What Lawyers Can Learn from Their Mistakes: An Empirical Examination of Legal Malpractice

Author : Susan Fortney

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Herbert M. Kritzer & Neil Vidmar, When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims (2018).

All lawyers in private practice must recognize the possibility of opening a summons and seeing their names listed as defendants. Many private practitioners are more concerned about malpractice than professional discipline. The Preface to the Restatement of Law Governing Lawyers captures the regulatory role of malpractice in stating that "the remedy of malpractice liability and the remedy of disqualification are practically of greater importance in most law practice than the risk of disciplinary proceedings."[1]

Despite the important role that malpractice plays in influencing lawyer conduct, only a small number of empirical scholars have studied legal malpractice claims. That is one reason why we should welcome the recent book by Herbert M. Kritzer and Neil Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims*. As suggested by the book title, the book persuasively makes the case for change because a large percentage of victims are deprived of a meaningful remedy in pursuing legal malpractice claims.

In the introduction, Professors Kritzer and Vidmar note that the book's purpose is to provide a portrait of legal malpractice claims. Unlike other studies conducted by bar groups and insurers, the book goes beyond providing statistical tabulations related to types of claims. The authors use different empirical methods and data sets to systematically analyze what gives rise to claims, how claims are handled, and the nature of claims. They also provide background information on the legal bases of claims and professional liability insurance. Their discussion provides context for lawyers, as well as lay people unfamiliar with the anatomy of a legal malpractice case, the role that malpractice insurers play, and the profile of the defense and plaintiffs' bars.

Throughout the book, the authors use data and other information to demonstrate that lawyers' professional liability is not a "unitary phenomena." (P. 4.) Rather, they assert that there are two distinct worlds: "one involving claims in the context of legal services for individuals and family businesses and one for claims arising from work on behalf of large corporate entities." (P. 4.) This analytical framework builds on the "two hemispheres" construct used by John P. Heinz and Edward Laumann in their Chicago Lawyers study to describe the two segments of legal practitioners.[2] One hemisphere serves primarily the corporate sector and the other primarily serves the personal services sector. Understanding the differences in the two hemispheres helps explain the different outcomes related to whether and how a malpractice claim will be brought and handled.

Most notably, the distinct differences in the two hemispheres are apparent when considering the likelihood that an injured person will be able to pursue a legal malpractice claim. Injured clients from the corporate sector are probably represented by lawyers who carry malpractice insurance (P. 5.) By contrast, lawyers serving the personal services sector are more likely to be uninsured. This lack of insurance will affect the ability of an injured person to retain counsel willing to handle a legal malpractice case on a contingency fee basis.

Although lawyers who take claims on a contingency fee basis routinely screen claims carefully, such screening is particularly important for legal malpractice cases because of the cost of pursuing professional liability cases and the risk that defendant-lawyers do not carry professional liability insurance. Relying on qualitative and quantitative data, Professors Kritzer and Vidmar discuss how the size of the claim and the insurance status of the tortfeasor-lawyer affect

whether a client will be able to find counsel willing to handle the malpractice matter. Specifically, in interviews with attorneys who handle plaintiffs' work, the authors learned that the amount of the potential damages was an important criterion in plaintiffs' lawyers deciding to accept representation on a contingent-fee basis. Most attorneys reported requiring a threshold amount ranging from a low of $100,000 to a high of $5 million. (P. 147.) That means that many victims will likely not be able to retain experienced counsel unless the amount of damages is large enough to convince a plaintiffs' lawyer that it is feasible to agree to a contingency fee.

Assuming that the amount of damages would support a knowledgeable plaintiffs' attorney handling a matter on a contingency fee basis, a second hurdle in retaining a lawyer relates to insurance and the prospect of recovery. Because states, other than Oregon and Idaho, do not require that lawyers carry a minimum level of professional liability insurance, there is a significant risk that the tortfeasor will be uninsured. Although no national numbers are available, state-level information reveals that a significant percentage of lawyers practice without insurance. The percentage ranges from 6% in South Dakota (a state requiring that lawyers directly disclose to clients that the lawyer is uninsured) to 36% in Texas. (P. 41.) The likelihood of being represented by an uninsured lawyer is considerably higher for consumers who hire solo attorneys because uninsured lawyers are predominately in solo practice. For example, a state bar survey in Texas revealed that 63% of solo lawyers are uninsured.[3] This suggests that those clients in the personal services sector who are infrequent users of legal services may be the most vulnerable to being exposed to uninsured lawyers.[4] Although the harm to these clients may not be quantifiable, the qualitative data from Professors Kritzer and Vidmar support the conclusion that these malpractice victims will likely not be able to retain counsel if the wrongdoer is uninsured. This points to the access to justice problem. As stated in Professor Leslie Levin's book review of *When Lawyers Screw Up*, "If individuals cannot obtain competent legal representation to pursue their [malpractice] claims, they cannot effectively access the courts. If lawyers are not required to pay for harm they cause clients, justice is also denied."[5]

To address the access to justice problem, Professors Kritzer and Vidmar identify a number of changes that would help malpractice victims obtain meaningful redress. The first option they suggest is that more U.S. jurisdictions ought to join the vast majority of common law countries that require lawyers to carry a minimum level of liability insurance. For decades, Oregon was the only U.S. jurisdiction to require that lawyers participate in a mandatory insurance scheme. The legal landscape began to change in 2017 when the Idaho Supreme Court adopted a rule requiring that lawyers in private practice carry professional liability insurance coverage with limits of liability of $100,000 per occurrence and $300,000 for annual aggregate of claims.[6] In addition to the move in Idaho, bar groups in other states began studying the issue of mandatory malpractice insurance. In 2019 bar-appointed bodies in California and Washington issued reports making recommendations related to mandatory insurance. Importantly, both reports referred to Professors Kritzer and Vidmar's work related to how the failure of lawyers to carry insurance affects victims' ability to hold lawyers accountable.[7]

The reports' references to the Kritzer and Vidmar findings point to the important role that empirical work can play in informing the debate and decisions related to lawyer regulation, access to justice, and public protection. Moving forward, their work may inspire other researchers to tackle other empirical projects to bridge the disjunction between the legal academy and the legal profession. As Judge Harry T. Edwards urged over two decades ago, "law schools should be producing scholarship that judges, legislatures, and practitioners can use."[8] *When Lawyers Screw Up* is precisely the type of "useful" scholarship because it helps us better understand how lawyers err and how, as a profession, we can better provide access to justice to those who lawyers harm.

1. Geoffrey C. Hazard, Jr., *Foreword* to **Restatement (Third) of the Law Governing Lawyers**, at xxi (2000).
2. John P. Heinz & Edward O. Laumann, **Chicago Lawyers:The Social Structure of the Bar** (1982).
3. Leslie C. Levin, *Herbert M. Kritzer & Neil Vidmar's When Lawyers Screw Up*, 32 **Geo. J. Legal Ethics** 109, 113 (2019) (book review).
4. In many cases, lawyers who cannot afford to purchase legal malpractice insurance will not have non-exempt assets to pay a malpractice judgment.

5. Levin, *supra* note 3, at 114.
6. *See* Susan Saab Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots*, 9 **St. Mary's J. Legal Mal. & Ethics** (forthcoming) (reviewing recent developments in states).
7. *See* **Cal. Ins. Working Grp. Rep.**, at 8 (March 15, 2019) (noting that the principal argument in favor of requiring insurance is that clients who are harmed by attorneys' malpractice generally have little recourse if their lawyers are uninsured because some plaintiffs' malpractice lawyers are reluctant to pursue claims against uninsured lawyers). *See also* Wash. St. B. Ass'n, Mandatory Malpractice Ins. Task Force Rep. to Bd. of Governors, at 21 (Feb. 2019) ("Plaintiffs' lawyers rarely agree to pursue professional negligence cases when the potential defendant is an uninsured lawyer.").
8. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 **Mich. L. Rev.** 34, 41 (1992).

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