LEGAL MALPRACTICE & THE LIABILITY INSURANCE INDUSTRY: AN INTRODUCTION WITH A FOCUS UPON TEXAS

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This paper is about two questions. First, should liability carriers that have defended an insured and lost be able to sue the lawyers they have hired to defend their insureds, when the case has been fouled up by those defense lawyers and the insurer had to pay far more than necessary? The problem here arises from a strong rule, which is nearly absolute in many places, that only a client can sue a lawyer for malpractice. Second, if liability insurers should be able to sue the defense lawyers they hire for their insureds, what is the best legal doctrine upon which to base that right? This last question can be addressed from two points of view: jurisprudential and practical. The latter of these two points of view, in answering virtually any legal question, pays special attention to recent legal history. As already pointed out, legal history is such that only the client, and no one else, may sue their lawyers for malpractice.

I. Some Background

Legal malpractice is a tort cause of action a client ("C") has against his/her/its lawyer ("L") for negligent (e.g., poor, unreasonable, below standard, sub-par, below accepted standards, etc.) lawyerly performance. This idea includes gross negligence, i.e.,

really poor performance that L (or someone in his group) consciously knew was very, very high risk and really quite dangerous, although no injury was consciously intended. It would be helpful if grossly negligence professional conduct by lawyers was called "gross malpractice," but this is not customary.[1] If L quite deliberately injuries C, that is not malpractice, it is a breach of fiduciary duties. Attorneys are legally obligated to be loyal to their clients and trustworthy. These are two of the central elements of having a fiduciary duty. There are many fiduciary duties, and lawyers have most, if not all, of them.[2]

One court has said that, under Texas law, there is a way to distinguish legal malpractice from breach of fiduciaries. "If a claim, regardless of what it is called, involves a lawyer's performance in representing a client, then it is a legal malpractice claim."[3] "If a claim involves a lawyer's 'integrity and fidelity,' then it is a breach of fiduciary duty claim." Any claim involving only the latter is purely a fiduciary duty claim.

Perhaps the court is implying that if a client's claim involves both, then it is a malpractice claim.[4] If this is true, it would account for the assertion of some courts of appeals that a plaintiff should not be able to assert both types of claims against a lawyer. Sometimes this is called "fracturing."[5] One wonders if the courts has this fundamental

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[1] The leading treatise on this subject is the 5 volume set, Ronald Mallen & Jeffrey M. Smith, LEGAL MALPRACTICE (5th Ed. 2000) ("M & S"). The phrase "legal malpractice" is treated broadly to cover any civil action which might be brought against a lawyer for allegedly injurious errors or omissions.

[2] Attached as Exhibit 1 is a list of fiduciary duties which probably apply to lawyers.

[3] *Liberty Mutual Ins. Co. v. Gardere & Wynne,* 82 Fed. Appx. 116, 118 n. 3 (5th Cir. 2003)

[4] Id. Of course the two types of causes of action are different. For one thing it is necessary to prove damages and causation in malpractice cause of action, but not in a breach of fiduciary duties cause of action. *Burrow v. Arce,* 997 S.W.2d 229 (Tex.1999) (restitution is a property remedy and or punishment when there has been a violation of fiduciary duties).

[5] "Historically, an attorney's malpractice exposure for negligence has been limited to a client. Within that confine, attorneys can gauge the nature of their duties and how to fulfill those duties. Beginning in the

distinction right. Why couldn't one group of actions—or even one action—count as both. What should L's selling C out in litigation be called? Perhaps deliberate conduct which would be malpractice if done negligently counts as fiduciary duty if done deliberately. If so, of course, this would make one of the equations asserted by the Fifth Circuit in the *Gardere & Wynne* case discussed in the last paragraph quite mistaken.

II. Introduction

In many states, only C or a former C can sue L for malpractice.[6] But what if C's liability insurer hired L, paid L, and had to pay the judgment which resulted for L's error? Thus, L's errors did not cost C anything except for anxiety. It cost the insured liability insurer huge amounts, however. Shouldn't it be able to sue L? And what if the relevant insurer and plaintiff in the malpractice action is something other than a primary carrier, say, an excess carrier? What if the allegedly injured party and plaintiff in the legal malpractice action is a reinsurer?

Insurer as Client. Obviously, a liability insurer might have any of the actions already mentioned against a lawyer which has provided it with coverage decisions or who represented the insurer badly in a lawsuit it brought either by it or against it by an insured, the assignee of an insured who was victorious in an underlying tort case, the holder of the insured's rights as the result of a court order, and so forth. These are paradigms of the orthodox attorney-client relationship. No one has ever thought an insurer could not be the client of one or more lawyers.

1970's, thee has been an expansion of liability to persons who are not clients but to whom attorneys can owe a duty of care." M & S, n. 1, at § 7.1, p. 675 of V. 1.

6 See *Archer v. Medical Protective Co.,* 197 S.W.3d 422 (Tex. App.—Amarillo, 2006). See also *Greathouse v. McConnell,* 982 S.W.2d 165 (Tex. App.—Houston [1st Dist.] 1998). And there are more cases from various Courts of Appeals in Texas favoring an "Anti-Fracturing Doctrine." The Supreme Court has not ruled, however.

Some History. Malpractice-type cases against lawyers have always been difficult to win. The work of litigation attorneys is almost never as simple as lots of other kinds of work, and it often involves more complexity, more prolonged time intervals, more uncertainties, more vagaries and is more influenced by numerous uncertain judgments that even much of medical practice. This is true with respect to hypothesizing, thinking, imagining, acting, interacting, psychological insight, and so forth. (Of course, the practice law is often not anything like those professions and vocations which depend upon sophisticated mathematics and advanced science. It is not difficult in that way.) Most types of malpractice cases against attorneys are still difficult to win, hard to develop, and expensive to conduct, and this last point includes prosecution, as well as to defense. (An exception is an actually blown statute of limitations governing a suit against a clearly solvent business entity involving unquestionable liability in the underlying case.)

Nevertheless, legal mal cases are becoming somewhat more common, and more lawyers are pursuing them for their clients. A few lawyers are even advertising to take them.[7] Many believe that this is a consequence of "tort reform," which is politically popular in Texas and elsewhere. Interestingly, although they are difficult to prosecute, often lengthy, and usually expensive, the lawyer for the plaintiff in a legal mal case is usually safe from being sued for mal practice if she loses it.

(Then again, a malpractice case brought by C against L_1 who lost *C v. X* or *X v. C,* there this second lawsuit is based upon the efforts of C's next lawyer, L_2, will—almost certainly—not give way to successful case by C against L_2 if the latter fouls up *C*

[7] In at least one case, the advertising lawyer is chasing a particular person who is at least posing as a lawyer. Mary Ann Cavazos, *Man May Have Impersonated Peace Officer,* CORPUS CHRISTI CALLER-TIMES (October 5, 2007).

v. L_1 and loses it. "Enough is enough," the jury will think, if not actually say. "This fellow finds fault with everything. I bet he doesn't even like his kids." C suing L_2 for having lost a legal mal case against L_1—particularly one where the first defendant where L_1 was a litigation lawyer—is informally and without actual legal standard, subject to a very broad and high burden of proof.)

This historical point is dramatically true when it comes to the insurance industry. In the past, relations between lawyers and liability insurers have had several characteristics, for the most part. Historically, liability insurers ("L-Irs") have sent most of the lawyers they use for handling possibly covered litigation against their insureds--the lawyers who worked for them by representing their insureds ("L-Ids")--streams of business. The hourly legal fees of these lawyers were usually substantially discounted, partly because there was lots of business.[8]

Historically, liability insurers did not monitor or audit the hours charged carefully. (It was not uncommon for an insurance defense lawyer to charge a lawyer-hour for a secretary preparing a standard general denial-only answer in a Texas state court, project which might take the secretary 10-15".) Lawyers need not complain much if fees had to be adjusted in this or that case from time to time for some L-Ir-favoring reason. And L-Irs hardly ever—at least, almost never--sued the lawyers they hired, although they would stop using some of them for various relevant reasons, and they would stop helping market them to other adjusters, unless, of course, they wanted to injure the other adjuster or insurer.

[8] I reviewed a case recently in which a professional level liability insurer paid two lawyers with well over a decade of experience each $135 and $145 and hour to defend the insured, and this occurred in the years between 2003 and 2005.

Digression on Vocabulary. The attorneys L-Irs used regularly for defending their L-Ids have for a long time been called “insurance defense lawyers” and their organizations have, for a long time, been—and still are—called “insurance defense firms.” Lawyers who represented insurers directly were not insurance defense lawyers, and they had no common designation. The relevant public would be better off--from a communications point of view, as well as a social/business understanding standpoint--if the lawyers representing insurance companies directly were called “insurance company lawyers, “insurer lawyers,” “insurance lawyers,” or something of the sort.

Often, these lawyers are called “coverage lawyers,” but this phrase too is misleading. Obviously, this phrase means that the lawyer analyses insurance policies in various contexts and provides legal opinions to whoever hires him. For one thing, policy need “coverage counsel” just as insurers do, and the mere phrases being used do not indicate the probable side of the lawyer. Of course, L is not always on one side or the other, but this is often true.

For another thing, the phraseology do not explicitly refer to the role such lawyers frequently play in litigated coverage disputes, where the insurer might be either a plaintiff (as in declaratory judgment actions the insurer brings) or a defendant (as in declaratory judgment actions brought against them by or on behalf of insureds). Some coverage lawyers are fit to be involved in litigation, and some are not. Not all coverage lawyers involved in litigation realized that they are not fit to do it.

In addition, there is a third point. The phrases “coverage lawyer” or “coverage counsel” do not indicate the other sorts of things lawyers for insurers do for insurer in litigation with current or former policyholders. They might, for example, defend against

common law and/or statutory bad faith claims of various sorts, including those involving so-called "*Stowers* Claims";[9] they might handle suits seeking the payment of premiums; they might handle suits in which the insurer is seeking policy cancellation or rescission; they might handle insurer-intermediary or intermediary-customer disputes; they might work on restitution cases; and/or they might handled suits or administrative actions involving state governing bodies, not to mention lobbying and that might involve insurance departments, legislatures or both.

Another very useful phrase, at least in some contexts, is "insurance lawyer." Not even, the phrase "insurance lawyer" divides those who work for insurers from those who work for policyholders or those who are mainly a type of plaintiff's lawyer trying to get recover from a resisting insurer after having prevailed against a policyholder. Nor does it separate all of the various activities listed in the preceding paragraph.

Historical Change. The system surrounding the insurance defense industry began to change dramatically about 15-20 year ago. Many liability insurers have captive firms handling most of their work defending policyholders. From a practical point of view, these are really—or, at least, to some extent--"in house" firms, though this claim is not a true description from a legal standpoint. Extensive auditing systems have become common among L-Irs using outside lawyers. At the same time, hourly rates have not gone up quickly or proportionately to the rest of the legal profession. Fees of $500 an hour are not unheard of at senior levels in high prestige firms, but they are nonexistent for

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[9] *G. A. Stowers Furniture Co. v. Am. Indem. Co.,* 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved). Interestingly, there was a dissent in the Commission for Appeals, but it has never been reprinted in an official place. See Vincent Morgan and Michael Sean Quinn, *"Damn Fools"—Looking Back at Stowers* After 75 Years, 6 J. TEXAS INS. LAW 2 (May 2005). This whole idea has national significance. See Michael Sean Quinn, *The Defending Liability Insurer's Duty to Settle: A Meditation Upon Some First Principles,* 35 TORT & INS. L. J. 929 (2000).

insurance defense lawyers. Indeed, outside big, complex cases, carriers still pay lower fees than wealthy individuals or families pay per hour for legal services. Moreover, various types of Irs are now suing Ls for malpractice. Usually, they are suing when they themselves were the principal and perhaps only client. Sometimes insurers are suing when L's principal and perhaps only client was an Id, and L-Ir had to pay bunches of money, arguably as the result of L's negligence. The money paid is usually for discharging the L-Ir's duty to defend and its duty to indemnify.

Many L-Irs now insist that the Ls they utilize for any purpose whatsoever have to purchase and prove that they have malpractice insurance. Lawyers should take this as an admonition, if not a warning. Unless the L-Irs intends to do something about the actionable conduct of lawyers they hire to represent their insureds, why would the L-Ir care whether the L has legal malpractice insurance? (Keep in mind that this kind of liability insurance covers more than legal malpractice as described above. It covers a variety of torts actions which can be brought against lawyer for professional errors. Thus, the insurance might better be called "Lawyer Error & Omission Insurance;" that's what it really is.)

The Present. How does this system work now? Like Gaul, the insurance industry is, roughly speaking, divisible into three parts. (I) There is life insurance. (II) There is first-party coverage, where Irs pays Ids for losses involving his property, his asserts, or his body (e.g., property, loss of value in an intangible asset, business interruption, and health insurance) or pays for Id's covered expenses (e.g., hotel bills, medical bills, or losses which the Id does not pay but which are paid for him, roof repair, ransom to kidnappers, and so forth). (III) And there is third-party coverage, a/k/a liability

insurance, where L-Ir defends Id (or pays for the defense), and pays settlements or judgments when appropriate or when the insured's responsibility is established and found to be within coverage.[10]

Insurers hardly ever sue Ls in life insurance cases, although disappointed beneficiaries sometimes do.[11] This might happen when an angry relative who thinks he should have been a (larger) beneficiary sues the estate and trust lawyer for malpractice. Usually these beneficiaries are not clients of the will-devising lawyers they sue, although testators could make them into L's clients by fairly simple devices. Because there is no attorney-client relationship in these cases, the plaintiffs often lose these cases in many jurisdictions, but not always.

Property insurers occasionally sue their lawyers. The foundations here are usually poor coverage advice or opinions, poor adjustment advice, or poor litigation regarding either coverage—as in declaratory judgment actions--or adjustment practices—as in statutory or common-law bad faith actions. Property insurers functioning as plaintiffs in subrogation cases could also sue their lawyers, but these cases are rare. Health insurers have not really started suing their coverage lawyer much, but they will.

III. Some Hypos Stated and Discussed

Some *Insurer v. Lawyer* malpractice—or lawyer error—cases arise in first party situations; some arise in various areas of liability insurance. As indicated, sometimes the latter type of suit results from an L representing a L-Ir directly. In these, the insurer is usually the only relevant or at least the principal relevant client of L. Sometimes these

[10] Probably most liability insurance policies have a first-party content, namely the right to a defense if sued and the factual assertions in the pleadings add up to a covered claim if proved. *Lamar Homes Inc. v. Mid-Continent Casualty Co.,* No. 05-0832 §V (Tex. August 31, 2007)
[11] See 3 M & S, Chapter 32.

suits arise differently. They result from the way L, hired by L-Ir, but who represented L-Id when he/she/it was sued. Sometimes that same lawyer has provided the insurer with legal advice. Usually not. In the latter situation, of course, L represented only the L-Id. Trouble begins here. For the most part, in most states, only clients can sue their lawyers for mal practice,[12] although lawyers can be sued by non clients on the basis of some theories, e.g., malicious prosecution.[13]

Perhaps a diversity of examples from different sectors of the insurance industry might help place the problems facing liability insurers in context. Each of these examples is real from a historical standpoint, or nearly so. Some fiction has been added, for concealment purposes, as have some twists and turns.

(1) Here is a simple case. L advises a property insurer ("P-Ir") that it need not pay a building loss resulting from Rita because it resulted from a hurricane and water damage is excluded, because, although the wind blew Id's roof off first, and that caused the water damage, the roof was old and therefore probably decrepit, depreciated, and deteriorated, and so therefore not covered.

Trust me! This advice is horrible. If Ir followed it, L might—in theory―have an affirmative defense: "My advice was so obviously poor, that you were fools to take, so I ought not have to pay." No such affirmative defense—if made explicit--has ever worked, and they never will. Comparative negligence may work well in many types of negligence

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[12] *Zenith Ins. Co. v. O'Connor,* 55 Cal. Rptr3d 911 (Cal. App. 2007)(holding ceding liability insurer defending a policyholder cannot sue the defense lawyer, so the reinsurer cannot either).

[13] See 1 M & S, Ch. 6, §§ 6.8-.23. Nonclients can also sue lawyers for fraud, conspiracy, abuse of process, false arrest or imprisonment, intentional infliction, defamation, invasion of privacy, conversion, etc. See William T. Barker, Floyd P. Beinstock, and Bennett Evan Cooper, *Litigating About Litigation: Can Insurers Be Liable for Too Vigorously Defending Their Insureds?* 42 TORT TRIAL & INS. PRACTICE L. J. 827 (2007) (not often with respect to abuse of process).

cases, but they do not work well in insurance disputes, except when it is clear that the client rejected the attorney's clear advice.

(2) Here's another P-Ir hypothetical case. Suppose an expensive casino building takes wind damage and damage from what is known in the weather trade as a "storm surge." Suppose further that the policy excludes coverage for damages from either floods or waves, but does not mention storm surge in the exclusion, although its standard policies beginning the following year do. Finally suppose that a "storm surge" is arguably not really either of these—in at least some sense. If a court takes this view and if L does not advise Ir about the fact that all ambiguities are resolved in favor of coverage, especially in exclusions, then L will have committed malpractice. (The legal world created by Katrina has been made to argue that a storm surge is really just a flood.)

(3) Yet another hypo. Suppose Ir insured someone for a number of years, say 26 of them, and the Id now seeks coverage for accidental events which happened during the 15th year, but cannot find the policy. This Ir does not have computerized or microfilmed records going back that far, so it denies coverage, although the policies in Years 12-14 and 16-19 are all exactly the same, and the only difference between Year 19 and Year 20 is an increase in the policy limits. If L advised Ir that there is very little risk in denying coverage for Year 15, L has almost certainly committed malpractice. If L does not explain tendencies in the law to his client, Ir, malpractice has been committed. (Usually this kind of case arises in connection with L-Ir, but one could imagine it happening with a P-Ir, or some other first party insurer.

(4) A clear L-Ir hypo. Suppose L-Id is sued. The case is a big deal. The Petition contains four causes of action. Three of them are obviously not covered with a liability

insurance policy, but one of them will have to be paid by the insurer, if it is proved. L has told L-Ir to agree to refuse to defend but to offer to pay one quarter of reasonable legal fees, not to exceed $125.00 per hour. The policy says nothing about any of these matters. It is a standard liability policy of any sort.

L is guilty of at least three different forms of malpractice. (1) In Texas, if L-Ir has a legal obligation to defend one cause of action, it has a legal obligation defend all of them. (2) L-Ir's duty to defend is determined by the fact pleadings in a case against an insured, whether or not true, and not by the expressly stated causes of action. (3) The amount of money specified for attorneys is way too small for a serious case

(5) Here is what many regard as the most interesting type of hypothetical case. It involves liability carriers. Suppose L is representing L-Id, having been hired by L-Ir. The suit is a large one and serious. The plaintiff offers to settle for primary policy limits or less. This is called a "*Stowers* Demand," if it is done right. Assume this was done. L tells both the primary carrier, PL-Ir, and the excess carrier, ExL-Ir, that they need not worry. The case will be won, and if lost the damages will be less that ½ policy limits of the primary carrier.

L then loses the case; PL-Ir pays its policy limits and becomes insolvent (in part as a result of exactly this); so ExL-Ir pays the rest of the judgment. There is substantial evidence that if PL-Ir had offered ¾ of its policy limits, the case would have settled. L knew this but failed to tell anyone. He forgot.

Under Texas law, legal malpractice rights are not assignable,[14] but they can move from person to person by other means. They can move (a) through an award from a

[14] *Zuniga v. Groce, Locke & Hebdon,* 878 S.W.2d 313 (Tex. App.—San Antonio, 1994, writ ref'd). Given that the Texas Supreme Court refused the writ in this case, a rare event, instead of refusing it explicitly

bankruptcy court,[15] and (b) therefore presumably through the order of a district court controlling PL-Ir's insolvency, and so also (c) they can probably move through subrogation,[16] without any court order. (If A is B's subrogee, if A takes care of B, spends money, and so steps into B's shoes, as it were, think "Good Samaritan" metaphor.)

There is a Texas Supreme Court case which explicitly holds that excess carriers may sue "insurance defense" lawyers, given the facts of this hypo.[17] There is no reason why that law would not apply to primary carriers that have to pay amounts above policy limits. Besides, the advice L gives the PL-Ir about whether to pay policy limits may make it L's temporary client on a narrow issue.

(6) Lastly, consider the following case. Suppose a stripper falls off a stage and injures a customer. The customer then sues the bar, but L-Ir denies a defense, based upon L's advice. The basis of the advice was that the stripper was called an independent contractor by the bar, a category of persons whose conduct the policy explicitly excludes. Now, suppose that the plaintiff's pleading is not relevantly clear, that the bar is accused of inadequate supervision, and—although not mentioned in the tort pleadings—the joint actually had a set of rules for "its" strippers which is entitled "**Dancers' Decalogue: Dance-Determined De-clothing**." Suppose further L-Ir's L knew about this document, which was always given to every new dancer. This is an easy case! Once L-Ir is made to

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because there was "no reversible error." This decision became a Supreme Court decision. There have been few of these over a long time.) The high court itself refers to *Zuniga* as its case. See *Mallios v. Baker,* 11 S.W.3d 157, 163 (Tex. 2000).

[15] *Douglas v. Delp,* 987 S.W.2d 879, 882 (Tex. 1999)

[16] This is true even when the plaintiff is an ExL-Ir. *Am. Centennial Ins. Co. v. Canal Ins. Co.,* 843 S.W.2d 480 (Tex. 1992). Subrogation is permissible when assignment is not because assignment endangers the lawyer-client relationship, while subrogation does not. The latter does not impact the structure or level of the attorney-client relationship. The court here was following *Atlanta Int'l Ins. Co. v. Bell,* 475 N.W.2d 294, 298 (Mich. 1991), which is one of the most influential cases on this matter nationwide.

[17] Cited in the previous note.

pay the customer's damages, L will lose the malpractice brought against her by her client, L-Ir.

Now, what principles govern lawyer conduct in this area of practice? Here are a few.

(i) Do not do insurance work alone without experience or supervision by the experienced.

(ii) Do not advise insurers by telling them what they want to hear, or what you think they want to hear.

(iii) Remember insurers are at least *close* to being fiduciaries of their insureds. This is what it means to say that an insurer has a "special relationship" with an insured, so that the insurer must treat its insured's interests as at least equal to its own. The business of insurance is to *take care of* insureds, *protect* them from various, and *attend to the risks* which injure them. This point applies with special force to liability insurers providing defenses, although this point is not succinctly written law.

(iv) Ls advising L-Irs should look for ambiguities in policies and advise their client in writing about their possible exposures and consequent dangers.

(v) Finally, Ls working for L-Ir needs to think carefully about how to write denial letters and reservation-of-right letters.

Alas, the content of the last listed topic--# (v)—is beyond the scope of even this essay.

Insurer v. Insured's Defense Lawyer: The Future. There is something radically wrong with liability carriers not being able to sue the lawyers they retain, direct, and pay for defending their insureds and ultimately recover from them if they were negligent and lost the case which the were entrusted and thereby insured L-Ir. As already indicated herein (and demonstrated elsewhere[18]), defense lawyers frequently render legal services to the L-Ir that hired them and whose L-Id they are obviously, publicly, and often explicitly representing, and these services are often rendered in the very case where the lawyers are defending Id. Even if Ls do not provided legal services to "their" L-Irs, the following facts can all obtain: (i) the Ls have been paid for rendering legal services--granted: they have not been paid by their explicit (and perhaps only actual) client but by L-Ir—(ii) those legal services were defection, and (iii) the Ls caused financial injury to the entity that was paying the legal bills. Under these circumstances, it is hard to think of reasons why the actually injured party—L-Ir—should not be able to recover from L (or its professional liability carrier). In fact, there are no good reasons for this gap; there are very good reasons why the gap should be closed or abolished: and there are some elegant ways to do precisely this. The remainder of this essay will concern that issue.

IV. Routes to Rightness

There are several routes by means of which L-Irs can become the genuine legal owners of their L-Id rights against the Ls who defend them and whose bills for defense

[18] Michael Sean Quinn, *Whom Does the Insurance Defense Lawyer Represent?* 2 J. TEX. INS. L. 12 (2000).

the L-Irs usually and mostly pay. Here they are: (A) L-Ir clienthood, (B) assignment, (C) lien transfer, (D) subrogation, and (E) contract. Each of these will be discussed.[19]

A. Liability Insurer Clienthood

There is a substantial controversy in relevant legal circles regarding whether a liability insurer providing a defense to an insured is automatically a client of the defense lawyers used.[20] To some extent, the answer to this question hinges on the meaning of the word "provide" in this context, and there are three alternatives. First, L-Ir may provide a defense by paying for it. Second, L-Ir might provide a defense by picking L and then watching. Third, L-Ir might provide a defense by controlling the defense and therefore at least having the right to provide orders to L. Fairly obviously, only the third case matters. In the first and second cases, there is no reason to think that L-Ir is a client of L. It receives no legal services and no legal advice.

So, is L automatically L-Ir's lawyer if L-Ir picks L and controls him? After all, L is providing legal services and L-Ir is using them to discharge its contractual obligations to L-Id. If the answer to this question is affirmative, then there is what the profession is calling a "tripartite"—"Three Part" relationship exists amongst (1) L, (2) Id, and (3) Ir. It

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[19] William H. Black, Jr. and Sean O. Mahoney, *Legal Bases for Claims by Liability Insurers Against Defense Counsel for Malpractice,* 35 THE BRIEF 33 (Winter 2006). (This article discusses two that I do not discuss: "the third-party liability theory" and "the RESTATEMENT theory." The first of these two is implausible and lacks significant authority. The second is based on § 51(3)(c), cmt. g of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000). This section is entitled "Duty of Care to Certain Nonclients," and its main body plus subsection (3)(c) reads as follows: For the purposes of the elements of legal malpractice and a lawyer's duty of care, a lawyer owes the usual and recognized duty of care in each of the following circumstances: "when and to the extent that the absence of such a duty would make enforcement of those obligations to the client unlikely[.]" Comment g begins as follows, pretty much: A "lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to maters as to which the interests of the insurer, and the insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer[.]" See *Spratley v. State Farm Mut. Auto. Ins. Co.,* 78 P.3d 603, 607 (Utah. 2003) (relying upon *Paradigm Ins. Co. v. Langerman Law Office, P.A.,* 24 P.3d 593 (Ariz. 2001).
[20] See Charles M. Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?* 72 TEX. L. REV. 1583 (1994)

is difficult to see why “Tripartitianism” is impelled upon the profession if L provides legal services to Id and provides L-Ir with no advice. After all, L is not rendering legal services to L-Ir, instead; it is helping L-Ir discharge its insurance services by functioning as a defense lawyer for Id. Still, when abstraction is eliminated and the real world is the focal point, defense lawyers often render legal services to L-Irs by providing advise about how to conduct a case, what the settlement value is, how to conduct settlement negotiations, and how to conduct a trial. Obviously, these are all legal services, and they are rendered directly to L-Ir. Of course, L-Ir then uses them to perform its duties as a liability insurer, but it needs legal advice to do this well. If L gives it bad advice—or no advice, what advice is needed or sought—say, as to settlement value, and this act or omission results in a mistaken but necessary judgment, the injury and damages were caused by L, assuming that L-Ir would have done significantly better had good advice been provided and followed. (Interestingly, many easier legal malpractice cases involve not just one blunder by the lawyer but a series or an interconnected system.)

This conclusion is sound. Alas, it has not been deployed much as a foundation for L-Ir’s standing to sue L for fouling up the defense of Id. One wonders why not. One can think of two reasons immediately.

First, it would drive up legal fees which L-Irs would have to pay. Obviously, L will not work on complex and lengthy cases at cheap rates if their mistakes are highly probable to trigger expensive lawsuits in which they will be defendants. Of course, this problem can be avoided to some extent by setting up arbitration agreements between Ls and the I-Ir that use them.

Second, the fact that L-Ir and L have an attorney-client relationship with respect to advice L has provided L-Ir does not entail or even imply that this relationship is as broad as the attorney-client relationship between L and Id. Indeed, it will be much narrower. Many negligent acts and omissions of defense lawyers would not fall within the metaphorical pin points which constitute the areas of attorney-client relationship between L and L-Ir. Consequently, this use of Tripartitianism will be unreliable and so not terribly helpful, although it might be a little bit helpful occasionally and so should not be written off.

B. Assignment

An assignment is a document by means of which A transfers ownership of an asset to B. Sometimes this is A's status as a creditor; sometimes it is A's legal rights; sometimes it is an intangible asset the ownership of which is changing hands.[21] Assignments can be voluntary or involuntary. The latter of these two is often where ownership changes hands by means of a court order of some sort. One of these cases has already been discussed. The majority of states that have considered the issue of whether legal mal rights can be voluntarily assigned have come down in the negative side of this question. Texas is one of these,[22] and (unfortunately, in my view) this rule is likely to

[21] See *Assignments,* 7 TEX. JUR. 3D 173 (1997). See also *Assignments,* 6 AM. JUR.2D 143 (1999).
[22] *Zuniga v. Groce, Locke & Hebdon,* 878 S.W.2d 313 (Tex. App.—San Antonio 1994, writ ref'd). The use of the last phrase in the citation at that time means that the Supreme Court adopted the decision as its own. See Mallios v. Baker, 11 S.W.3d 157 (Tex. 2000)(involving partial assignment to judgment broker).

remain, even though a few other states have rejected it.[23] As already indicated, sine gave rejected it.[24]

The following arguments have been given for this rule:

- Having a rule of assignability would drive an immediate wedge between lawyers and client.
- Having a rule of assignability would reduce the eminence of the legal system.
- Clients would pull rugs out from under their clients in order to settle cases.
- Assignability would destroy the sanctity of the attorney-client relationship.
- Assignability would create a commercial market for buying these rights and that would demean the legal profession.
- Assignability would impose temptations upon Ids to carelessly give up significant secrets at times they were under stress.
- Assignability would become public knowledge and the public (including potential jurors) would come to have less confidence in the legal system.

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[23] *New Hampshire Ins. Co., Inc. v. McCann,* 707 N.E.2d 332 (Mass.1999)**,** followed by *St. Paul Fire and Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP*., 379 F.Supp.2d 183 (D. Mass. 2005) and 233 F. Supp.2d 171 (D. Mass. 2002)(for a detailed account of the facts). These are subrogation cases, but they rest on Massachusetts law regarding assignment. See also *Kommavongsa v. Haskell,* 67 P.3d 1068, 1070 (Wash. 2003).

[24] Here are a few such decisions. *Law Office of David J. Stern, P.A. v. Security Nat'l Servicing Corp.,* No. SC06-361 (July 5, 2007); *Delaware CWC Liquidation Corp. v. Aitcheson,* 584 S.E.2d 473 (W.Va. 2003), and *Querrey & Harrow, Ltd. v. Transcontinental Ins. Co.,* 861 N.E.2d 719 (Ind. App. 2007). After rehearing was denied, transfer was granted, and this opinion was vacated in "rap 58(a)."

- Assignability would create new and active choses in action markets and hence increase litigation. They would even become a new form of investing.

These arguments have been considered by a few commentators who have rejected them.[25] So far, few courts have been persuaded. (Skeptical cynics may be inclined to believe that the legal profession is merely protecting itself). This device is unlikely to catch on around the country. Nevertheless, an attorney thinking about using this device in a given state should check the state's law and file, if at all possible, where the laws of assignment favor validity.

C. Creation of Lien

One wonders if there might not be devices somewhat like assignments which could be used, without any of its various apparent "dangers." The Texas Supreme Court has held that a former client may sue an attorney for malpractice even if the client executed a partial assignment to a person or entity that was financing the suit.[26] A partial assignment which was legally invalid does not destroy the client's right to file and pursue suit. The client still owns something, namely, a right to pursue a chose in action, which

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[25] See Kevin Pennell, *Note: On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem,* 82 TEX. L. REV. 481 (2003)(A "legal malpractice claim is a form of property and should be freely assignable; however, attorneys should be allowed to limit a prospective client's right to assign a potential legal malpractice claim, provided the client provides his informed consent." Id. at 482-83. Thus, "attorneys should be allowed to include anti-assignment provisions in their retainer agreements, assuming that they fully inform the client of the effect of that provision." Id. at 483. For a bibliography of commentaries, see Id. at n.11). See also Michael Sean Quinn, *On the Assignability of Legal Malpractice Claims,* 37 S. TEX. L. REV. 1203 (1996) (Quinn rejects Pennell's view that lawyers should be free to forbid assignment in their retainer agreements with respect to any client, even if they explain them.)

[26] *Mallios v. Baker,* 11 S.W.3d 157 (Tex. 2000).

can be the foundation of a lawsuit.[27] If so, isn't there something somewhat like an assignment which might do the same work.

Couldn't the former client of a lawyer—now the plaintiff against him in a legal mal case—provide the person or entity financing his claim some sort of lien on what is recovered? One should think he could. After all, plaintiff's lawyers have can have a lien on a contractually determined amount of any recovery. Under § 1.08(h) of the TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT a plaintiff's lawyer (among others) cannot own a property interest in his client's claim. He can have a lien, however, and various sorts of people can be notified about this.

One trouble with the "Lien Theory" is that outside established property law, the law of liens is vague, undeveloped, and unstable. Consequently, enforcing alleged grants of liens depends very much on at least judicial cooperation. Therefore, the "law of liens" is not to be trusted.

It's hard to find much of this kind of enterprise floating around. One wonders why not. Too speculative? Too complicated? Too many uncertainties?

D. Subrogation

Not every state permits a defending liability insurer to be subrogated to its insured's legal mal rights.[28] Some states are just beginning to consider the issue.[29] L-Irs may acquire an insured's right of legal malpractice through subrogation under Texas

[27] Where there is an invalid partial assignment, can the former client sue for all the damages? One would think so if the assignment is invalid.
[28] *Bank IV Wichita, Nat. Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson,* 827 P.2d 758 (Kan. 1992).
[29] *St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP,* 379 F.Supp. 183 (D. Mass. 2005)(denying both sides summary judgment and describes the issue as novel under Mass law).

law.[30] Even excess insurers can as well, as already mentioned,[31] though reinsurers probably cannot. Subrogation is not open to L-Irs in all states, however. In one recent case,[32] the Court of Appeals of Ohio rejected equitable subrogation for a defending primary liability carrier finding it would drive a wedge between attorney and client. "Indeed, the attorney would be placed in an even more precarious position than is inherent in a tripartite relationship. In another a Court of Appeals of Indiana, refused to allow an excess carrier to be subrogated in a legal mal action.[33] Oddly enough, it did this on the grounds that legal mal rights cannot be assigned.

The Ohio case presented in the last paragraph was quite different. There a conflict clearly existed between the insurer and the insured[, since the insured wanted the case settled. L,] and the attorney paid by the insurance company but with primary allegiance to the insured, could not escape liability if this court chose to follow the doctrine of equitable subrogation." According to the court, if L had done as the insurer wished, the insured would have sued him, but if he had done as the insured wished, the insurer would have sued him. "To permit such a result would 'substantially impair an attorney's ability to make decisions that require a choice between the best interests of the insurer and the best interests of the insured.'"[34]

Thus, subrogation is a good place to start when thinking about L-Ir bringing a malpractice action against defense counsel. Subrogation has its dangers however. Since

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[30] For a systematic summary of the law of subrogation, see Michael Sean Quinn, *Subrogation, Restitution and Indemnity,* 74 TEX. L. REV. 1361 (1996)(an aging account but mostly right). For a recent change in Texas law of subrogation, see *Fortis Benefit Co. v. Cantu,* 2007 WL 1861000 (Tex. June 29, 2007).

[31] See also *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pgh, Pa.,* 20 S.W.2d 692 (Tex. 2000).

[32] *Swiss Reinsurance America Corp. Inc. v. Roetzel,* 837 N.E.2d 1215 (Ohio App. 2005)**.** The actual primary carrier in that case was Frontier. It was the second-named plaintiff, and Swiss Re was Frontier's reinsurer.

[33] *Querrey,* supra n. 24.

[34] Id. at §[15] & {¶ 33}.

the subrogee steps into the shoes of the subrogor, any defenses which can be asserted against the subrogor can be asserted against the subrogee. Further, if "Gee" and "Gor" are co-plaintiffs, a procedural error by "Gor" which causes the dismissal of its case, can lead to the dismissal of "Gee's" case as well. In addition, if there will be substantial resistance. Some of it will be formalistic. Defense counsel will review the elements of subrogation and try to find various ways out. Judges who are unsympathetic to insurers will try to find hidden ways to get rid of the cases. Of course, this is not a legal point is more like a political point. Still it is an influential and important consideration.

E. Breach of Contract

It has been true in Texas for many years, and in other jurisdictions as well, that actions against a lawyer for injurious screw-ups sound in tort, not contract. One well-known Texas treatise is fairly clear on this point: "For most purposes, current Texas law apparently treats legal mal practice claims, even those framed as breach of contract, as tort claims."[35]

Similarly, not much is said about the possibly of using breach of contract as a cause of action in the Mallen & Smith treatise for example. In fact, §8.6 begins by saying this: "Few modern actions against attorneys are for breach of a written or an express contract."[36] The reason is interesting: "The prevailing rule is that there is no cause of action for breach of an express contract unless the wrong sued for is breach of a specific

[35] Charles F. Herring, TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 91 (6th ed. 2007). Immediately after this statement, Herring cites numerous cases. He also cites a very small number of Texas cases saying that contract theory might be used. See Michael Sean Quinn, THE ELEVEN COMMANDMENTS OF PROFESSIONAL RESPONSIBILITY: GALLIMAUFRY SECUNDUM 128-29 (2004) (discussing legal malpractice and pointing out that contracts between lawyers and clients are presumed to be unfair, and the attorney has burden to prove fairness). See *Honeycutt v. Billingsley,* 992 S.W.2d 570, 582 (Tex. App.—(Houston [14th Dist.] 1999, writ denied) citing *Archer v. Griffith,* 390 S.W.2d 735, 739 (Tex. 1964).
[36] 1 M & S, at 816.

promise."[37] In addition, implied promises to do a reasonably good job are difficult to distinguish from negligence actions, and the authors say, "there is no difference between the remedies for the different theories, except that a negligence claim usually is subject to a shorter statute of limitation."[38] Thus the matter is discussed in three short seconds in Volume I of a five (5) volume treatise.

In contrast, §55(1) in 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000), entitled "Civil Remedies of a Client Other Than for Malpractice," unequivocally affirms the use of contract law as a way to sue lawyers. It reads this way: "A lawyer is subject to liability to a client for injury caused by breach of contract in the circumstances and to the extent provided by contract law." Comment c says this, in part: "A client's claims for legal malpractice . . .can be considered either as tort claims or as contract claims for breach of implied terms in a client-lawyer agreement." The "Reporter's Note" goes on to discuss the idea of "warranty of result," which is obviously a dramatic remedy possibility.[39] (Interestingly, the same texts make it clear that a breach of fiduciary duty could also be treated as a contract action.) Now, ask yourself, "If § 55(1) can be the foundation of legal mal claims, what would be wrong with permitting assignments"?

In any case, in Texas and many other jurisdictions, legal malpractice does not constitute a contract action. This is true even though breach of contract is often pleaded by plaintiffs in legal mal cases, and then ignored by the judge, the defendants, and ultimately plaintiff's counsel herself. Why this is or should be true is extremely difficult to grasp. Lawyers and clients have agreements which must be contracts. Lawyers can

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[37] Id. at 818.
[38] Id. at §8.7 at 819-20.
[39] See Quinn, at 129 n. 35.

sue clients and former clients for breach of contract. This is what it is to sue for unpaid fees. The statute of limitations for contract in Texas anyway is longer for contract that for tort; thus it would be helpful to clients to allow actions for breach of contract. The usual problems of injury are the sorts of thing which are covered in contract cases, to wit: economic and financial loss. Legal mal actions seldom, if ever, involve the infliction of either bodily injury or property damages, yet this is what most ordinary and historical negligence actions concern. And besides, contract actions authorize the recovery of attorney's fees whereas tort actions do not. Then again, tort actions permit the recovery of punitive damages, whereas contract actions do not. Perhaps it is relevant that liability insurers have much less hesitancy about providing defense and indemnity when the actions pleaded are tort actions and not contract actions. In theory, however, this should ultimately make no difference.

Now, let's change the discussion slightly. What could be said about a liability insurer suing a lawyer who agreed to provide a defense to an insured and then fouled the whole thing up? Isn't there an agreement—and hence a contract—involved in this. The insurer basically says, "Defend this insured ably. Consult with us. Do what we say, if we say anything. Keep us posted. And we will pay you. If you keep the file and start to work, you have accepted this deal." If L loses a case which should have been won, or if L loses a case at $10MM when it should have been lost for $3MM, the lawyer has not done what he promised or contracted to do.

What is neat—even elegant—about this idea is that there would be two separate causes of action: the tort of legal mal for clients of L, and breach of contract to defend ably in the case of L-Ir. Of course, L-Ir would still have the tort, when it was the sole

relevant client or when it was the direct client. (Remember! If the defending L-Ir says to L, "What is this case against Id worth? I need to know so I can think about settlement." and then L gives a poor answer L has provided legal services through advice to L-Ir. It is an interpreting whether this mistake would be tort, contract, or both.)

V. Conclusion

I close this essay by positing and then discussing a hypothetical and asking a question. A man suffering from a deadly disease is treated for it at a doctor's clinic. A mistake is made by the nurse delivering the medication and the man dies on the spot. His estate and his family sue the doctor, the nurse, and the corporate entity employing them both. Everyone on the defense case comes to believe that this case is a looser, indeed, an extremely dangerous one. The doctor was inattentive to administration, the nurse was ill-trained; and the entity was an administrative nightmare. Everyone on the defense side also believed that the case against the corporate entity is more serious than the one against the doctor.

The case against the doctor was settled, but the one against the corporation was not. This happens even though the field adjuster saw disaster coming and tries tactfully to tell his administrative and decision-making superiors. Interestingly, neither defense counsel—not the one for the doctor and not the one for the entity and the nurse—told the insurer that the case needed to be settled. There were several opportunities to settle within policy limits, and an appropriate *"Stowers* Demand" was timely delivered.

None of the lawyers involved ever advised the insurer that the case would be lost big-time and should be settled for policy limits, if no lower number was possible. This happened even though there was a controversy in one of the firms about what should be

done. One of the associates helping on the case wrote a strong memo arguing that precisely this advice should be given and that it was legally wrong not to give it.

The medical malpractice case was tried. Hardly any affirmative defense was attempted, and the argument given by the defense was that it was the doctor's fault and not that of the nurse or the entity, even though the entity employed not only the nurse but the doctor as well. The nurse dropped dead at the end of the defense lawyer's closing argument. The jury returned a large—multimillion dollar verdict against the entity, including punitive damages, judgment was entered upon it, and the judgment was affirmed. There was no verdict rendered against the nurse, since she died dramatically and— of course—the doctor herself was gone from the case.

The case was highly publicized. The doctor lost her patients. Her practice closed. She was treated for depression. Her husband divorced her and got custody of the children. She changed back to her maiden name, moved, and joined a gigantic multi-doctor practice.

During the late parts of the appellate process, the doctor and the entity assigned any causes of action they might have against the insurer to the plaintiffs—the decedent's estate and his many children. They did not assign their cause of action for legal malpractice against the lawyers that represented them, but they created a lien against all proceeds until all the expenses were paid then $X.00 went to the plaintiffs in the underlying case. Thereafter, suit was filed. It included causes of action against the lawyers for malpractice and breach of fiduciary duties, and it included causes of action against the insurer for breach of contract and both statutory and common law bad faith. This happened three years after the entry of judgment in the underlying case.

There are lots of issues here, but I care only about a few of them just now. Could the insurer sue the lawyer it hired to defend its insured, by means of a cross claims. Would there be any statute of limitations problems? Could the insurer seek indemnity of some sort from the lawyers? What would the lawyers' defenses be? Would it be mal practice for the insurer's lawyer to fail to recommend that these cross actions be filed?

Does not justice require that the insurer have causes of action against the lawyers under circumstances like this one?