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Foreword: Legal Malpractice Is No Longer the Profession's Dirty Little Secret

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FOREWORD:
LEGAL MALPRACTICE IS NO LONGER THE
PROFESSION'S DIRTY LITTLE SECRET

*Susan Saab Fortney**

In 1994, Professor Manuel R. Ramos published a law review article called, *Legal Malpractice: The Profession's Dirty Little Secret*.¹ As suggested by the title, Professor Ramos argued that legal malpractice was a “taboo subject” that has been “ignored by the legal profession, law schools, mandatory continuing legal education (“CLE”) programs, and even by scholarly and lay publications.”² Thirty years later, legal malpractice is an ever-present threat that lawyers cannot afford to ignore.

On a daily basis we are bombarded with reports of lawyers and their firms being named in malpractice suits and disqualification matters. In fact, a daily electronic newsletter digests many of these stories.³ On a typical day, the newsletter includes ten to fifteen accounts of matters in which lawyers are on the hot seat. Lawyers appear to be keenly interested in reading and talking about the fates of others. Some may be interested in learning from the misfortunes of others. Many others may think: “There, but for the grace of God, go I.”

Despite the fact that lawyers are keenly interested in learning about legal malpractice issues, and are directly impacted by jurisprudential

* Professor, Texas A&M University School of Law. Professor Fortney organized the April 1, 2015, Hofstra Ethics Conference, “Lawyers as Targets: Suing, Prosecuting and Defending Lawyers.” At the time of the Conference, she served as the Howard Lichtenstein Distinguished Professor of Legal Ethics at Maurice A. Deane School of Law at Hofstra University and Director of the Hofstra Institute for the Study of Legal Ethics. She thanks Peter Guinnane, the Editor-in-Chief of the *Hofstra Law Review*, and the other members of the *Hofstra Law Review* for their dedication and great work on the Conference, the related articles, and the numerous essays dedicated to Professor Monroe Freedman.

1. Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657 (1994).

2. *Id.* at 1658-59 (citations omitted).

3. For a window into the types of stories that are published daily, see *Legal Ethics*, LAW360, <https://www.law360.com/legaethics> (last visited Feb. 15, 2016).

developments related to professional liability claims, there is limited scholarship tackling legal malpractice topics, even when compared to the growing body of scholarship devoted to general legal ethics concerns. To help address that gap, we organized the 2015 Hofstra Ethics Conference called, “Lawyers as Targets: Suing, Prosecuting and Defending Lawyers,” (“Lawyers as Targets”) sponsored by the Institute for the Study of Legal Ethics at the Maurice A. Deane School of Law at Hofstra University (“Institute”). It was possible because of the generous support of the Abraham J. Gross ‘78 Conference and Lecture Fund (“Gross Lecture Fund”).

We believed that this was worthwhile because the majority of lawyers in private practice appear to be more concerned about civil liability, as opposed to disciplinary liability. Thus, the call for papers for the conference invited works examining the changing landscape of legal malpractice claims and litigation.

The Institute sponsored the conference, and the Gross Lecture Fund provided generous support for it. At the time that we organized the conference, Eric Lane, Dean and Eric J. Schmertz Distinguished Professor of Public Law and Public Service at the Maurice A. Deane School of Law at Hofstra University, and I planned to honor Professor Monroe H. Freedman at the 2015 Hofstra Ethics Conference. Over the last three decades, Professor Freedman, a leading authority in legal ethics, contributed to the Hofstra Ethics Conferences being regarded as a leading national forum for discussions of legal ethics. Therefore, we wanted to honor and surprise Professor Freedman by dedicating the 2015 conference to him. Sadly, Professor Freedman died just weeks before the conference. Nevertheless, Dean Lane dedicated the conference to Professor Freedman and opened the conference by announcing that the Institute will continue the biennial conferences, ethics fellowships for outstanding students interested in the study of legal ethics, publication of the *New York Legal Ethics Reporter*,⁴ legal ethics scholars’ roundtables, and other ethics programming. As stated in the announcement of the naming, the Institute will “continue to create scholarship and commentary in the tradition of Monroe, whose prolific writing never ceased to provoke us.”⁵

4. The *New York Legal Ethics Reporter* is an electronic publication that runs legal ethics articles and commentaries of interest to New York practitioners and academics. N.Y. LEGAL ETHICS REP., <http://www.newyorklegaethics.com> (last visited Feb. 15, 2016). The publication is co-sponsored by the firm of Frankfurt Kurmit Klein & Selz PC and the Maurice A. Deane School of Law at Hofstra University. *Id.*

5. *A Tribute to Monroe H. Freedman*, HOFSTRA L., <http://law.hofstra.edu/facultyandresearch/centers/isle/tribute/index.html> (last visited Feb. 15, 2016).

The naming of the Monroe H. Freedman Institute for the Study of Legal Ethics is a fitting tribute, as well. As noted by Professor Alan Dershowitz and others, Professor Freedman is widely recognized as a leader in the field of legal ethics, with many referring to him as the father of modern legal ethics.⁶ Since his death, a number of academics and practitioners have written eloquently about his influence and many contributions.⁷ At the 2016 annual meeting of the American Association of Law Professors, the Professional Responsibility and Criminal Justice Sections co-sponsored a three-hour program called, “Ethics in Criminal Practice—The Hardest Questions Today: A Conversation in Honor of Monroe H. Freedman.” The *Hofstra Law Review* will publish articles written by panelists who participated in that program in its Volume 44, Issue 4. This Symposium Issue of the *Hofstra Law Review* includes three essays paying tribute to Professor Freedman. First, Stuart Rabinowitz, the President of Hofstra University, shares his perspectives on Professor Freedman as a dean, teacher, and colleague.⁸ The second essay, written by Dean Eric Lane, provides personal insights relating to the influence of Professor Freedman.⁹ Professor Roy Simon, the Emeritus Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra Law School, contributes the third tribute piece in this Issue. Professor Simon chronicles how Professor Freedman led the effort to make Hofstra Law School one of the preeminent institutions devoted to legal ethics education, scholarship, and programming.¹⁰

Articles written by the speakers at the Lawyers as Targets conference follow the tribute pieces. Each of the conference articles tackles a different aspect of legal malpractice and civil litigation matters in which lawyers are respondents. The first two articles examine legal malpractice in particular practice settings. In her article, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, Professor Lynn Baker examines the legal ethics and malpractice issues related to professional liability rules and the common law related to aggregate settlements.¹¹ As she points out, this rule goes to the heart of an increasing number of very large liability claims against lawyers who

6. See Margalit Fox, *Monroe H. Freedman, Influential Voice in Legal Ethics, Dies at 86*, N.Y. TIMES, Mar. 4, 2015, at A19.

7. See generally *A Special Section: Monroe H. Freedman, Father of Legal Ethics—A Life of Infinite Value*, 23 PROF. LAW. 2 (2015).

8. Stuart Rabinowitz, *A Tribute to Monroe Freedman*, 44 HOFSTRA L. REV. 269 (2016).

9. Eric Lane, *Remarks at Monroe Freedman's Memorial*, 44 HOFSTRA L. REV. 273 (2016).

10. Roy Simon, *Monroe Freedman: Friends, Role Model, and Colleague*, 44 HOFSTRA L. REV. 275 (2016).

11. Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291 (2016).

represented plaintiffs who reached settlements in mass tort cases. Professor Baker discusses the genesis of the rule and its application. After dissecting the rule, she identifies additional requirements set forth in *ABA Formal Ethics Opinion 06-438*¹² and the American Law Institute's *Principles of the Law of Aggregate Litigation*.¹³ After examining the current interpretations of the aggregate settlement rule ("the Rule"), she offers a normative theory to "mitigate the current interpretative confusion regarding which settlements are 'aggregate settlements' and what client disclosures are mandated by the Rule."¹⁴

Transactional lawyers, like litigators, can easily become targets in legal malpractice cases. Professor Vincent R. Johnson examines the liability exposure of a subgroup of lawyers who handle international business transactions. In introducing his article called *Legal Malpractice in International Business Transactions*, Professor Johnson suggests that claims involving international business transactions might be a time bomb.¹⁵ Professor Johnson explains how, regardless of whether a lawyer normally represents domestic entities or represents transnational companies, lawyers face increased liability exposure when they handle business matters with international aspects. He analyzes reported legal malpractice cases involving international business transaction work and theories that could be asserted against lawyers. The discussion underscores the importance of lawyers understanding the various laws and rules related to international business transactions, including legal provisions drawn from American state and federal common law and statutes, international conventions, customary business practices, and foreign legal systems.¹⁶ Given what may be staggering malpractice liability, Professor Johnson concludes by urging lawyers to devote attention to adopting prudent professional practices and mitigating malpractice risks.¹⁷

The next four articles in this Issue examine issues related to legal malpractice litigation. The article, *Reflections of an Ethics Expert and a Lawyer Who Retains Him*, by Professor Michael Hoeflich and Mr. William Skepnek, deals with legal malpractice experts.¹⁸ As suggested by the title of their article, Professor Hoeflich and Mr. Skepnek provide

12. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-438 (2006).

13. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION (AM. LAW INST. 2010).

14. *Id.* at 291.

15. Vincent R. Johnson, *Legal Malpractice in International Business Transactions*, 44 HOFSTRA L. REV. 325 (2016).

16. *Id.* at 325-29.

17. *Id.* at 350-51.

18. Michael Hoeflich & William Skepnek, *Reflections of an Ethics Expert and a Lawyer Who Retains Him*, 44 HOFSTRA L. REV. 353 (2016).

different perspectives on the role and approach of experts in preventing and litigating malpractice actions. In bringing and defending a legal malpractice case, experts are normally essential to establish the standard of care unless a lawyer's "lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge."¹⁹ Because expert testimony can make or break a legal malpractice case, the article provides valuable insights to both lawyers who hire experts and to those who agree to serve as experts.

Professors Herbert Kritzer and Neil Vidmar consider the dynamics of the case-within-a-case feature of legal malpractice cases that requires that the plaintiff prove that she would have recovered or prevailed in the underlying matter for which the defendant-lawyer had been hired. In their article, *Lawyers on Trial: Juror Hostility in Legal Malpractice Trials*, Professors Kritzer and Vidmar consider whether jurors' hostility toward lawyers contributes to the jurors finding negligence in legal malpractice cases involving the case-within-a-case requirement.²⁰ The authors draw on the findings from a fascinating Internet experiment in which they evaluated respondents' decisions in two contexts. In the first, the tortfeasor was the defendant in an underlying tort case, such as an automobile case.²¹ The second involved cases in which the tortfeasor being sued for malpractice was the plaintiff's lawyer in the underlying tort case. For the second set of scenarios, the respondents were told that the defendant-lawyer was not contesting the allegation that the lawyer breached some duty.²² Rather, they were asked to only decide whether the original tortfeasors in the underlying cases had been negligent or what damages were due the plaintiff or both.²³ This approach was designed to test the following hypotheses: (1) juries are more likely to find for the plaintiff when the defendant who will have to pay any damages is the plaintiff's former lawyer; and (2) juries award more in damages when the defendant is the plaintiff's former lawyer.²⁴ Based on the study results, each involving different underlying cases (automobile accident, products liability, and medical malpractice), the researchers only found clear support for hypotheses in the premises liability case.²⁵

19. SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION* 77 (2d ed. 2015) (quoting *Television Cap. Corp. v. Paxson Comm'n Corp.*, 894 A.2d 461, 469 (D.C. 2006)).

20. Herbert Kritzer & Neil Vidmar, *Lawyers on Trial: Juror Hostility in Legal Malpractice Trials*, 44 *HOFSTRA L. REV.* 375 (2016).

21. *Id.* at 383.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 397 (describing the difference between the amounts awarded in the experimental

Although the findings may suggest some hostility toward lawyers generally, the authors did not believe that the findings supported the conclusion that jurors wanted to punish lawyers.²⁶ The article points to the value of not merely accepting commonly-held notions about jurors' views of lawyers, but rather to devoting more time and resources to gathering reliable data, including information from juror simulation studies. Such information can be used by plaintiffs' lawyers evaluating whether to bring and try cases, and by the lawyers and insurers defending malpractice claims.

Once sued, lawyers must carefully decide the best course of action to defend against a malpractice claim. In addition to denying liability and attempting to demonstrate that the plaintiff has failed to meet the burden of proof, a defendant may rely on affirmative defenses. In her article, *The Litigation Privilege: Its Place in Contemporary Jurisprudence*, Professor Louise Hill examines the justification and reach of the litigation privilege.²⁷ She also analyzes cases where the privilege has been asserted, as well as situations when the defendant-lawyer could have been more successful had the lawyer asserted the privilege. Because the litigation privilege can play a key role in the defense of claims asserted by litigation adversaries, Professor Hill's article advances the understanding of when litigators can zealously represent their clients and still have immunity for litigation-related statements and conduct.²⁸

In legal ethics and malpractice circles, there is also uncertainty and confusion created by the interplay of the provisions of Rule 1.6 and Rule 4.1 of the ABA *Model Rules of Professional Conduct* ("Model Rules"). Peter R. Jarvis and Trisha M. Rich analyze these rules in *The Law of Unintended Consequences: Whether and When Mandatory Disclosure Under Model Rule 4.1(b) Trumps Discretionary Disclosure Under Model Rule 1.6(b)*.²⁹ Although the interplay of the rules can be circuitous, Mr. Jarvis and Ms. Rich do an outstanding job of dissecting the language of the two rules and suggesting interpretations that reconcile the two rules. In addition to considering the disciplinary consequences, they also help the reader understand the very serious

and the control condition as "modest").

26. *Id.*

27. Louise Lark Hill, *The Litigation Privilege: Its Place in Contemporary Jurisprudence*, 44 HOFSTRA L. REV. 401 (2016).

28. *Id.* at 402-08; see also FORTNEY & JOHNSON, *supra* note 19, at 242-44 (reviewing different jurisdictional approaches to applying the litigation privilege).

29. Peter R. Jarvis & Tricia M. Rich, *The Law of Unintended Consequences: Whether and When Mandatory Disclosure Under Model Rule 4.1(b) Trumps Discretionary Disclosure Under Model Rule 1.6(b)*, 44 HOFSTRA L. REV. 421 (2016).

malpractice consequences if Rule 4.1 is interpreted broadly as turning discretionary disclosures into mandatory ones.³⁰ Understanding this possibility, they make a compelling argument for amending disciplinary rules to eliminate the risk that a lawyer could be held civilly liable for not making disclosures to a non-client when the disclosure is discretionary under the applicable confidentiality rule.³¹

Another malpractice-related concern that merits clarification is the question of when a lawyer has a duty to report the lawyer's own malpractice to a client. In a 2009 law review article, Professor Benjamin P. Cooper examined a lawyer's ethical duty to report his own malpractice to a client.³² In his article published in this Issue, *When Clients Sue Their Lawyers for Failing to Report Their Own Malpractice*, Professor Cooper turns to the civil liability exposure for lawyers who fail to report their malpractice to their clients.³³ Distinguishing breach of fiduciary duty and negligence claims, Professor Cooper persuasively reasons why clients should be able to obtain fee forfeitures when their lawyer breaches the fiduciary duty of loyalty by failing to report to the client the lawyer's own malpractice. The lack of clarity regarding when lawyers have a duty to report has created confusion for both lawyers and clients. Professor Cooper advances our understanding of how the fiduciary nature of the attorney-client relationship should compel lawyers to put clients' interests before their own when it comes to disclosing the lawyer's own malpractice.

Around the United States, persons injured by legal malpractice are often left without a remedy. Legal malpractice cases are frequently expensive and difficult to try. The amount of damages may not be large enough to persuade a plaintiff's attorney to represent the injured person on a contingent fee basis. Even when the damages are large enough, a malpractice case may not be pursued if there are limited assets or insurance to cover a judgment or settlement. When malpractice cases are brought, various legal rules work to the advantage of the defendant-lawyer.³⁴ As a result, a traditional legal malpractice action may provide little compensation to those harmed by lawyer malpractice. As an alternative to our current liability regime for malpractice claims,

30. *Id.* at 431-37.

31. *Id.*

32. Benjamin P. Cooper, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 BAYLOR L. REV. 174, 180-88 (2009).

33. Benjamin P. Cooper, *When Clients Sue Their Lawyers for Failing to Report Their Own Malpractice*, 44 HOFSTRA L. REV. 441 (2016).

34. See Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 491-503 (2008) (discussing a number of common law and procedural rules that benefit defendants in legal malpractice actions).

Professor Melissa Mortazavi, in her article, *A No-Fault Remedy for Legal Malpractice?*, explores a no-fault approach to adjusting legal malpractice claims.³⁵ Professor Mortazavi draws on the experience of no-fault regimes in other contexts to argue implementation of such a system for select types of legal malpractice claims. Her creative approach should inspire others to rethink the traditional approaches and to consider new possibilities that may be more efficient and fairer to both injured persons and alleged tortfeasors.

In addition to being named as defendants in legal malpractice suits, lawyers commonly are targets in motions to disqualify counsel. On many different levels, responding to disqualification motions can be very costly. As James B. Kobak, Jr. notes in his article, *Dealing with Conflicts and Disqualification Risk Professionally*, the serious consequences of disqualification motions go beyond the fact of disqualification itself.³⁶ In his article, Mr. Kobak provides a balanced and scholarly, yet practical, discussion of the common bases for disqualification motions. He astutely analyzes the recent court decisions, using a helpful framework for recognizing the types of conflicts that provide a basis for disqualification motions. Anyone dealing with a disqualification motion would be well-advised to consult Mr. Kobak's thoughtful article. Finally, jurists and policy makers should seriously consider his recommendations on limiting the concurrent conflict and imputation rules.

The final contribution to this Issue is Professor Benjamin H. Barton's article, *Some Early Thoughts on Liability Standards for Online Providers of Legal Services*.³⁷ As suggested by its title, the article considers the liability of online providers of legal services and the issues that courts will face if and when these lawsuits arise. In considering possible lawsuits against online providers, Professor Barton discusses four possible legal regimes that might apply to such actions: legal malpractice, products liability, negligence, and breach of contract. After discussing each area, he predicts that courts will apply the legal malpractice standard of a "reasonable lawyer," but will not import the procedural and causation protection that lawyers enjoy in legal malpractice actions.

35. Melissa Mortazavi, *A No-Fault Remedy for Legal Malpractice?*, 44 HOFSTRA L. REV. 471 (2016).

36. James B. Kobak, Jr., *Dealing with Conflicts and Disqualification Risk Professionally*, 44 HOFSTRA L. REV. 497 (2016).

37. Benjamin H. Barton, *Some Early Thoughts on Liability Standards for Online Providers of Legal Services*, 44 HOFSTRA L. REV. 541 (2016).

Thanks to the Gross Lecture Fund for supporting the conference, “Lawyers as Targets: Suing, Defending and Prosecuting Lawyers.” Thanks to the authors for their valuable contributions. And finally, thank you to the late Professor Monroe H. Freedman for his leadership in spearheading the Hofstra Ethics Conferences and for his enduring inspiration.