Carpenter & David A. Moss, *Introduction to PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* 13 (Daniel Carpenter & David A. Moss eds., 2014). Theories of capture are most often applied to administrative agencies, but have also been applied to legislatures, and more infrequently, to courts. See, e.g., Patrick Luff, *Captured Legislatures and Public-Interested Courts*, 2013 UTAH L. REV. 519, 520-21, 526; Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the "Captured" Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 465-66 (2002).

52. Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. SEE ALSO 1, 5 (2010); see James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE, *supra* note 51, at 75.

53. See Carpenter & Moss, *supra* note 51, at 18.

54. Kwak, *supra* note 52, at 80. For example, shared identification with a group makes people more generous to the in-group members, and also more trusting of those members. *Id.* at 81. Relationships also affect behavior because people care about what other people think about them, and especially those with whom they frequently come in contact. *Id.* at 89.

55. *Id.* at 95.

56. Lawyers often provide most of the elected judiciary's campaign contributions. See Benjamin Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market*, 37 GA. L. REV. 1167, 1198-99 (2003); Arielle Dreher, *Buying Justice: 'Dark Money' in Judicial*

positions.⁵⁷ Cultural factors further help to explain why judges tend to favor lawyers' interests.⁵⁸ Judges are former lawyers and continue to identify with them. As Benjamin Barton explains, judges "instinctively favor the legal profession in their decisions and actions."⁵⁹ Dennis Jacobs, former Chief Judge of the Second Circuit Court of Appeals observed that judges are "proud of being lawyers."⁶⁰ They "have a high regard for our profession, its processes, its culture and values, and its judgments."⁶¹ Judges enter their positions believing—as they learned in law school—that the legal profession is, and should remain, "self-regulating." While they also identify as judges, their thoughts and actions "are influenced by the group affiliation that is most salient in a given context."⁶² As between the interests of lawyers and the public, judges are more likely to identify with lawyers, especially when there are rarely opposing interest groups that are advocating for the public's interests.⁶³

So why, then, are state legislatures not protecting the public? Kritzer and Vidmar briefly note some possible explanations. Legislators may have concerns that courts will strike down legislation imposing requirements on lawyers on separation-of-powers grounds.⁶⁴ Alternatively, legislatures may not have done more "because of the combination of lawyers constituting a significant portion of the membership of state legislatures" and "the generosity of lawyers as campaign contributors."⁶⁵ The authors do not seem convinced by those explanations. And indeed, although some state courts claim the exclusive right to regulate lawyers,

Elections, JACKSON FREE PRESS (Nov. 16, 2016), <http://www.jacksonfreepress.com/news/2016/nov/16/buying-justice-dark-money-judicial-elections/> [<https://perma.cc/TE5Z-9UV7>] (reporting that most of supreme court justice's campaign contributions totaling \$586,000 came from attorneys).

57. Lawyers often sit on commissions that recommend judicial retention and elevation to higher judicial positions. *See, e.g.*, CONN. GEN. STAT. § 51-44a (2017) (providing that six members of Judicial Selection Commission shall be attorneys); N.Y. JUD. LAW § 62 (2017) (providing for at least four attorney members on Commission on Judicial Nomination). Bar associations endorse judicial candidates or give ratings to judges and judge-aspirants as "recommended" or "not recommended." *See, e.g.*, Ohio State Bar, *Ohio State Bar Association Commission on Judicial Candidates Announces Supreme Court of Ohio Candidate Ratings for the 2018 Election*, <https://www.ohioabar.org/about-us/media-center/osba-news/ohio-state-bar-association-commission-on-judicial-candidates-announces-ohio-supreme-court-candidate-ratings-for-the-2018-election/> [<https://perma.cc/2NEN-R4KU>].

58. It may not be quite accurate to call the phenomenon cultural "capture," which in the agency context occurs when regulators are exposed to the regulated industry and their views and attitudes are transformed. In contrast, judges are predisposed to favor lawyers' interests before they go on the bench.

59. BARTON, *supra* note 48, at 2; *see also* Dennis Jacobs, *The Secret Life of Judges*, 75 *FORDHAM L. REV.* 2855, 2855 (2007) (describing judges' "serious and secret bias" which includes a preference for "all things that need and use lawyers, enrich them, and empower them vis-à-vis other sources of power and wisdom").

60. Jacobs, *supra* note 59, at 2856.

61. *Id.* at 2859.

62. Kwak, *supra* note 52, at 82 (making this observation in the agency context).

63. *See* BARTON, *supra* note 48, at 37 (noting that judges identify with lawyers and "[o]n a subconscious level, when judges face a question that will affect the legal profession, judges naturally react in terms of how it will affect 'us' more than 'them'").

64. KRITZER & VIDMAR, *supra* note 3, at 171.

65. *Id.*

many courts share the power to regulate the legal profession with legislatures.⁶⁶ Moreover, fewer than fifteen percent of state legislators nationwide are lawyers,⁶⁷ suggesting that legislatures would not necessarily favor lawyers' interests.⁶⁸ And unlike campaign contributions to judges—which come primarily from lawyers—campaign contributions to state legislatures come from many sources. A more likely explanation for legislative inaction is that legislatures traditionally depend on the courts to oversee lawyers and will not become involved unless a problem emerges that garners public attention.⁶⁹ The problems created by uninsured lawyers receive relatively little media coverage,⁷⁰ and so the public has not mobilized to demand changes in the status quo.

Kritzer and Vidmar pose the question, “[w]hy is Oregon the only jurisdiction in the United States that requires [LPL] insurance?”⁷¹ They do not attempt to answer the question (understandably, because their focus is elsewhere), but it is an important one to consider. If courts are “captured” and legislatures are relatively indifferent, how did Oregon come to impose this requirement?

66. In California, the legislature is actively involved in lawyer regulation. *See, e.g.*, RICHARD L. ABEL, *LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT* 22–25, 30, 43–53, 55–56 (2011). In some other states, the courts have recognized the power of legislatures to co-regulate the legal profession. For example, the Oregon Supreme Court has acceded to some lawyer regulation by the state legislature as long as it does not unduly burden the court's judicial functions. *See* Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and their Resolution*, 39 WILLAMETTE L. REV. 795, 829 n.87 (2003); Roy Pulvers, *Separation of Powers Under the Oregon Constitution: A User's Guide*, 75 OR. L. REV. 443, 456–58 (1996); *see also* Walter W. Steele, Jr., *Cleaning Up the Legal Profession: The Power to Discipline—The Judiciary and the Legislature*, 20 ARIZ. L. REV. 413, 418 (1978) (noting that “there is a general recognition that the legislature can enact reasonable regulations governing the admission and disbarment of lawyers in the exercise of the police power and in aid of the courts' powers, but the ultimate power of admission or disbarment is inherently in the courts”).

67. Jen Fifield, *State Legislatures Have Fewer Farmers, Lawyers; But Higher Education Level*, PEW, Dec. 10, 2015, <http://www.pewtrusts.org/en/researchandanalysis/blogs/stateline/2015/12/10/statelegislatureshavefewerfarmerslawyersbuthighereducationlevel#!vz/home/OccupationsofStateLegislators/OccupationsofStateLegislators> [https://perma.cc/YG37-KBEX].

68. It is conceivable that even a small percentage of state lawyer-legislators could have an outsized impact on legislation relating to lawyer regulation, but further research would be needed to demonstrate that this occurs. In California, some of the antagonists of the California State Bar have included state Senators Nicholas Petris and Quentin Kopp, and Assembly Speaker Willie Brown, Jr., who were lawyers. *See* ABEL, *supra* note 66, at 43–45, 49. *But see generally* Nick Robinson, *The Decline of the Lawyer-Politician*, 65 BUFF. L. REV. 657, 711, 717 (2017) (indicating that lawyer-members of Congress have had a disproportionate influence over the U.S. legal system).

69. Even when legislatures have statutory obligations to oversee the state bar, they often do not seem to take an active role in identifying possible problems. In Texas, for example, the State Bar is subject to sunset review every twelve years. TEX. GOV'T CODE § 81.012 (3) (2017). The State Bar prepares a detailed Self-Evaluation Report that identifies issues that the bar believes should be considered during the process. *See Trends: State Bar Sunset Revision Process Underway*, 64 TEX. B. J. 962 (2001). The State Bar is typically deeply involved in working with the legislature on any legislative changes. *See* Mark D. White, *A Matter of Discipline*, 76 TEX. B. J. 1047, 1049 (2013).

70. *See* Levin, *Lawyers Going Bare*, *supra* note 2, at 1317.

71. KRITZER & VIDMAR, *supra* note 3, at 170–71. As noted, after the book went to press, Idaho also instituted an LPL insurance requirement.

The short answer is that the legal profession wanted it. During the 1970s, legal malpractice claims increased sharply, and it became harder—and more expensive—for lawyers to obtain LPL insurance.⁷² In 1970, almost forty percent of respondents to an Oregon State Bar (OSB) survey reported that their LPL insurance premiums had been raised and ten percent indicated that their insurers were showing reluctance to renew coverage.⁷³ The majority of respondents favored a bar-sponsored plan for LPL insurance that would be mandatory for private practitioners.⁷⁴ At the OSB's request, the 1973 Oregon legislature authorized the OSB to require all lawyers in private practice to carry LPL insurance,⁷⁵ but the OSB did not impose a requirement at that time. By the mid-1970s, the cost of LPL insurance for Oregon lawyers had more than tripled in the preceding ten years, claims against lawyers had increased “dramatically,” only two commercial LPL insurers wrote coverage in Oregon, and Oregon lawyers paid “among the highest premiums in the country.”⁷⁶ The OSB voted at its 1976 annual meeting to seek legislation authorizing the creation of a professional liability fund to insure all of its lawyers in private practice.⁷⁷ The Oregon legislature passed the law in 1977.⁷⁸

Other states that considered the issue in the 1970s did not impose an insurance requirement.⁷⁹ Many states have since considered imposing an LPL insurance requirement, but ultimately rejected the idea, due to concerns about cost and other bar opposition.⁸⁰ In 2017, forty years after Oregon imposed an LPL insurance

72. See George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L. J. 305, 308 (1997); Fredric L. Goldfein, *Legal Malpractice Insurance*, 61 TEMP. L. REV. 1285, 1285–86 (1988); John J. Lynch, *The Insurance Panic for Lawyers*, A.B.A. J., July 1, 1986, at 42, 43; Mary Ann Galante, *Legal Insurance Crisis: Malpractice Rates Zoom*, NAT'L L. J., June 3, 1985, at 1.

73. *Insurance Survey*, OR. ST. B. BULL., Apr. 1970, at 23.

74. *Id.* Of the 725 questionnaires returned, 605 lawyers answered the question, with 485 indicating they favored such an arrangement, 34 opposed, and 86 undecided. *Id.*

75. Oregon State Bar, Statement of the Board of Governors Professional Liability Fund, 1977 Annual Meeting 1.

76. *Id.*

77. *Id.* at 1–2.

78. *Id.* at 2; Goldfein, *supra* note 72, at 1296. Oregon requires all of its lawyers in private practice whose principal offices are in Oregon to purchase LPL insurance, unless the lawyers are exclusively providing pro bono services for OSB-certified pro bono programs. OR. REV. STAT. § 752.035 (2015); *Professional Liability Fund Coverage*, OR. ST. B., <https://www.osbar.org/probono/PLFCoverage.html> [<https://perma.cc/38M2-9VA7>].

79. Jerome B. Schultz, *Ensured Insurance: Bars Look at Mandatory Coverage*, B. LEADER, Jan.–Feb. 1987, at 18, 18. California and North Carolina did, however, form the first bar-related (lawyer-owned) mutual insurance companies, in order to provide more affordable LPL insurance to lawyers. Cohen, *supra* note 72, at 308.

80. Goldfein, *supra* note 72, at 1292, 1296; Robert I. Johnston & Kathryn Lease Simpson, *O Brothers, O Sisters, Art Thou Insured? The Case for Mandatory Disclosure of Malpractice Insurance Coverage*, PA. LAW., May–June 2002, at 28, 30; ABA, 2014–2016 Survey of Lawyers' Funds for Client Protection, § VII (2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2014_16_survey_of_lawyers_funds_for_client_protection_final.authcheckdam.pdf [<https://perma.cc/5X8N-FBZC>]. Some of the other arguments against mandatory insurance included, *inter alia*, that it would encourage frivolous lawsuits and that there is insufficient evidence that the public was being harmed. See Schultz, *supra* note 79, at 19.

requirement, Idaho became the second state to do so.⁸¹ Like Oregon, the Idaho initiative to require LPL insurance came from the state bar.⁸² In 2018, the Nevada State Bar petitioned the Nevada Supreme Court to adopt such a requirement, but with little explanation, the petition was denied.⁸³

III. ADDRESSING THE ACCESS TO JUSTICE PROBLEM

So what changes might states implement—if they were looking at this from the public’s perspective—to better address the access to justice problem for victims of lawyer malpractice? Unfortunately, there is no simple, single fix. In their final chapter, the authors offer some partial solutions. The facts they develop earlier in their book shed light on the likelihood that their suggestions—and some others offered here—will work to protect the public. These suggestions include LPL insurance requirements or alternatively, enhanced disclosure requirements, and other mechanisms to increase victims’ recoveries.

A. INSURANCE REQUIREMENTS

Not surprisingly, Kritzer and Vidmar view an LPL insurance requirement as an important step toward protecting the public.⁸⁴ There is some recent movement in that direction. In addition to the developments in Idaho and Nevada, an insurance requirement is also being considered in California, Georgia and Washington.⁸⁵

81. IDAHO B. COMM’N R. 302 (a)(5) (2018); In re Amendments to the Sections of the Idaho B. Comm’n Rules, Amended Order, Mar. 30, 2017. Lawyers who work in private practice and for corporate entities are required to maintain LPL insurance.

82. In 2015, Idaho State Bar (“ISB”) Commissioners, on their own initiative, began to consider whether to propose a change to the Bar Commission rules to require lawyers to carry LPL insurance. Telephone interview with Michelle Points, former Commissioner, Idaho State Bar (May 8, 2018). In October 2016, the Commissioners and district bar presidents approved a resolution for an insurance requirement. *See* General Session Minutes, Idaho State Bar Board of Commissioners, Oct. 6, 2016. The Commissioners discussed the proposal with bar members in district meetings as part of its annual 2016 resolution process. ISB 2016 Resolution Process, at 6. In December 2016, the resolution passed by a vote of 51% to 49%. Diane Minnich, *2016 Resolution Process—The Results*, THE ADVOCATE, Jan. 2017, at 22. The ISB then submitted a proposed rule change to the Idaho Supreme Court. *Id.*

83. Supreme Court of Nevada, ADKT 534, In the Matter of Amendment to Supreme Court Rule 79, Order Denying Petition for Amendment to Supreme Court Rule 79, Oct. 11, 2018. The court’s only explanation was that “the Board of Governors has provided inadequate detail and support demonstrating that the proposed amendment to SCR 79 is appropriate.” *Id.*

84. *See* KRITZER & VIDMAR, *supra* note 3, at 171.

85. In 2017, the Washington State Bar Association formed a mandatory malpractice insurance task force. *See* Mandatory Malpractice Insurance Task Force, Charter, Sept. 28, 2017, https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/task-force-charter.pdf?sfvrsn=381a3bf1_4 [<https://perma.cc/6BVW-PJRH>]. In 2018, the California Assembly required the California State Bar to study LPL insurance and to report its findings in 2019. *See* State Bar of California, Malpractice Insurance Working Group Charter 1, <http://www.calbar.ca.gov/Portals/0/documents/cc/Malpractice-Insurance-Working-Group-Charter.pdf> [<https://perma.cc/8MV6-F93V>]. The Georgia State Bar began considering the issue in late 2018. *See* Greg Land, *State Bar Mulls Rule on Purchase, Disclosure of Lawyer Malpractice*

The argument in favor is primarily public protection.⁸⁶ Secondly, proponents argue that it is important to the public's perception of lawyers and to the profession's ability to continue to self-regulate.⁸⁷ The main argument against an LPL insurance requirement is that some lawyers simply cannot afford it and would be unable to practice law.⁸⁸ Opponents also contend that such a requirement may force other lawyers to raise their rates or to perform less pro bono work.⁸⁹ In addition, opponents argue that since insurers can set high premiums and deny coverage altogether, it would be insurers—and not the courts—that would determine which lawyers could practice law.⁹⁰ Some fear that if all lawyers are insured, they will become a “target” for lawsuits.⁹¹

Not surprisingly, most of the opposing arguments focus on lawyers' interests. The most compelling seems to be that some uninsured lawyers truly cannot afford LPL insurance. We do not know how many lawyers fall into that category.⁹² Many lawyers are uninsured because they do not think they need insurance, either because they believe they are careful lawyers or because they are engaged in low-risk practices.⁹³ Some are philosophically opposed to it.⁹⁴ When uninsured lawyers report that they are uninsured because of the cost, they do not necessarily mean that they cannot afford LPL insurance. In some cases, they simply do not

Insurance, Daily Report (Jan 4, 2019), <https://www.law.com/dailyreportonline/2019/01/04/will-state-require-purchase-disclosure-of-legal-malpractice-insurance/> [<https://perma.cc/2PH5-3V8J>].

86. See, e.g., Goldfein, *supra* note 72, at 1296 (1988); Thomas G. Bousquet, *It's Time for Mandatory Malpractice Insurance*, TEXAS LAW., Dec. 6, 1993, at 11; Schultz, *supra* note 79, at 18, 19; Memorandum from Darrel Tillar Mason, Chair, Special Comm. on Lawyer Malpractice Ins., to the Exec. Comm. & Bar Council of the Va. State Bar 3 (Oct. 2, 2007), <http://www.vsb.org/docs/mmi-en6-080408.pdf> [<https://perma.cc/4HGH-HQ6A>].

87. See, e.g., REPORT OF THE NEW JERSEY SUPREME COURT AD HOC COMMITTEE ON ATTORNEY MALPRACTICE INSURANCE 45–46 (2017), <https://judiciary.state.nj.us/courts/assets/supreme/reports/2017/atmalpracticeinsurance.pdf> [<https://perma.cc/VCU5-RN82>]; Schultz, *supra* note 79, at 19.

88. See Levin, *Lawyers Going Bare*, *supra* note 2, at 1320.

89. See *id.* at 1322; Schultz, *supra* note 79, at 19.

90. See Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 FORDHAM URBAN L. J. 177, 207 n.167 (2012); REPORT OF THE NEW JERSEY SUPREME COURT AD HOC COMMITTEE ON ATTORNEY MALPRACTICE INSURANCE, *supra* note 87, at 53–54.

91. See Mason Memorandum, *supra* note 86; NEVADA PROFESSIONAL LIABILITY INSURANCE SURVEY 6 (2017) (on file with author).

92. For example, a survey of uninsured New Jersey lawyers indicates that about 64% make less than \$50,000 annually from private practice, but does not reveal the respondents' total household income. See REPORT OF THE NEW JERSEY SUPREME COURT AD HOC COMMITTEE ON ATTORNEY MALPRACTICE INSURANCE, *supra* note 87, at app. Z, at 20, available at <https://njcourts.gov/courts/assets/supreme/reports/2017/malpracapp.pdf> [<https://perma.cc/33FU-4LS5>] [hereinafter N.J. Survey Responses]. The survey also does not reveal whether these individuals are actually practicing law.

93. See Levin, *Lawyers Going Bare*, *supra* note 2, at 1293–95. A survey of uninsured Nevada lawyers revealed that the primary reason almost 24% were uninsured was because they had confidence in their practice and did not need it. See NEVADA PROFESSIONAL LIABILITY INSURANCE SURVEY, *supra* note 91, at 5. Likewise, a survey of uninsured New Jersey lawyers revealed that 32% did not carry insurance because they did not believe that it was necessary. N.J. Survey Responses, *supra* note 92, at 9.

94. See, e.g., Levin, *Lawyers Going Bare*, *supra* note 2, at 1291–92; REPORT OF THE NEW JERSEY SUPREME COURT AD HOC COMMITTEE ON ATTORNEY MALPRACTICE INSURANCE, *supra* note 87, at 51 (noting the argument that an insurance requirement “usurps an attorney's freedom of choice”).

want to pay the premium because their earnings from their legal work are relatively low.⁹⁵ This may be because they are at or near retirement⁹⁶ or are primarily working on a pro bono basis. A survey of New Mexico uninsured lawyers suggests that less than twenty percent of its uninsured lawyers truly may be unable to pay for LPL insurance.⁹⁷ The same lawyers who cannot afford LPL insurance are also unlikely to be able to pay for malpractice claims.

The argument that an insurance requirement would force some uninsured lawyers who provide pro bono and low-cost legal services to raise their rates or discontinue their pro bono work directly implicates the public interest. Yet it does not seem to be a good reason for exempting large numbers of lawyers from an insurance requirement. A survey of New Mexico uninsured lawyers suggests that less than eighteen percent performed *any* pro bono work.⁹⁸ For lawyers who perform exclusively pro bono work, this problem can be addressed, as it is in Oregon and Idaho, by exempting lawyers from purchasing insurance if they work through bar-approved pro bono programs that provide insurance coverage to volunteer lawyers.⁹⁹ It is true that there may be a small number of lawyers who serve underserved populations, charge very little, barely eke out a living, and cannot afford LPL insurance.¹⁰⁰ It may be that exceptions to an insurance requirement can be made for such lawyers, whose clients can be afforded some protection through a client malpractice fund.¹⁰¹

95. This could be seen, for example, in responses to a survey of uninsured New Jersey lawyers. See N.J. Survey Responses, *supra* note 92, at 10–11 (responses including “[i]ncome does not warrant spending” and “[n]ot enough volume of work to justify expense”).

96. See Levin, *Lawyers Going Bare*, *supra* note 2, at 1292, 1329. A survey of New Jersey uninsured lawyers revealed that more than 55% worked part-time (26 hours or less). N.J. Survey Responses, *supra* note 92, at 3. Over 19% were age 70 and over and almost 32% were ages 60–69. *Id.* at 19.

97. Levin, *Lawyers Going Bare*, *supra* note 2, at 1320–21. Of course, there are some states in which LPL insurance premiums are significantly higher than in New Mexico. For example, the average cost of \$100,000/\$300,000 of coverage for New Jersey lawyers in solo and two-person firms is about \$4100. E-mail from Mike Mooney, Senior Vice President, Prof'l Liab. Practice Leader, USI Affinity, to author (July 9, 2018, 8:45 EDT) (on file with author).

98. See Levin, *Lawyers Going Bare*, *supra* note 2, at 1322. It was unclear whether all of that pro bono work was for persons of limited means. *Id.* at 1322–23.

99. See OR. ST. B. BYLAWS §§ 6.101, 13.201(f) (2017); Annette Strauser, *2018 Malpractice Coverage Requirement: General Information*, IDAHO STATE BAR (Aug. 29, 2017), <https://isb.idaho.gov/blog/author/astrouser/> [<https://perma.cc/JGG4-CPET>]. Lawyers may also be able to obtain coverage when representing individual clients on a pro bono basis through the Idaho Volunteers Lawyer Program. See E-mail from Susan R. Pierson, Dir., Idaho Volunteer Lawyers Program, to author (July 30, 2018, 14:00 EDT) (on file with author).

100. See Levin, *Lawyers Going Bare*, *supra* note 2, at 1292.

101. Currently, client security funds help compensate victims of attorney defalcations when lawyers cannot repay the money; they do not compensate victims of malpractice. See, e.g., KY. SUP. CT. R. 3.820(10)(d) (2018); N.Y. COMP. CODES R. & REGS. tit. 22, § 7200.8(d) (2018). If a malpractice claims fund were formed, low-income uninsured lawyers could, in lieu of purchasing LPL insurance, be required to contribute a sum annually to a malpractice claims fund. The required contribution would be less than the cost of malpractice insurance. Uninsured lawyers would remain financially responsible for satisfying any malpractice judgment against them and the fund would only compensate victims if the uninsured lawyers could not do so. This would incentivize these lawyers to purchase LPL insurance if they have the resources to obtain it. It may be possible to administer such a fund at a relatively low cost, as some states run client security funds relatively

The other arguments against mandatory insurance are less compelling. For example, the claim that it would be insurance companies and not the courts that determine who can practice law does not bear up under scrutiny. Some states may be able to create a professional liability fund like the one in Oregon that insures all lawyers, regardless of their claims experience. In states that require lawyers to purchase LPL insurance in the open market, lawyers can seek to join law firms that provide insurance if they cannot otherwise afford it. They may also be able to work in other settings (e.g., the government, in-house) where they need not personally purchase insurance. In most states, there are multiple insurance companies that will write insurance for solo and small firm lawyers¹⁰² and indeed, only a tiny percentage of lawyers do not carry insurance because they cannot obtain coverage.¹⁰³ If all insurance companies in a state consider a lawyer to be an unacceptable risk, why should the lawyer be permitted to practice law uninsured?

Idaho's recent experience requiring lawyers to carry \$100,000/\$300,000 of LPL insurance purchased on the open market suggests that an insurance requirement does not produce dire consequences. In Idaho, the average mid-career solo and small firm lawyer pays roughly \$2400–\$2500 per year for LPL insurance.¹⁰⁴ As far as the Idaho State Bar can ascertain, every lawyer who wished to secure coverage was able to do so.¹⁰⁵ Most of the previously uninsured lawyers purchased the minimum amount of insurance with no prior acts coverage.¹⁰⁶ Consequently, their first year of coverage cost them \$1000–\$1300, although it will rise in the future.¹⁰⁷ Some lawyers licensed in Idaho who did not practice law there chose to change to inactive status. Likewise, some older lawyers changed to senior status or became emeritus members (enabling them to perform pro bono work).¹⁰⁸ However, these lawyers can resume active practice if they purchase LPL insurance.¹⁰⁹

Finally, the concern that an insurance requirement would make lawyers a “target” of frivolous lawsuits appears misplaced. In Oregon, where the Professional

inexpensively. See ABA 2014–2016 SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION, *supra* note 80, at § II, 26–27. Due to the low number of contributors to the fund, there would need to be limits on the maximum recovery, just as there are with client security funds. *Id.* § II, at 10–11.

102. See, e.g., Leslie C. Levin, *Uninsured Lawyers and Professional Liability Requirements: What Does the Research Tell Us?*, NWLAWYER, Aug. 2018, at 36, 37 (noting that there are at least eight insurance carriers for solo and small firm lawyers in Washington). *But see* REPORT OF THE NEW JERSEY SUPREME COURT AD HOC COMMITTEE ON ATTORNEY MALPRACTICE INSURANCE, *supra* note 87, at 154 (noting only five carriers are writing insurance in that state).

103. Levin, *Lawyers Going Bare*, *supra* note 2, at 1293; NEVADA PROFESSIONAL LIABILITY INSURANCE SURVEY, *supra* note 91, at 5; N.J. Survey Responses, *supra* note 92, at 9.

104. Telephone Interview with Anonymous Insurer (July 5, 2018).

105. See Levin, *supra* note 102, at 37.

106. Telephone Interview with Anonymous Insurer, *supra* note 104.

107. The fact that prior acts are not covered reduces the insurers' exposure. The premiums will increase by about 12–15% every year until these attorneys are paying the same premiums as previously insured lawyers. *Id.*

108. Levin, *supra* note 102, at 37.

109. *Id.*

Liability Fund (PLF) insures all lawyers in private practice whose principal offices are in Oregon, lawyers pay \$3300 annually for \$300,000/\$300,000 coverage, regardless of their claims experience.¹¹⁰ The PLF receives about 12 claims annually for every 100 insured lawyers,¹¹¹ which is significantly higher than the roughly 3.75 claims per hundred lawyers in other states, where not all lawyers are insured.¹¹² This differential can be partly—but not entirely—explained by the fact that all Oregon private practitioners are in the insurance pool. Moreover, there are no deductibles for claims covered by the Oregon PLF, making it likely that lawyers submit all claims, in contrast to lawyers in other states who may choose not to notify their insurers when claims against them do not exceed their deductibles. In addition, the reported claims rate may be higher in Oregon because lawyers' annual payments to the PLF are not based on claims experience, so there are no adverse consequences for Oregon lawyers when they submit claims. While it may be that more claims are brought against Oregon lawyers because lawyers are known to be insured, it does not appear that there are more “frivolous” claims in Oregon. Indeed, Oregon lawyers report a high level of satisfaction with the way in which the PLF handles claims,¹¹³ suggesting that claims are handled and paid appropriately.

B. INSURANCE DISCLOSURE

As Kritzer and Vidmar note, the most common alternative approach to an insurance requirement is that lawyers disclose whether they maintain LPL insurance. This is the approach suggested by the ABA,¹¹⁴ and approximately half of the states have some sort of insurance disclosure requirement.¹¹⁵ In seven states,

110. OR. REV. STAT. § 752.035 (2018); *Coverage*, OR. STATE BAR PROF'L LIAB. FUND, <https://www.osbplf.org/coverage/overview.html> [<https://perma.cc/K29T-8MJF>].

111. KRITZER & VIDMAR, *supra* note 3, at 70. The PLF may be more generous in what it calls a “claim” than other carriers. E-mail from Carol J. Bernick, Chief Exec. Officer, Or. PLF, to author (Oct. 22, 2018, 12:55 EDT) (on file with author). The PLF counts as “claims” any matter in which a demand was made, an investigation conducted, or some other action (such as a claim repair) was undertaken by the PLF, even if there was never a demand from a claimant. KRITZER & VIDMAR, *supra* note 3, at 70. It also includes as “claims” instances of deposition/file subpoena review and representation, even though there is no allegation of wrongdoing involving the insured. E-mail from Bernick, *supra*.

112. KRITZER & VIDMAR, *supra* note 3, at 70. This is comparable to the claims rates in Canada, where lawyers are required to maintain LPL insurance. *Id.* at 70–71.

113. In 1997, 79% of covered attorneys were “very satisfied” with the way the PLF handled and disposed of claims, 19% were “satisfied” and only 2% were “dissatisfied.” Kirk R. Hall, *Annual Report of the PLF*, OR. ST. B. BULL., Nov. 1998, at 43, 48. That was the seventh year that the PLF received such high marks. *Id.* Comparable figures were reported based on a 2007 survey. See KIRK R. HALL, MINIMUM FINANCIAL RESPONSIBILITY FOR LAWYERS 18 (rev. 2014) (2000).

114. The ABA model rule requires lawyers in private practice to certify annually whether they maintain LPL insurance. See MODEL COURT RULE ON INSURANCE DISCLOSURE (AM. BAR ASS'N 2004), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_court_rule_on_insurance_disclosure.pdf [<https://perma.cc/AY75-NUWT>]. The rule also states that “[t]he information submitted by lawyers will be made available by such means as designated by the highest court in the jurisdiction.” *Id.*

115. AM. BAR ASS'N STANDING COMM. ON CLIENT PROTECTION, AM. BAR ASS'N, STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON INSURANCE DISCLOSURE (2016), <https://www.americanbar.org/content/dam/>

lawyers are required to directly disclose to clients if they do not maintain insurance.¹¹⁶ South Dakota has the most robust direct disclosure rule, which requires lawyers to disclose directly to clients if they do not maintain at least \$100,000 of LPL insurance and to convey this information in every written communication with clients and in any advertising.¹¹⁷ In other direct disclosure states, the information is typically only communicated to clients through written notice at the time of engagement,¹¹⁸ except in Pennsylvania, where the information is also posted on the Supreme Court's Disciplinary Board website.¹¹⁹ In sixteen other states, insurance information is disclosed to regulators, but in only ten of those states is the information published on state court or bar websites.¹²⁰

Kritzer and Vidmar view the South Dakota approach to insurance disclosure as "ideal" as compared to other states,¹²¹ but even it has limitations. In South Dakota, the information about whether a lawyer is insured is not posted on any state website, meaning that unless the lawyer advertises, clients usually do not learn that the lawyer is uninsured until the lawyer sends a written communication to a client. This may not occur until after the client has agreed to the representation.¹²² In most of the other direct disclosure states, where insurance information is not required to be disclosed until the lawyer sends the retainer letter or related documents, clients "probably fail to notice it just as they fail to notice many details in a legal document."¹²³ Kritzer and Vidmar suggest that lawyers be required to give clients a short pamphlet at the outset of representation that describes potential avenues of redress if the client is dissatisfied and includes a prominent check-in-a-box to indicate whether the lawyer is insured.¹²⁴ Alternatively, they suggest that when the client is provided with a fully executed retainer letter, it be accompanied by a cover sheet prominently indicating whether the lawyer is insured.¹²⁵

aba/administrative/professional_responsibility/chart_implementation_of_mcrid.authcheckdam.pdf [https://perma.cc/7ZES-U3DT].

116. The states are Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania, and South Dakota. *Id.*

117. S.D. RULES OF PROF'L CONDUCT R. 1.4(c), 7.1(a)(1) (2018).

118. *See, e.g.*, N.M. RULES OF PROF'L CONDUCT R. 16-104(c) (2018). In some states, clients are required to provide written acknowledgement that they receive the notice. *Id.*

119. *Disciplinary Board Makes it Easy for Public to Know if Lawyers Have Professional Liability Insurance*, DISCIPLINARY BD. OF THE SUPREME COURT OF PA. (May 10, 2017), <https://www.padisiplinaryboard.org/news-media/news-article/3/disciplinary-board-makes-it-easy-for-public-to-know-if-lawyers-have-professional-liability-insurance> [https://perma.cc/S2FT-N3RG]; Levin, *Lawyers Going Bare*, *supra* note 2, at 1298–99.

120. Levin, *Lawyers Going Bare*, *supra* note 2, at 1301–02.

121. KRITZER & VIDMAR, *supra* note 3, at 174.

122. S.D. RULES OF PROF'L CONDUCT R. 1.4(d) (2018) (stating that disclosure must be made "in every written communication with a *client*") (emphasis added).

123. KRITZER & VIDMAR, *supra* note 3, at 174.

124. *Id.*

125. *Id.*

The authors' suggestions would be improvements, but they do not address some larger problems with current insurance disclosure regimes. First, clients are unlikely to terminate the representation if they do not learn the lawyer is uninsured until after they have orally agreed to engage the lawyers' services. Cognitive biases make it difficult for a client to change course once a decision to retain a lawyer has been made.¹²⁶ Social norms, power imbalances, and time pressure also make it hard for a client to "disengage" from the lawyer at that point.¹²⁷

While some states post lawyers' insurance information on websites for the public, it is unlikely that the public ever sees this information. They have little reason to look for it because the public believes that all lawyers are insured.¹²⁸ If they think to search for the information, it is not easy to locate. This information usually cannot be found through a simple internet search engine inquiry. Members of the public ordinarily must locate the correct state court or bar website and enter a lawyer's name. Kritzer and Vidmar suggest that state bars should periodically undertake a public service announcement to alert residents to the availability of lawyers' insurance information on websites.¹²⁹ This is a good suggestion, but even more is needed.

The problem is that not only does the public fail to find this information, but it does not understand the potential implications of lawyers being uninsured. Many people believe that lawyers are affluent¹³⁰ and do not realize that some uninsured lawyers lack the means to compensate clients for malpractice. They do not know that lawyers are allowed to shield their assets from malpractice actions. Lawyers' insurance information posted on official websites does not address this problem. For example, when the public sees that an Arizona attorney does not have LPL insurance, they are told only that "Arizona lawyers are not required to have professional liability insurance" and that lawyers in private practice are "required to report whether or not they carry such insurance."¹³¹ The Virginia State Bar (VSB) website states under its "Frequently Asked Questions" section that the VSB does not require lawyers to obtain LPL insurance, "but encourages them to

126. Levin, *Lawyers Going Bare*, *supra* note 2, at 1326–27.

127. *See id.* at 1326.

128. *See id.* at 1325. Indeed, in my conversations with attorneys, I have discovered that even many lawyers believe that they are required to carry LPL insurance.

129. KRITZER & VIDMAR, *supra* note 3, at 173.

130. *See, e.g.*, LEO J. SHAPIRO & ASSOCS., PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 18 (2002), https://www.americanbar.org/content/dam/aba/migrated/marketresearch/Public Documents/public_perception_of_lawyers_2002.pdf [<https://perma.cc/8HJY-DNMN>] (noting that the public believes that law careers are lucrative); David O'Boyle & Michael Smith, *Survey Reveals Public Perceptions of Lawyers and Legal Profession*, WASH. LAW. (Apr. 2015), <https://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/april-2015-legal-beat.cfm> [<https://perma.cc/7VJL-Y3PD>] (reporting that nearly half of respondents think lawyers are rich).

131. *Find a Lawyer by Name*, STATE BAR OF ARIZ., <https://www.azbar.org/FindALawyer.aspx> [<https://perma.cc/4RU4-WA5Q>] (last visited Feb. 16, 2019).

purchase coverage,” with no further explanation.¹³² The Washington State Bar Association website states that not all lawyers maintain LPL insurance and that “[s]ome lawyers may make a responsible decision not to maintain insurance because . . . the lawyer may choose to be financially responsible (self-insured).”¹³³ This statement may mislead the public into believing that all uninsured lawyers will “self-insure.”

At a minimum, the public should be able to find a lawyer’s insurance status through a simple internet search engine (e.g., Google) and the website should state unambiguously that if clients hire an uninsured lawyer, they may be unable to recover on legal malpractice claims. In addition, uninsured lawyers should be required to display this information in law firm advertising—as they are in South Dakota—and should also be required to prominently display this information on their law firm websites so that the public can learn before ever contacting the lawyer that the lawyer is uninsured.

C. OTHER MECHANISMS TO INCREASE VICTIMS’ RECOVERIES

As Kritzer and Vidmar note, insurance requirements are only a partial solution to the access to justice problem. They discuss some other ideas that would make the law more favorable to plaintiffs and enable them to recover damages for non-economic harm.¹³⁴ They also suggest one-way attorneys’ fee shifting (requiring the defendant to pay a winning plaintiff’s attorneys’ fees) to incentivize plaintiffs’ lawyers to take on LPL cases that involve relatively modest damages. They point to New Jersey, where such one-way fee shifting can occur.¹³⁵ This seems likely to encourage more lawyers to take on low-value cases against insured lawyers, but it is unlikely to induce them to take cases against uninsured lawyers, who may lack the means to pay for attorneys’ fees if a judgment is entered against them. Before implementing such a change, it would be important to consider its impact on the cost of LPL insurance. New Jersey’s relatively high LPL premiums, in comparison to neighboring states,¹³⁶ are probably partly due to its plaintiff-friendly laws, but fee-shifting may also contribute to the cost of LPL premiums there. High premiums may reduce the likelihood that a state will require all lawyers in private practice to carry LPL insurance and could even result in more lawyers going bare.

132. *Frequently Asked Questions*, VA. STATE BAR, <http://www.vsb.org/site/public/faqs> [<https://perma.cc/99LZ-XNKS>] (last updated Mar. 5, 2018).

133. *Professional Liability Insurance*, WASH. STATE BAR ASS’N, <https://www.wsba.org/for-legal-professionals/license-renewal/license-renewal-faqs/professional-liability-insurance> [<https://perma.cc/N4DL-CPTS>] (last updated Aug. 21, 2018).

134. See KRITZER & VIDMAR, *supra* note 3, at 180–84.

135. *Id.* at 179–80.

136. See REPORT OF THE NEW JERSEY SUPREME COURT AD HOC COMMITTEE ON ATTORNEY MALPRACTICE INSURANCE, *supra* note 87, at 155.

The authors also suggest that certain legal malpractice claims might be handled outside the courts through alternate dispute resolution mechanisms that make it possible for victims to pursue such claims without legal representation.¹³⁷ They point to the Legal Services Ombudsman and the Financial Ombudsman Services in England or consumer dispute tribunals in Australia and the Netherlands as models.¹³⁸ They also outline the practical problems with attempting to import these approaches to the United States. Lawyers are regulated by each state, and it is unlikely that smaller states would generate sufficient claims to have a viable operation that could justify the expenditures to maintain these new entities.¹³⁹ The authors creatively suggest pooling arrangements among several states,¹⁴⁰ but their proposal may require claimants and witnesses to travel great distances to prove their claims. Moreover, these additional tribunals would require a level of funding that may make them difficult to implement in the United States.¹⁴¹

In sum, there are no easy solutions to effectively address the access to justice problem that Kritzer and Vidmar identify. Many of the ideas that they offer are good ones, notwithstanding some of the obstacles they may encounter. In the same spirit, I would also like to offer two other ideas. My proposals, like those proposed by the authors, are only partial and are not without challenges, but they may also help address some of the difficulties that victims face when lawyers screw up.

1. MONETARY AWARDS IN DISCIPLINE PROCEEDINGS

State lawyer discipline systems could do more to help the victims of lawyer malpractice. Discipline systems are currently geared toward protecting the public from lawyers who have misbehaved, rather than compensating the victims of lawyer misconduct.¹⁴² This forces malpractice victims to hire another lawyer to seek

137. See KRITZER & VIDMAR, *supra* note 3, at 177.

138. *Id.* at 176–79.

139. *Id.* at 178.

140. *Id.*

141. Lawyer discipline systems are already underfunded in some jurisdictions. For example, Mississippi's budget for lawyer discipline amounts to \$95 per lawyer, and it only employs three lawyers and no investigators or auditors to oversee more than 9000 lawyers. See STANDING COMM. ON PROF'L DISCIPLINE, AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, 2016 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.), charts VII, IX pt. A (2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2016_sold_chart%207.pdf [<https://perma.cc/RD7U-YGDM>], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2016_sold_chart%209a.pdf/ [<https://perma.cc/ZSB9-VA4G>]. See also Rick Brundett, *ABA Report Starts Discussion About How to Improve Lawyer Discipline in S.C.*, S.C. LAW WEEKLY, Oct. 27, 2008 (noting that South Carolina system is underfunded); Kris Fischer, *Q & A with Hal R. Lieberman*, LEGAL ETHICS (Mar. 25, 2011), <http://nylegaethics.attorney/new-q-a-with-hal-r-lieberman/> [<https://perma.cc/DSC9-W3ZS>] (noting inadequate resources in New York discipline system); Alana Roberts, *Tough Love; Florida Supreme Court Takes the Hard Line, Stiffens Penalties in Attorney Misconduct Cases; Attorney Discipline*, PALM BEACH DAILY BUS. REV., July 2, 2008, at A1 (discussing funding of Florida discipline system). It seems unlikely that funding will be available for additional tribunals devoted to lawyer misconduct, unless lawyers fund them.

142. See, e.g., Fla. Bar v. Della-Donna, 583 So. 2d 307, 311 (Fla. 1989) (stating that disciplinary proceedings “are instituted in the public interest and to preserve the purity of the courts” and “are not designed to

monetary relief elsewhere. While restitution is recognized as an appropriate discipline sanction in several jurisdictions,¹⁴³ it is rarely awarded, except when lawyers have misappropriated funds or otherwise have been unjustly enriched.¹⁴⁴ A few states occasionally order fee restitution in discipline cases when lawyers neglect client matters.¹⁴⁵ More states should routinely do so.¹⁴⁶ But fee restitution only provides victims with very limited relief, and it provides none if the lawyers were working on a contingent fee basis.

The rules governing lawyer discipline could be amended to do more for victims by providing for limited monetary awards when certain lawyer misconduct rises to the level of lawyer malpractice. As Kritzer and Vidmar note, Israel's discipline tribunal can award aggrieved clients up to 25,000 NIS (about \$6500 U.S.) when a disciplinary violation causes harm.¹⁴⁷ In Australia, some state lawyer disciplinary tribunals can award compensation orders up to \$25,000 AUD (about \$18,000 U.S.).¹⁴⁸ Such awards would not run afoul of the right to a jury trial in

redress private grievances"); *In re Harman*, 403 N.W.2d 459, 460 (Wis. 1987) (noting that purpose of discipline "'is for the protection of the public, the courts and the legal profession.' It is not the purpose of lawyer discipline to make whole those harmed by attorney misconduct" (citation omitted)).

143. See, e.g., PROCEDURES OF ARK. SUPREME COURT REGULATING PROF'L CONDUCT OF ATTORNEYS AT LAW § 18(C) (2018); UTAH RULES GOVERNING THE UTAH STATE BAR R. 14-603(i)(1) (2018); STANDING COMM. ON PROF'L DISCIPLINE, *supra* note 141, chart III pt. B, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2016_sold_chart%203b.pdf [<https://perma.cc/Z8ZH-3R46>].

144. Unlike damages, restitution is aimed at remedying unjust enrichment. See RESTATEMENT (THIRD) OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. LAW INST. 2011).

145. See, e.g., *In re Wolfram*, 847 P.2d 94, 104 (Ariz. 1993) (ordering restitution in amount of \$3650 where attorney neglected criminal matter); *In re Starczewski*, 306 P.3d 905, 917 (Wash. 2013) (ordering \$15,000 in restitution where lawyers' neglect resulted in client's inability to accept a settlement); *Lawyer Disciplinary Bd. v. Dues*, 624 S.E.2d 125, 135 (W. Va. 2005) (ordering restitution in amount of \$13,000 to clients where lawyer neglected cases); *In re Hahnfeld*, 826 N.W.2d 47, 56-57 (Wis. 2013) (ordering restitution where lawyer neglected case). Texas appears to order fee restitution more frequently. See COMM'N FOR LAWYER DISCIPLINE, STATE BAR OF TEX., ANNUAL REPORT 12 (2018), https://www.texasbar.com/AM/Template.cfm?Section=Grievance_and_Ethics_Information1&Template=/CM/ContentDisplay.cfm&ContentID=41986 [<https://perma.cc/3GH9-VRE7>] (noting that Texas lawyers are required to immediately pay restitution "in most cases involving agreed disciplinary judgments"); E-mail from Claire Reynolds, Pub. Affairs Counsel, Tex. State Bar Office of the Chief Disciplinary Counsel, to author (Sept. 17, 2018, 15:53 EDT) (on file with author) (explaining that restitution usually occurs when lawyer failed to perform any meaningful work or when attorney steals client money).

146. Some jurisdictions also occasionally require lawyers to compensate victims for additional losses as a condition of probation or readmission to practice. See, e.g., *Sorenson v. State Bar*, 804 P.2d 44, 49 (Cal. 1991) (requiring lawyer, as a condition of probation, to pay attorneys' fees a grievant was forced to incur to defend against lawyer's harassing litigation); *Fla. Bar v. Hogsten*, 127 So. 2d 668, 669 (Fla. 1961) (requiring lawyer, as condition of readmission, to pay \$100 to compensate client for cost of hiring a second lawyer to complete work not performed by disciplined lawyer); *In re Klewin*, 295 N.W.2d 11, 11 (Wis. 1980) (requiring that if lawyer seeks reinstatement, he provide proof "that any client who may have suffered any loss through respondent's neglect has been made whole by the respondent"). In Wisconsin, petitioners for reinstatement "shall show" that petitioner "has made restitution to or settled all claims of persons injured or harmed by petitioner's misconduct." Wis. SCR 22.29(4)(m) (2018). More states should take this approach, as well.

147. KRITZER & VIDMAR, *supra* note 3, at 179.

148. See *Fact Sheet: Negligence*, WESTERN AUSTRALIA LEGAL PROF. COMPLAINTS COMMITTEE 2, <https://www.lpbwa.org.au/Documents/Complaints/The-Committee-s-Services/Fact-Sheet-Negligence.aspx> [<https://perma.cc/7CJW-THUC>] (last updated Mar. 2009) (noting the State Administrative Tribunal can award

most jurisdictions if this compensation does not displace the right to bring a malpractice action in court and the lawyer can obtain judicial review of the award.¹⁴⁹ In the context of lawyer regulation, some courts have even upheld the constitutionality of mandatory *non-reviewable* arbitration to resolve lawyer-client fees disputes.¹⁵⁰ The courts' reasoning for why this process does not run afoul of the right to a jury trial rests, in part, on courts' special responsibilities to regulate lawyers and the fact that law practice is not a right, but a privilege.¹⁵¹ Thus, the courts reason, the state may impose reasonable conditions and limitations on those who wish to practice law.¹⁵² Courts have also justified these decisions in the fee arbitration context by noting the importance of a system that can be used effectively by clients, who are on an unequal footing with their lawyers, and on the importance of maintaining public confidence in lawyers and the judicial system.¹⁵³

Awarding some compensation in discipline proceedings would also not violate attorneys' due process rights. As the United States Supreme Court has noted, "Due process is not necessarily judicial process."¹⁵⁴ It merely requires notice and an opportunity to be heard before an impartial observer and the right to confront

maximum compensation of \$25,000 unless the practitioner agrees to a higher amount); *Complaints Process Information*, LAW SOC'Y OF N.S.W., <https://www.lawsociety.com.au/sites/default/files/2018-04/COMPLAINTS%20PROCESS%20INFORMATION.pdf> [<https://perma.cc/S9C5-V33H>] (stating that the maximum compensation order is \$25,000 unless the solicitor and complainant agree otherwise).

149. There is no federal constitutional right to a jury trial in state actions. *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217 (1916); *Kelley Drye & Warren v. Murray Indus., Inc.*, 623 F. Supp. 522, 526–27 (D.N.J. 1985); *Nodvin v. State Bar*, 544 S.E.2d 142, 146 (Ga. 2001). State constitutions typically provide for the right to a jury trial in many cases but have not precluded courts from requiring non-judicial determinations of matters prior to the opportunity for a trial. *See, e.g., Firelock Inc. v. Dist. Court*, 776 P.2d 1090, 1096 (Colo. 1989) (upholding constitutionality of state's mandatory arbitration statute for most civil actions under \$50,000 where statute provided for subsequent *de novo* review by court); *Parker v. Children's Hosp. of Phila.*, 394 A.2d 932, 939 (Pa. 1978) (upholding statute requiring compulsory arbitration of medical malpractice claims before proceeding to court). States may also provide for the award of compensatory damages in administrative proceedings where judicial review is available. *See, e.g., Ky. Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854–55 (Ky. 1981); *Vainio v. Brookshire*, 852 P.2d 596, 599 (Mont. 1993).

150. *See, e.g., Anderson v. Elliot*, 555 A.2d 1042, 1049–50 (Me. 1989); *In re LiVolsi*, 428 A.2d 1268, 1275 (N.J. 1981); *Shimko v. Lobe*, 813 N.E.2d 669, 676–77 (Ohio 2004).

151. *See, e.g., Guralnick v. Supreme Court of N.J.*, 747 F. Supp. 1109, 1116 (D.N.J. 1990), *aff'd*, 961 F.2d 209 (3d Cir. 1992); *Stuart v. Walker*, 143 A.3d 761, 766 (D.C. 2016); *Anderson*, 555 A.2d at 1048. *See generally* KRITZER & VIDMAR, *supra* note 3, at 178 (noting in their proposal to use an ombudsmen to award compensation to victims outside of court that this would not run afoul of the right to a jury trial because there is no right to practice law, and the courts have the power to impose such a requirement on lawyers as a condition of practicing law).

152. *See Kelley Drye & Warren*, 623 F. Supp. at 527; *Biotechpharma, LLC v. Ludwig & Robinson, PLLC*, 98 A.3d 986, 997 (D.C. 2014).

153. *See A. Fred Miller, P.C. v. Purvis*, 921 P.2d 610, 618 (Alaska 1996) (justifying mandatory attorney fee arbitration based on "the need for public confidence in the lawyer/client relationship, the difficulty which clients with limited income may have in procuring an attorney to represent them against another attorney, and the vulnerability of clients when litigating against their former lawyers"); *see also Biotechpharma*, 98 A.3d at 997; *Anderson*, 555 A.2d at 1048; *In re LiVolsi*, 428 A.2d at 1272.

154. *Reetz v. Michigan*, 188 U.S. 505, 507 (1903); *Guralnick*, 747 F. Supp. at 1113; *see also Nodvin v. State Bar*, 544 S.E. 2d 142, 146 (Ga. 2001) (noting that due process does not guarantee "a particular form or method of state procedure").

and cross-examine witnesses.¹⁵⁵ These rights are recognized by the ABA *Model Rules on Lawyer Disciplinary Enforcement*,¹⁵⁶ and are provided by the lawyer discipline procedures in many states.¹⁵⁷

In order for disciplinary authorities to make awards to malpractice victims in disciplinary proceedings, some changes would be required. Disciplinary procedures would need to be amended to authorize limited compensatory awards. Courts would need to acknowledge that lawyer discipline is not only designed to protect the public and the administration of justice,¹⁵⁸ but also to benefit victims.¹⁵⁹ Disciplinary counsel would need to reorient their perspective to consider the interests of victims when they prosecute discipline cases.¹⁶⁰ Courts would need to consider whether to treat a finding of attorney misconduct that was accompanied by a monetary award in a discipline proceeding as having any collateral estoppel effect on a malpractice action.¹⁶¹ If courts conclude that it should have some collateral estoppel effect, state rules of professional conduct may need to be clarified because they currently state that “[v]iolation of a Rule should not itself . . . create any presumption in such a case that a legal duty has been breached.”¹⁶² Insurance companies that do not already include coverage for discipline defense in their LPL policies would need to amend their policies to do so.¹⁶³

Permitting limited monetary awards in discipline proceedings will place some additional fact-finding burdens on the decision makers, but they should not be unduly onerous. Many discipline cases involve neglect of client matters,¹⁶⁴ where

155. See *Guralnick*, 747 F. Supp. at 1113 (and cases cited therein); *A. Fred Miller*, 921 P.2d at 617–18.

156. See MODEL RULES FOR LAWYER DISCIPLINARY ENF’T R. 18 cmt. (AM. BAR ASS’N 2002).

157. See, e.g., CONN. STATEWIDE GRIEVANCE COMM. AND GRIEVANCE PANEL RULES OF PROCEDURE R. 7 (A), (H); PA. RULES OF DISCIPLINARY ENF’T R. 208(b)(5).

158. See, e.g., STATE BAR OF ARIZ., *supra* note 131 and accompanying text; Leslie C. Levin, *The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 17–18 (1998).

159. As a practical matter, if victims can recover some compensation through the discipline process this should increase public protection, because it should raise the likelihood that they will file disciplinary grievances. This will put discipline authorities on notice of lawyer misconduct about which they might otherwise be unaware. Cf. KRITZER & VIDMAR, *supra* note 3, at 155 (noting that some lawyers advise their clients to “hold off” on filing discipline complaints, at least during the pendency of litigation).

160. Some disciplinary counsel already take integrative approaches to discipline. But victims typically play no role in discipline proceedings except as witnesses, so disciplinary counsel would be required to consider victims’ interests.

161. Currently, the mere fact that there has been a finding of a disciplinary rule violation does not itself establish civil liability in many jurisdictions. *Id.* at 57–59. *But see* *Stender v. Blessum*, 897 N.W.2d 491 (Iowa 2017) (finding some issue preclusion based on discipline findings in a subsequent lawyer malpractice case).

162. See, e.g., MO. RULES OF PROF’L CONDUCT scope ¶ 7 (2018); N.C. RULES OF PROF’L CONDUCT 0.2 scope ¶ 7 (2018). I am grateful to Mark Dubois for bringing this point to my attention.

163. Some insurance companies already include some discipline defense in their policies. Levin, *Regulators at the Margins*, *supra* note 2, at 580. The amount available for discipline defense is often capped and the cap would probably need to be raised, but insurers need not necessarily increase total defense coverage above what the policy already provides.

164. See RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* 57–58 (2008).

the appropriate standard of care is clear. Causation can be proved as it is in a malpractice case, using expert evidence, where necessary.¹⁶⁵ Awards might be capped at \$25,000 to limit extended evidentiary hearings over the upward value of complex claims. Disciplinary authorities could also retain the discretion to make no monetary awards when lawsuits have also been filed or where fact-finding would be especially complex.

Finally, even if disciplinary systems do not award money to malpractice victims, they can more routinely take the approach recommended by Kritzer and Vidmar, which is to impose automatic suspension or disbarment on lawyers who do not pay malpractice judgments.¹⁶⁶ Such sanctions already have been imposed on lawyers who have failed to pay in a few instances.¹⁶⁷ As the authors recognize, this is not likely to incentivize plaintiffs' malpractice lawyers to take on cases against uninsured lawyers, but it may increase the likelihood that lawyers who have the means will pay judgments against them.¹⁶⁸

2. REVISION OF THE BANKRUPTCY LAW

Lawyers who commit malpractice should be prevented from using the bankruptcy laws to avoid compensating their victims. As previously noted, some lawyers strategically use the bankruptcy laws to avoid malpractice claims.¹⁶⁹ Moreover, under the current bankruptcy laws, a lawyer cannot be suspended from practice or denied readmission solely for failing to pay a malpractice judgment where that liability has been discharged in bankruptcy.¹⁷⁰ Some courts take the view that even after a lawyer's declaration of bankruptcy, they can require restitution as a condition of probation or readmission on the theory that restitution is not imposed *solely* because of the attorney's failure to pay the debt, but also

165. The cost of experts need not necessarily be borne by the victims. For example, if disciplinary counsel calls on experts in seemingly meritorious cases, and the disciplinary authorities find against the lawyer, they may be able to charge the disciplined lawyer with the costs of the experts. *See, e.g.*, N.D. RULES FOR LAWYER DISCIPLINE R. 1.3(D) (stating that where discipline imposed, lawyer must pay the costs and expenses of the disciplinary proceeding, including witness fees); ILL. SUP. CT. R. 773(a) (stating that "costs" include expert witness fees); WIS. SCR 22.001(3) (same).

166. KRITZER & VIDMAR, *supra* note 3, at 175.

167. In those cases, it does not appear that the failure to pay was the sole reason for the imposition of discipline. *See, e.g., In re Stewart*, 934 N.Y.S.2d 133, 134 (App. Div. 2011); *Jankura v. Piombino*, No. 14-0065, 2014 WL 10101427, Conn. Statewide Grievance Comm., 14-0065 (Nov. 7, 2014).

168. KRITZER & VIDMAR, *supra* note 3, at 175.

169. *See supra* note 35 and accompanying text; Derocher, *supra* note 47.

170. *See* 11 U.S.C. § 525(a) (2012) (stating that a "governmental unit may not revoke, suspend or refuse to renew a license" of a person who has been bankrupt or debtor "solely" because such bankrupt or debtor has not paid a debt that is dischargeable in bankruptcy); *see also In re Schwenke*, 849 P.2d 573, 577 (Utah 1993). The costs of the proceeding assessed in disciplinary matters are, however, non-dischargeable. *See, e.g., In re Feingold*, 730 F.3d 1268, 1275-76 (11th Cir. 2013). So are orders that a lawyer reimburse a client security fund for money expended as a condition of reinstatement. *See, e.g., In re Young*, 577 B.R. 227, 232 (W.D. Va. 2017); *Brookman v. State Bar*, 760 P.2d 1023, 1026 (Cal. 1988).

because paying restitution helps to rehabilitate the lawyer.¹⁷¹ A few courts state that they can consider the failure to make some restitution of a discharged debt because it shows a lack of rehabilitation.¹⁷² Some courts have concluded otherwise.¹⁷³

To address these problems directly, the bankruptcy code could be amended so that malpractice judgments are not dischargeable in bankruptcy. There are already somewhat similar exceptions to the discharge of debts in bankruptcy, such as for domestic support obligations; personal injuries caused by operating a vehicle when intoxicated; any debt for fraud or defalcation when acting in a fiduciary capacity; restitution ordered in a federal criminal case; and judgments, settlements or court-ordered payments due for certain violations of the securities laws.¹⁷⁴ Likewise, an exception for malpractice judgments would preclude lawyers from discharging debts in bankruptcy to avoid the consequences of the harm they have caused. While there might be cases in which insured lawyers, in good faith, grossly underestimated their likely exposure and are underinsured, these might be addressed by creating an exception for “undue hardship” in the bankruptcy law.¹⁷⁵ This exception should not, however, protect lawyers who have shielded assets and are deliberately uninsured or underinsured.

CONCLUSION

When Lawyers Screw Up fills in many of the significant gaps in our knowledge about lawyer malpractice in the United States. Kritzer and Vidmar had to rely on sometimes limited data, but their careful analysis of the available information has advanced our understanding enormously. Hopefully, this book will prompt regulators and state bars to encourage insurers in their states to collect and release more information to round out our understanding of lawyer malpractice. This information benefits lawyers, who can better assess their own risk of liability and likely exposure. It also benefits insurers and regulators, because the analyses

171. See *In re Levine*, 847 P.2d 1093, 1123 n.21 (Ariz. 1993); *Hippard v. State Bar*, 782 P.2d 1140, 1145 (Cal. 1989); *Brookman*, 760 P.2d at 1025–26; *People v. Huntzinger*, 967 P.2d 160, 162–63 (Colo. 1998).

172. See *Hippard*, 782 P.2d at 1145–46 (considering failure to make even partial restitution of a malpractice debt discharged in bankruptcy as evidence of lack of rehabilitation); *People v. Sullivan*, 802 P.2d 1091, 1096 (Colo. 1990) (finding order of restitution is warranted even though court judgment was claim in bankruptcy proceedings so that respondent can demonstrate his rehabilitation prior to reinstatement).

173. See *In re Borowski*, 216 B.R. 922, 924 (Bankr. E.D. Mich. 1998) (noting it would likely violate bankruptcy law if attorney ordered to repay debt as condition of continuing to practice law); *Cleveland Bar Ass’n v. Gay*, 763 N.E.2d 585, 586 (Ohio 2002) (finding it could not consider in lawyer’s petition for reinstatement to practice failure to make restitution where debt was discharged in bankruptcy); *In re Stewart*, 240 P.3d 666, 668 (Okla. 2010) (concluding court is precluded on petition for readmission from considering lawyer’s failure to repay tax liability discharged in bankruptcy that led to lawyer’s suspension).

174. See 11 U.S.C. § 523(a)(4), (a)(5), (a)(9), (a)(13), (a)(19) (2012).

175. This might be comparable to the “undue hardship” showing that can be made to obtain the discharge of some educational loans under the bankruptcy law. See 11 U.S.C. § 523(a)(8) (2012).

provide them with the opportunity to see the larger picture of how the LPL insurance market works—and does not work—in the United States. The book is especially valuable for courts and other lawmakers, as it convincingly sheds light on the challenges that individuals, in particular, face when lawyers commit malpractice, and why it can be so hard for some victims to recover damages. Many of the solutions the authors propose deserve careful consideration. Ultimately, however, the biggest problem presented by lawyer malpractice is not with devising solutions. The problem is the lack of will by the courts, legislatures, and the bar to adequately protect the public when lawyers screw up.

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