

Fordham Law Review

Volume 65 | Issue 1

Article 14

1996

Professional Liability Insurers as Regulators of Law Practice

Anthony E. Davis

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

 Part of the [Law Commons](#)

Recommended Citation

Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 Fordham L. Rev. 209 (1996).

Available at: <https://ir.lawnet.fordham.edu/flr/vol65/iss1/14>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Professional Liability Insurers as Regulators of Law Practice

Cover Page Footnote

Partner in Fox & Horan, New York, and an adjunct professor of law at Brooklyn Law School and the Benjamin N. Cardozo School of Law/Yeshiva University. He is also the author of Risk Management Survival Tools for Law firms (1995). At this juncture, one further preliminary matter must be expressed. I wish to acknowledge the assistance of a number of the leading domestic commercial professional liability insurers and insurance brokers for providing me with both past and current policy language, and in several instances also for engaging in extensive discussions about their perceptions of themselves as regulators of their insureds. In recognition of their proprietary rights in the context of an industry which is highly competitive, however, and where even comparison charts of various policy provisions prepared by brokers are products perceived as having significant commercial value, I have agreed to use their policy provisions and refer to all conversations with them anonymously.

PROFESSIONAL LIABILITY INSURERS AS REGULATORS OF LAW PRACTICE

*Anthony E. Davis**

INTRODUCTION

THIS Article addresses the extent to which professional liability insurance carriers (“Insurers”) can, or should, serve as informal regulators of their insureds. There are two threshold matters, however, which must be confronted in seeking answers to those questions. First, we must assess the extent to which Insurers have acted, or currently act, as regulators of the profession, or actively try to do so. Second, we must recognize that the designation of Insurers as *informal* regulators itself may be misplaced.

Part I of this Article addresses whether Insurers should be recognized as formal rather than informal regulators of conduct. Part II surveys the scope of regulation which has been attempted by Insurers to date and attempts to assess its efficacy. Part III suggests additional forms of regulation from Insurers which I believe are imminent or which should be anticipated in the future. Finally, part IV addresses the fundamental policy question raised in this Article: What is the degree to which Insurers *should* be permitted to perform and—if I am correct in my analysis—expand this regulatory function?¹

* The author is a partner in Fox & Horan, New York, and an adjunct professor of law at Brooklyn Law School and the Benjamin N. Cardozo School of Law/Yeshiva University. He is also the author of *Risk Management Survival Tools for Law Firms* (1995).

1. At this juncture, one further preliminary matter must be expressed. I wish to acknowledge the assistance of a number of the leading domestic commercial professional liability insurers and insurance brokers for providing me with both past and current policy language, and in several instances also for engaging in extensive discussions about their perceptions of themselves as regulators of their insureds. In recognition of their proprietary rights in the context of an industry which is highly competitive, however, and where even comparison charts of various policy provisions prepared by brokers are products perceived as having significant commercial value, I have agreed to use their policy provisions and refer to all conversations with them anonymously. Rather than referring to some with, and others without, attribution, I have decided further that it would be preferable to treat all such references anonymously. I trust that those who know me will attest to those who do not that this rule of anonymity of source should be taken as confirming, rather than detracting from, the authenticity of the material. Since this Article is about what are essentially policy issues, rather than a comparison or critique of particular approaches to given problems, I trust that the reader will agree that there is no harm in protecting perceived commercial interests in this way, particularly if the result is to enable a broader and more complete review of the issues.

I. IS THE INSURANCE POLICY FORMAL OR INFORMAL REGULATION?

The insurance policy is becoming less of an informality. Notably, we can already discern the makings of a movement towards a requirement, in the sense of a condition for the right to practice, that lawyers must have a designated level of professional liability insurance. In some states, such as Oregon,² this already is an absolute and general requirement; in others, such as California³ and Colorado,⁴ it is being proposed as a limited requirement upon practitioners who wish to avail themselves of limited liability entity structures as their chosen commercial vehicle for engaging in law practice.⁵ In either circumstance, lawyers who practice pursuant to any such rule are thereby placed under the burden of entering into contracts which may contain express requirements as to the manner in which they or their firms conduct themselves. As we shall see, such requirements can go to issues central to any practice, such as the selection of clients, the management of the office and the admission of new partners. There is, therefore, clearly an element of delegated rule-making authority when a state requires such coverage but leaves to Insurers the definition of the scope and conditions for issuing such policies. While none of the existing or proposed requirements for obtaining such coverage makes it a disciplinable offense for a lawyer to violate the terms of coverage, even in instances where claims are rejected by Insurers on the grounds of a practitioner's breach of the insurance contract, such an extension is not entirely far fetched. Surely, even without such an express provision, a firm that deliberately flouts the terms of its policy to make its mandated coverage effectively a sham might be disciplined under other provisions of the ethics codes. Thus, to say that regulation by Insurers is informal is doubtful at best in some jurisdictions.

Furthermore, even in states that do not require professional liability insurance as a condition of the right to practice law, lawyers voluntarily accept regulation by Insurers. Most lawyers have coverage for which they often pay quite substantial premiums. Thus, these lawyers are likely to, and by and large do, heed the terms and conditions of coverage—including the limitations, which are usually expressed as "exclusions." Arguably, even this contractual regulation is more than merely informal, at least to the extent that lawyers recognize and ac-

2. Resolution Adopted by the Oregon State Bar at its November 1977 Bar Convention, effective July 1, 1978 (pursuant to Or. Rev. Stat. § 9.080(2) (1993)).

3. Cal. Corp. Code § 15052 (Deering 1994).

4. Colo. Court Rules, Ch. 22, Rule 265, § 4 (1995).

5. In addition, the Rhode Island Supreme Court has established a similar requirement. See *In re Rhode Island Bar Ass'n*, 263 A.2d 692 (R.I. 1970) (permitting attorneys organized as a corporation to practice law provided, among other things, that they obtain liability insurance for the protection of clients served by such corporation).

cept as morally and legally binding the obligation to perform their contracts conscientiously.

There are, in addition, consequences for insureds who flout the terms of their coverage. They face the loss of coverage—usually at their moment of greatest need—as well as consequential exposure to personal liability for damages, and the loss of any value for the premiums they paid. Because regulation is presumably defined as the establishment of rules, the breach of which will, or at least may, have adverse consequences, the terms and conditions of professional liability insurance policies would seem to qualify as regulations. Accordingly, my first proposition is that Insurers, whether by pure contract or pursuant to legal requirement, are already in a position formally to regulate their insureds. While this may be a non-traditional form of regulation, there are two questions that we must next address: (1) What is the scope of this kind of regulation?; and (2) How effective is it?

II. THE SCOPE AND EFFECTIVENESS OF INSURANCE-BASED REGULATION

The first matter to explore is the extent and manner in which Insurers' exercise insurance-based regulatory power both currently and in the past.

A. *Scope*

Because we are accustomed to thinking in terms of the kinds of regulation contained in the Model Code and in States' ethics codes (the "ethics codes"), it may be helpful to classify Insurers' regulatory efforts in the context of the regulatory classifications within the ethics codes. As will appear from the following examples, there are two ways Insurers seek to regulate attorneys which directly relate to the regulatory schemes contained in the ethics codes. The first is through policy provisions that supplement or clarify the definition of prohibited conduct beyond the terms and requirements of the standard ethical constraints. The second is through policy provisions prohibiting or restricting, that is, excluding from coverage, permitted conduct or conduct not expressly or clearly forbidden by the ethics codes.

There is, in addition, a third form of regulation—risk management services, advice, or assistance—provided as a means of educating, persuading or, in a few instances, requiring improved management as a pre-condition to the inception of coverage or the renewal of coverage. This form of regulation is slowly increasing in influence and reach in the lawyers' professional liability insurance arena and is derived from the traditional insurance industry's emphasis on utilizing loss control techniques and systems on insureds, and, where necessary, imposing them as a condition of coverage.

Let us turn, then, to examine some examples of regulation of lawyers by professional liability insurers.

1. Policy Provisions which Augment Existing Ethical Rules

a. *Conflicts of Interest*

In general terms, the ethics codes are structured to regulate under what I call the “closed door/open door” model. In other words, the codes start out with blanket prohibitions against lawyers accepting or continuing representations where a conflict exists—the closed door. For example, “A lawyer *shall not* enter into a business transaction with a client.”⁶ The problem arises with the “open door” which follows when the rule continues with language providing that notwithstanding the prohibition, lawyers *may* act in such situations provided that they meet certain specified requirements. For example, a closed-door provision may add: “unless: (1) the transaction and terms . . . are fair and reasonable . . . ; (2) the client is given a reasonable opportunity to seek the advice of independent counsel . . . ; and (3) the client consents in writing.”⁷ While the various ethics codes differ in degrees of specificity of these “open door” provisos, they all follow this “closed door/open door” structure.

Insurers, in contrast, have been trying to keep the doors closed. They have sought to prevent lawyers from accepting clients in reliance on the ethics codes’ consent provisions. The reason for this is clear. It is nearly impossible to mount credible or successful defenses in malpractice cases where the plaintiff’s claim is grounded in an alleged conflict of interest. The policy provisions dealing with these situations are not uniform, but they do fall into two broad categories.

First, there are provisions excluding from coverage representations where the lawyer or firm has personal, entrepreneurial or business interests in a client’s business or affairs. The following is a representative example⁸ of a currently used exclusion clause relating to personal, entrepreneurial, or business interests:

Example 1

This policy does not apply to:

...

(e) any Claim made by, against or arising out of the conduct of any organization (other than the Named Insured or a Predecessor Firm) which is owned, controlled, managed or operated by an Insured or in which the Insured is a partner or employee;

(f) any Claim arising out of an Insured’s activities and/or capacity as:

6. Model Rules of Professional Conduct Rule 1.8 (1994) [hereinafter Model Rules] (emphasis added).

7. *Id.*

8. See *supra* note 1.

- (1) an officer, director, partner, trustee, member or employee of an organization (other than the Named Insured or a Predecessor Firm);
- (2) a public official or employee of a governmental body, subdivision or agency;
- (3) a fiduciary under the Employee Retirement Income Security Act of 1974 and its amendments or any regulation or order issued pursuant thereto, except if an Insured is deemed to be a fiduciary solely by reason of legal advice rendered with respect to an employee benefit plan;
- (g) any Claim made against an Insured as beneficiary or distributee of any trust or estate

The second, though presently less common category of exclusionary provisions are blanket exclusions for all representations involving conflicts of interest among multiple clients. The following is a representative example of a currently used, blanket exclusion clause for representations involving conflicts of interest among multiple clients:

Example 2

This policy does not apply to:

...

- I. Claim(s) arising out of the Insured's rendering or failing to render professional services to two (2) or more parties of divergent, varying, or opposed interests, thereby creating an actual conflict of interest

Variations from and supplements to these forms exist. Some Insurers are more specific as to the nature or extent of ownership interests which will trigger the kind of exclusions stated in Example 1. For example, ownership of less than five percent of a publicly traded company may not trigger the exclusion while another, similar policy places the threshold at a ten-percent ownership level. On the other hand, some policies go beyond the general exclusionary language of Example 1 and specify, for instance, that lawyers' or firms' ancillary business activities are expressly excluded from coverage.

These examples demonstrate that Insurers have determined that the profession's codes of professional responsibility are inadequate to prevent lawyers from engaging in conduct likely to harm clients' interests and, therefore, lead to claims. Professor Silver, in his comments on the first draft of this Article, rightly points out that any such concerns on the part of Insurers, and their attempts to affect lawyers' conduct, probably has more to do with the Insurers' own financial self interest—profits—than benign concern for the well-being of clients.⁹ I agree with and accept that point. But I also suggest that his comment may require additional clarification. The reason these exclusions are

9. Charles Silver, *Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis*, 65 *Fordham L. Rev.* 233, 234-35 (1996) [hereinafter Silver, *Response to Davis*].

perceived to be necessary at all derives from claims, awards, and settlements made out of the fear or expectation of awards against lawyers which Insurers are under contract to defend and indemnify. Whatever the motive underlying Insurers' activities in rewriting their policy language, they are ultimately reacting to the fact—as they perceive it—that the resulting cases invariably cast the lawyers in a negative, self-interested light. These cases are, therefore, very difficult to defend and lead to awards or settlements that reduce Insurers' profits. The end result is that Insurers decline to accept or, at a minimum, try to avoid, the risk of these situations. By excluding coverage, Insurers attempt to make the profession confront the fact that lawyers who engage in representations involving conflicts, even if such representations are technically permissible, will assume the entire risk of the consequences. Thus, it is important to recognize that while Professor Silver correctly points out that the Insurers' motivation is probably different from that of other professional regulators, the end result is still regulation designed to change lawyers' conduct.

b. *Supervision*

An interesting and relatively recent exclusionary provision relates to the obligation to supervise subordinate lawyers. Expressed as an unequivocal obligation for the first time in the Model Rules of Professional Conduct,¹⁰ the applicable insurance policy language is interesting as much for what it permits as for what it excludes. Most lawyers' professional liability policies explicitly exclude all claims relating to activities of lawyers at any time before or after they are members or employees of the insured firm. One policy, available only to certain medium and large size firms, gives some limited coverage to the acts of lawyers who join insured firms as lateral hires or as part of merged practices. That expansion of normal coverage, however, is expressly limited by the following provision:

Example 3

1. Any claim arising out of any Act of any other person or entity . . . for which an Assured is or may be vicariously or indirectly liable (whether by operation of law or as a result of agreement). For purposes of this exclusion, the term vicarious or indirect liability is intended to mean, among other things, the liability of the Assured for failure to supervise the work of his or her partners, or others, if such Assured had no direct involvement in that work.

On one level, this example may be regarded as merely an Insurers' attempt to limit the scope of the risk assumed in the context of what is an unusual enlargement of coverage. On another level, the limitation also denotes a recognition that within the insured firm, as opposed to acts committed prior to joining the firm, lawyers have an oversight

10. Model Rules, *supra* note 6, Rule 5.1 (b), (c).

obligation which, if not performed, may give rise to liability. This is particularly important to Insurers in the context of the risk management category addressed in section 3 of this part.¹¹

c. *Advertising: Networks and Office Sharing*

Two insurers recently introduced policy exclusions to deal with the propriety and implications of various forms of affiliations, networks, and office sharing arrangements among lawyers and firms. This is a topic which, in the context of the ethical rules governing advertising and solicitation, has been the subject of detailed and lengthy opinions of the American Bar Association and local ethics organizations.¹² These policy exclusions are notable. While the ethics organizations express certain reservations about network and office-sharing arrangements and notify the bar of their possible adverse implications, such as vicarious liability for the acts of others and the potential for the application of conflict of interest rules, the policy exclusions actually disavow coverage for vicarious liability claims arising out of such relationships. The following examples demonstrate this point:

Example 4

This policy excludes:

...

12. [A]ny claim based on the vicarious or indirect liability of an Assured . . . for the Act of any other person or entity that is not an Assured arising out of or related to any formal or informal arrangement, including but not limited to an arrangement described as or constituting a "network," between or among the Assured and one or more other persons or entities (whether or not engaged in the practice of law) for the joint marketing, promotion, advertising or conduct of their businesses. For purposes of this exclusion, the term 'vicarious or indirect liability' means, among other things, liability of an Assured for failure to supervise the work of any other person or entity participating in any such formal or informal arrangement if such Assured had no direct involvement in that work.

Example 5

We agree with you that this insurance does not apply to a claim made or suit brought against a person or organization insured hereunder if such claim or suit arises solely out of a wrongful act of a lawyer with whom you share common office space or common office facilities who is not insured under this policy.

11. In addition, other aspects of lateral hire and merger controls among the policy provisions which prohibit or restrict conduct otherwise permitted by the ethics codes are discussed in part II.A, *infra*.

12. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-388 (1994) (discussing the ethical propriety and requirements of networking and affiliating law firms); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 84-351 (1984) (discussing the implications of one law firm listing another law firm on its letter head as an "associated" or "affiliated" firm).

Here, again, Insurers are seeking actively to discourage, i.e., to regulate, conduct which the ethics codes and the ethics committees expressly endorse as proper, albeit with some reservations. The regulation is in the form of an express notice to insureds that they are on their own when it comes to liability for claims arising from such relationships or activities. The conduct is not prohibited, but, from an economic point of view, the exclusions are obviously intended to discourage such relationships beyond the reservations expressed by or within the profession itself.

2. Policy Provisions which Create New Classes of Restricted Conduct

We turn now to policy provisions which go beyond the realm of merely supplementing existing professional regulation to the expression of new forms of restricted conduct. These provisions concern activities which are either largely outside the scope of the profession's own regulatory scheme, as in the case of the regulation of lateral hiring and practice mergers, or which explicitly contradict statements in the profession's ethics codes, as in the case of suits for legal fees.

a. *Mergers and Lateral Hires*

Notably, the language extracted in Example 3 above is in the context of a provision granting coverage for the prior acts of laterally hired lawyers and lawyers joining insured firms as part of mergers. The policy containing that provision, however, also contains express qualifying language permitting both the insured firm and the Insurer to withhold such coverage on notice to the other. This is consistent with the much more common industry standard that expressly excludes such coverage. The reason Insurers customarily seek to exclude this coverage may be inferred from *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*,¹³ a recent case against the Chicago firm of Winston & Strawn. In that case, Winston & Strawn was found liable for three million dollars in punitive damages arising from the firm's acquisition of a local practice as its new regional office. Winston & Strawn failed to take the steps required to bring formal closure to the acquired firm or to purchase extended reporting coverage, sometimes referred to as "tail" coverage, prior to the effective moment of merger.¹⁴

To avoid the transfer of these risks, most policies contain language in the definition of coverage, usually appearing at the beginning of the policies, expressly limiting coverage: (1) to persons or entities which are members or employees of the insured during the policy period, (2) to errors, acts, or omissions occurring while such persons or entities

13. 907 P.2d 506 (Ariz. 1995), cert. denied, 116 S. Ct. 1877 (1996).

14. *Id.* at 513-18.

are or were members or employees of the insured, and (3) to claims reported during the policy period. As Professor Silver properly points out in his response, one purpose of these limits on coverage is to prevent "stacking."¹⁵ In the context of this general concern, a number of Insurers are adding supplementary language expressly to deal with the issue of lateral hires and mergers. Two examples follow:

Example 6

(H) CHANGES IN RISK:

(1) If, during the Policy Period, the total number of attorneys in the Firm increases by more than five percent (5%) or twenty-five (25), whichever is less, as the result of the Firm's merger with or acquisition of any other law firm or any group of attorneys who practiced together at another law firm, the Firm must promptly give the Underwriter written notice thereof, and the Underwriter will be entitled to impose such additional coverage terms and charge such additional premium in connection therewith as the Underwriter, in its discretion, may require.

Example 7

12. When any firm is merged into or acquired by the Firm, or an individual or a group of individuals who formerly practiced at another firm become partners and/or employees of the Firm, this Policy shall indemnify the Firm (subject to its terms, conditions, exclusions and limitations) in respect of any Claim first made against the merged or acquired firm or individual(s), but only for Acts committed subsequent to the date of their joining the Firm, and such merged or acquired firm or individual(s) shall be included hereunder effective from the date of joining as additional Assureds.

(1) When any such merger, acquisition or group of individuals who practiced together at another firm increases the total number of attorneys of the Firm, as at the preceding Anniversary Date, by more than five percent (5%) or twenty-five (25) attorneys, (whichever is the lesser) then within 30 days of the merger or acquisition, the Firm shall notify Underwriters . . . ; and

(2) within 30 days of the receipt of notification Underwriters agree to add the merged or acquired firm or individuals subject to such terms and conditions as the Underwriters, in their discretion, may require. If however within 30 days of the receipt of notification of the merger or acquisition Underwriters do not otherwise require any terms or conditions to the merger or acquisition, then the additional premium on the number of new attorneys shall be calculated [as stated]. Unless specifically agreed by addendum hereto such merged or acquired firm or firm at which such group of individuals formerly practiced,

15. See Silver, *Reponse to Davis*, *supra* note 9, at 235-37. "Stacking" is the creation of a pyramid of policies against which claims can be made arising out of what is really one incident or occurrence.

shall not be deemed to be a Predecessor in Business of the Firm, irrespective of whether or not notification to Underwriters is required as described above.

Clearly, Insurers are, to say the least, wary of these Trojan horse liabilities. Another form of limitation of coverage in this context is in the development of policies which limit or exclude "prior acts" coverage. While there is no suggestion that any of these approaches either may be or are intended to prevent the movement of lawyers and consolidations of firms currently under way, these provisions certainly are intended to require—or at least to encourage—firms to exercise reasonable and prudent "due diligence" as they embark on lateral hiring or merger negotiations. The advent of significant claims arising from liabilities derived from laterally hired partners or acquired practices makes this again an economic as well as a regulatory question. As claims threaten Insurers' profits, Insurers can either increase premiums in exchange for unlimited, or less restrictive, coverage, or they can participate in the price competition and seek to reduce the scope of coverage. In addition, as will be discussed below, a number of Insurers are also seeking to educate firms to this need for effective "due diligence" as another method of reducing claims and maintaining profitability.¹⁶

b. *Temporary Lawyers*

A proliferating practice throughout the country is the use, sometimes by the largest firms, of the services of "temporary" or "contract" lawyers. These lawyers may be hired from the open market, leased from agencies, or can be former employees re-hired on a "project" basis. Up to now, these temporary lawyers have been treated as employees of the insured firm without differentiation from other, full-time employees. There are, however, several elements of risk peculiar to these temporary lawyers which would not normally arise with full-time employees. These additional risks include: joinder of insureds in suits arising from activities of the temporary lawyer unrelated to the matter(s) for which the temporary lawyer was hired; claims from undisclosed conflicts introduced by the temporary lawyers; and claims arising from difficulties in supervising and overseeing the activities of such temporary lawyers even within the theoretical scope of the engagement. Accordingly, Insurers are starting to draft exclusionary clauses limiting their exposures:

Example 8

Any other employee who leaves your firm, including a lawyer you had intended to employ on a temporary basis . . . is a protected person, but only for work done within the scope of their employment by you.

16. See *infra*, part I.A.3.

The Insurer, therefore, is expressing to the insured that the insured is assuming all of the economic risks associated with any claims made against the firm in connection with such temporary employees other than the particular matter(s) for which they were engaged. These provisions are similar in intent to those excluding or limiting coverage for prior acts in connection with laterally hired lawyers. Again, while not prohibiting such relationships, Insurers are regulating the conduct at least to the extent that such notice and exclusion requires the firm to exercise a conscious discretion as to the advisability of such engagements and to evaluate their capacity to oversee and control such employees. Although not discussed further, I believe that additional responses on the part of Insurers to this issue may be anticipated in the future. For instance, Insurers may require insureds hiring such lawyers to certify that such temporary lawyers carry their own independent professional liability insurance coverage.

c. *Fees*

As discussed further in part III below, Insurers are either contemplating or are actually taking express action in connection with lawsuits for fees, an activity that, while discouraged, is nevertheless permitted by the ethics codes. Insurers view these cases as nothing more than invitations to counterclaims for malpractice. Some Insurers suggest that as many as a third of all malpractice claims are brought in the form of counterclaims in fee suits initiated by insureds.¹⁷ While I have heard anecdotally, but reliably, of manuscript endorsements on the policies of particular insureds excluding coverage on all claims which commence as counterclaims to fee suits initiated by the insured, I have not yet seen such a clause. The closest I have yet come is the following exclusion, which is not a manuscript, but forms part of this particular policy language:

Example 9

This Policy excludes:

10. any Claim for the return of or reimbursement for legal fees, costs or expenses.

17. While there are no current reliable statistics, the American Bar Association's extensive survey in 1989 suggested that the number of claims deriving from fee suits, at least at that time, were in the region of 7 percent of all claims. See ABA Standing Committee on Lawyers Professional Liability, *Characteristics of Legal Malpractice: A Report of the National Legal Malpractice Data Center 22-23* (1989). Insurers continue to tell me, however, that they see much higher numbers in their experience. Furthermore, many Insurers make the point that while the percentage of all malpractice claims deriving from fee suits may be debatable, almost all fee suits result in counterclaims for malpractice. Accordingly, it is a very effective exclusion from Insurers' perspective in declining risk transfer; similarly, this is an area where the principle of moral hazard, raised by Professor Silver and discussed in part IV, *infra*, clearly plays a significant role.

The compelling policies behind complete exclusions for all claims arising from fee suits are discussed in part III.

3. Risk Management and the Regulation of Law Firm Management Systems

From the inception of liability insurance at Lloyd's coffee shop in London in the seventeenth century, loss control and risk management have been integral to the insurance industry. This first took the form of requiring improvements in navigational devices for mariners; but as each new risk was underwritten, insurers sought to reduce their exposure by requiring maximum risk management. Today, the most ubiquitous examples are automobile safety belts and air bags, and hard hats for construction workers. Lawyers were exempt from the risk management imperative until very recently for a variety of reasons. First, until the late 1970s there were few claims, and the area was highly profitable for Insurers, even at premiums that were relatively low when compared to today's premiums.¹⁸ Second, even when the claims started to appear with any severity or frequency, lawyers tended to react with arrogant assertions that nothing could or would happen at their firms. Third, with the exception of relatively short periods in the 1980s, the market for lawyers' professional liability insurance has been "soft," that is, there has been greater capacity than demand, keeping premiums highly competitive, even as they have generally risen in response to the growing claims experience.¹⁹ Nevertheless, that increase in claims has finally led to the introduction of risk management by Insurers in the arena of law practice.

Currently there are three kinds of risk management available for lawyers and law firms. First, and for the moment clearly foremost, are the educational risk management programs provided by Insurers and brokers. These take the form of seminars or continuing legal education programs offered either to firms or to groups of insureds, or to the bar generally, which are sponsored by Insurers. These programs deal with fundamental firm management issues, as well as particular issues, such as conflicts, docket, time and file controls, and so on. Also within this education category are the variety of newsletters and even more substantial publications issued to insureds by Insurers to guide and assist insureds in avoiding claims by adopting improved practice management. Second are the much more active programs involving "audits" of firms' practice management systems, and the con-

18. See, e.g., Rita H. Jensen, *Driving Up the Rates: Malpractice Insurers' Bad Patch*, Nat'l L.J., Nov. 9, 1992, at 3 (discussing factors that have influenced the rise in insurance rates, including increased severity of claims); see also Sherry R. Sontag, *Soured Deals Snag More Professionals: Lawyers, Accountants and Others are Often the Only Deep Pockets*, Nat'l L.J., Feb. 4, 1991, at 1 (noting that insurance carriers were increasing rates to meet rising claims exposure).

19. Edward A. Adams, *Attorneys' Liability Assurance: Insurance Rates for Malpractice Stabilize*, Nat'l L.J., Dec. 26, 1994, at A5.

sequential requirement of the implementation of appropriate changes as indicated by the audit findings. While not yet commonplace, and largely but not exclusively confined to larger firms with significant claims histories, the use of audits is nevertheless spreading as Insurers become increasingly concerned about their exposures. This concern is highlighted within the current highly competitive marketplace where price increases are by no means as achievable as Insurers would like. Notably, even some law firms are beginning to recognize the value of streamlined practice management in the increasingly competitive marketplace in which they operate, and are, therefore, voluntarily commissioning and undergoing risk management audits. As firms limit premium increases by accepting higher deductibles or self-insured retention levels, they become increasingly cognizant of the need for, and potential savings and benefits from, improved loss control, which, in turn, requires more effective management.

The third type—internally generated and effective peer review and practice oversight—arises almost exclusively from within that subgroup of the legal profession which has become familiar with the first two kinds of risk management already described either voluntarily or as a condition of coverage. This is mature risk management and is internally driven, even if originating from services provided by Insurers.

The important question for purposes of this Article is whether and to what extent this process of the introduction of risk management practices constitutes Insurer derived regulation of the profession. The answer is one of degree. To the firms which fall into the category known to Insurers as “distressed,”²⁰ risk management is clearly being directly imposed by Insurers as a condition of coverage. Indeed, for purposes of full disclosure, and for those not already familiar with my own practice, I regularly undertake risk management audits for such firms on behalf of Insurers as a condition of coverage. To these firms, risk management is clearly mandatory, and the changes in the internal management of these firms, which are also required following such audits, clearly constitute regulation in every sense.

At the next level, some Insurers are selecting the firms which they will insure by a process of elimination involving the voluntary agreement of these firms to participate in the Insurer’s risk management programs. These programs vary from offering, but not requiring, audits, through special claims handling procedures, to the provision of highly sophisticated management manuals and materials, or a combination of all of these approaches. In each case, however, the firms insured in these programs are self-selecting, and voluntarily agree to abide by whatever risk management program the Insurer is proposing.

20. When firms are in the distressed category, their claims history is so bad that they cannot, or cannot easily find any coverage, or at least coverage at any but an exorbitant cost.

Presumably, even though these firms could likely obtain coverage from other sources without such requirements, they select such coverage because of price or a combination of price and a belief in the value of the risk management program being offered. To these firms, even though the risk management component is purely voluntary, it is also operating as regulation, albeit self imposed.

At the bottom of the ladder, some Insurers offer, but do not require, a variety of risk management services and programs as incentives to their current and potential insureds. These most commonly involve educational programs and written materials, but sometimes also include voluntary audits. To the firms receiving these benefits, risk management is presented by Insurers as a service, as a way of differentiating themselves from competitors, and, almost as a hoped-for side effect, as a means of affecting their insureds' behavior. Even at this level, however, to the extent that education does change the way lawyers manage their practices, risk management is arguably performing a regulatory function, even in the absence of any enforcement elements.

B. *Effectiveness*

It is worth taking a moment to define an important term —“to regulate”—as a precursor to evaluation of the efficacy of professional liability insurance as a regulatory tool. The verb “to regulate” has four meanings, of which two are pertinent: (1) “to bring under the control of law or constituted authority;” and (2) “to reduce to order, method, or uniformity.”²¹ I suggest that both the policy language and the introduction of risk management as described above clearly perform each of these functions.

The important thing to bear in mind in considering all of the examples in part II.A above is that although the enforcement mechanisms are different from the traditional disciplinary model of lawyer regulation, the inducements offered to encourage compliance and the threats and sanctions for non-compliance with respect to the policy terms are quite powerful. Clearly, both the inducements and sanctions are, at root, economic. On the one hand, compliance will be met with continuation or renewal of coverage at a competitive price; on the other, failure to comply may result in exposure to liability without coverage, and the potential of non-renewal, or renewal at exorbitant cost. While not as apparently drastic as the threat of disbarment, these economic benefits and risks are often of very great moment to practitioners in a profession which increasingly focuses on the financial and business aspects of its operations. Indeed, it is notable that, since professional liability policies are renewed annually, arguably

21. Webster's Third New International Dictionary of the English Language Unabridged 1913 (1986).

many practitioners pay more regular attention to the demands of their Insurers than they do to the provisions of the ethics codes.

Perhaps, by one measure, insurance regulation is ineffective, in that claims and awards against lawyers show little sign of abating.²² The same can certainly be said, however, about the rise of grievance complaints and disciplinary activity, and we do not assert that as a basis for saying that the ethics codes are not effective regulatory mechanisms. Similarly, the criticism can be made that unlike ethics codes which apply to every member of the bar, there is no uniformity in the terms of professional liability coverage. This criticism clearly strikes particularly at the second definition of regulation. In fact, however, this is an illusory criticism. Precisely because the field is so competitive, Insurers tend, over time, to offer very similar policies, even if they use different verbiage. A comparison of Examples 6 and 7 will demonstrate the truth of this assertion. Certainly, the similarities in coverage and exclusion terms greatly outweigh the differences among the available policies at any given moment in time.

Focusing on one of the issues discussed below in part III.A.1 regarding conflicts of interest, it is my perception that firms are much more conscious of the dangers of engaging in conflicting representations as a result of the policy exclusions than they have ever been of the precepts of the ethics codes. When I make risk management presentations to firms, or groups of lawyers that deal with these issues, lawyers, and particularly partners, often argue about and object to the notion that there are potential clients who should not be accepted as clients. These lawyers, however, recognize that they have no choice but to deal with the economic ramifications of their insurance policy's exclusionary language regarding the acceptance of engagements which involve actual or potential conflicts. Lawyers expressing resentment about this intrusion into their practices clearly state that while they may have no choice but to change behavior in the face of the policy exclusions, the ethics code conflict provisions have never acted as a brake on their activities in any practical way.²³ An additional, specific example which has become an industry standard as a result of the "Savings and Loan" crisis, is the exclusion from coverage of the acts of lawyers who are also directors of financial institutions which they represent. This policy change has clearly forced most practitioners with

22. See *supra* notes 13-14.

23. Notably, disqualification, and loss of fees, in individual cases is the most significant consequence of a breach of the states' ethics codes conflict of interest provisions in almost every instance. Absent egregious breach of fiduciary duty as a part of the behavior involving a conflict, disciplinary sanctions such as suspension or disbarment are almost unheard of. The same point can be made with respect to fee dispute cases, again the exception being cases involving outright dishonesty or flagrant and repeated misconduct. See, e.g., *In re Cooperman*, 633 N.E.2d 1069 (N.Y. 1994) (affirming decision to suspend a lawyer for two years, finding that the lawyer acted in bad faith regarding a fee arrangement that clashed with public policy).

financial institutional practices to abandon their former directorships. I believe that these examples present a clear indication that Insurers do act as effective regulators of lawyer behavior, sometimes more effectively than the profession's own internal regulatory mechanisms. I also suggest that, at least with reference to the conflicts of interest example, and perhaps in other areas too, this effectiveness is to be applauded.

Professor Silver's comments regarding the distinction between the "rationale" of insurance regulation and its actual "effect" are important because they also suggest that there are limits on the efficacy of this regulation. Indeed, this point has been made by several people from within the insurance world to whom I also showed an early draft of this Article. For there are two sets of economic pressures confronting Insurers, claims, which reduce profitability, and competition. As Professor Silver points out, currently, professional liability Insurers perceive the market to be "soft," i.e., an excessive supply of insurance product, resulting in price competition, and even in competition as to the scope of coverage.²⁴ Certainly, this is bound to have a limiting effect in how far Insurers can go in drafting exclusions and regulating their clients. To some degree, certainly, there are already firms which actively negotiate these issues with their Insurers. Even within this free-market context, however, my Insurer commentators point out that it is generally becoming much harder than in years past to obtain manual endorsements, which generally enlarge coverage by excluding or limiting the application of standard exclusionary language. By and large, fewer and fewer people within insurance companies have the authority to approve such endorsements; thus, they are becoming harder to obtain. Furthermore, as one broker whose clientele include some very large and prominent firms pointed out, even within that market, the focus is "ninety percent price, ten percent coverage." Additionally, insureds are aware that competition has its limits and its dangers. In the past year, the Home Insurance Company, reputedly the insurer of the largest number of lawyers of any carrier until its demise, closed its doors.²⁵ Accordingly, while there is continuous give and take, overall, Insurers are generally trying to move the boundaries of coverage; to the extent they are successful, they thereby do compel lawyers to change their behavior or at least to think about the consequences of failing to do so.

In assessing the efficacy of Insurer regulation, an additional question suggested by Professor Schneyer, is whether there is any difference in this regard between the commercial marketplace and the "captive" insurance groups, most notably the Attorneys' Liability As-

24. See Silver, *Response to Davis*, *supra* note 9, at 243.

25. For a current summary of the Home Insurance Company's woes, see Amy Feldman, *The Home's Economics Threaten O&Y Building*, *Crain's N.Y. Bus.*, July 8, 1996, at 4.

urance Society ("ALAS"). In turn, this raises the question of adverse selection, discussed further in part IV below. Particularly, since these groups are self-selecting, presumably with common risk and exposure features, the question is whether their policies perform the same functions, or to the same extent, as suggested in this Article. Here, answers can only be impressionistic. It is my belief, however, that there is at least as much regulation within these groups as in the open market for insurance, and for the same reasons. Indeed, the very fact there are documented instances of non-renewals from within these groups suggests that the ultimate penalty for insureds which fail to abide by the regulatory standards, or which inaccurately represent themselves as appropriately falling within the groups normal risk and exposure standards, is no different from those firms insured commercially. On the other hand, at least in the case of ALAS, there may be some basis for concluding that non-coercive regulation, such as the emphasis on risk management practices among member firms, is predominant in these groups. Since their policies, however, tend to be modeled on, and in many respects similar to, the commercially available policies, the other forms of regulation discussed here are clearly also operating within these groups. Accordingly, any differences are likely to be of degree, or, perhaps more accurately, in tone, rather than of substance.

III. COMING ATTRACTIONS: THE NEXT WAVE OF INSURANCE REGULATION

It would be possible to turn this section into a treatise on the changes to policy language needed to improve clarity and to accomplish more effectively the regulatory goals already espoused by Insurers, as highlighted in part II. That, however, is not my purpose. Rather, I address just two issues of that sort—conflicts of interest and lateral hires—and then deal with three areas where I believe that Insurers will move to the next decade to add additional, and new, regulatory provisions to their policies. These new regulations are in the areas of fees, lawyer specialization, and limited liability entities.

A. *Refinement and Consolidation of Existing Insurance Regulation*

1. Conflicts of Interest

The claims experience of all Insurers, from law firms of all sizes and in every state, as reported anecdotally as well as in the now aging American Bar Association statistics, is such that Insurers are bound to continue to seek to avoid accepting the transfer of risks that are easily controllable by their insureds. While the adage "Just say 'No'" was coined in another context, it clearly applies neatly to law firms engaging in representations involving conflicts of interest. Since there is no sign that the profession is about to do anything of its own accord to

change the "closed door/open door" structure of its own ethics codes, in my view, Insurers are certain to conclude that they will have to do the job for us.²⁶ Accordingly, while it will not make me popular among practitioners, I suggest that the exclusionary language, of which Example 1 is an illustration, will become even broader, perhaps to the point of simply excluding coverage in every instance where any insured has a personal, financial, or business interest in a matter other than a claim for an agreed and reasonable fee. Similarly, I suggest that the language of Example 2, which has a similar effect with respect to multiple client representation, will become commonplace, if not uniform. If these predictions are correct, I submit that Insurers will accomplish what decades of drafting and redrafting ethics codes have failed to achieve, namely the effective elimination of conflicts of interest from the practice of law, and the reassertion of the principles of fiduciary obligation over personal expediency.

2. Lateral Hires and Practice Mergers

Here I suggest that there will also be a steady progression toward much closer regulation of the process of movement by lawyers among firms and the consolidation of firms. The fundamental reality is that lawyers generally fail to practice even the most elementary of those "due diligence" precautions which they would require of commercial clients in similar circumstances. Furthermore, they would be the first to recognize the failure to take these precautions on behalf of clients as malpractice. Since this is also a significant source of very large claims and awards, I do not doubt that Insurers will seek ways to reduce the levels of risk which they assume from this source. Here, however, I foresee Insurers attempting a variety of different regulatory approaches. Some will tinker with existing language models. Others may go much further, perhaps forcing firms to pay different premium levels for home-grown as opposed to laterally hired or acquired lawyers, or conditioning the avoidance of such differentiated premiums upon due diligence prior to hiring or acquisition. Another approach may be to offer entirely separate policies, again at different premium levels, for acquired and hired lawyers, for some given period

26. An interesting article, Professor Levinson discusses the need for increased self-governance within the profession, thus presuming the absence of adequate professional regulation to improve firms' independence, which he defines, in part, as avoiding conflicting representations. See L. Harold Levinson, *Independent Law Firms that Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 Ohio St. L.J. 229 (1990). He does not tell us how to reach that goal, so presumably he would support the Insurers' involvement if it assists in achieving the desired results. A second issue, which he does not address, is the interest which clients have in being represented by lawyers who are indeed covered by adequate professional liability insurance. As I have discussed elsewhere in this Article, that issue is addressed in Oregon as a requirement for all practitioners, and in a small but growing number of states which are attaching such a requirement as a condition for lawyers who wish to take advantage of the new limited liability entity statutes.

of time after hiring or acquisition, again in recognition of the different level of exposure such additions represent. Clearly, the aim will not be to prevent the economic realities from operating within the profession, but rather simply to require that the profession police itself sufficiently to avoid passing off risks which properly should be retained. To the extent that such risks are transferred to Insurers, they are likely to be separately quantified and to have to be paid for separately.

B. *New Regulation*

1. Fees

As discussed in part II, I suggest that Insurers are likely, sooner rather than later, to try to exclude from coverage all claims which are provoked by fee suits. While Insurers do not generally see it as their role to tell insureds how to conduct their business, they are likely to pressure lawyers to change the way in which they enter into, bill for, and collect for client engagements. In the context of risk management, Insurers will continue to press lawyers to use engagement letters and to institute effective billing controls so as to reduce the incidence of situations where suits for collections even become a subject requiring discussion. I also believe that they will seek to accomplish this result in one of two ways. First, they may require, as a condition of coverage, that insureds notify the Insurer in advance of the commencement of any fee suit, as if such suit were a claim, and that the Insurer will have an opportunity to advise against or to assist in the presentation of such a suit. Failure to comply with these requirements will result in loss of coverage on any counterclaim which results. Alternatively, some Insurers may simply seek to deny coverage automatically for claims asserted as counterclaims to fee suits. A third approach may be to impose a significantly higher deductible level in these cases. In any event, such new regulation will not be popular among lawyers who have continued to be averse to the adoption of meaningful management systems, but it likely will be effective.

Interestingly, this prophecy may already be in the process of realization. After the first draft of this Article had been completed, indeed on the day before I left for San Antonio to deliver it, I was shown a policy by an Insurer with a very significant market share that included the following exclusionary language:

Example 10

claims or counterclaims by current or former clients arising out of or in any way related to or connected with disputes concerning fees charged

While this is not the Insurer's standard policy language, the fact that the provision already exists, albeit in limited use, suggests that my prediction of future widespread application may not be especially radical.

2. Specialization

Here I confess that I am entering into the realm of speculation. There is, however, a trend in claims which Insurers have followed for some time with increasing apprehension, namely the incidence of losses by otherwise excellent firms and lawyers when they undertake business outside their normal areas of practice. Some Insurers refer to this as the problem of "dabbling." Firms usually do this for fear of losing a valued client to another firm, but such activity can ultimately cost far more than could ever be gained in billings from that client. Risk management can play a part in reducing the incidence of these claims, by assisting firms to control client and matter intake and to maintain adequate peer review and supervision of subordinates. If Insurers wish to engage in comprehensive regulation, however, they will likely turn to the policy. Here they have available a strategy not previously used for lawyers, but which might prove attractive, namely offering and pricing coverage by practice areas. Thus a firm might receive one quote for a policy limited to its principle practice area, say intellectual property, and a separate quote or quotes for additional coverage areas, or for unlimited practice area coverage. This layering of insurance might well be accompanied and mitigated by incentives to firms to institute improved systems for controlling new matter intake.

3. Limited Liability Entities

I have written elsewhere about the problems for lawyers in adopting limited liability status in states where both legislation and the other regulators of the profession permit.²⁷ Limited liability, however, presents significant problems for Insurers. First, if they underwrite firms based on the assumption that the firm will pay a given deductible, they may find that, if a colossal, firm-destroying claim arises, and the firm indeed collapses, the assets are insufficient to meet its other obligations. This leaves the Insurer unable to recover the deductible from the firm or the individual partners. Second, there is the potential that whole new classes of claims will arise to draw partners who do not have direct responsibility for particular client matters into such litigation, despite the use of limited liability, such as claims for failure to supervise. In turn, this may, in the absence of joint and several liability, result in multiple payment for single claims or at least in multiple defenses where the claims create a conflict among partners within insured firms. These two eventualities may have a variety of implications for how Insurers will seek to underwrite firms which choose to adopt limited liability status. For instance, Insurers may

27. *Limited Liability Partnerships—Will They Limit Malpractice Claims?*, Law Firm Risk Management Report (Alexander & Alexander, New York, N.Y.), Feb. 1995, at 1-3.

conclude that they require much more detailed financial statements regarding both firms' and individual partners' financial affairs as a condition of any insurance. Second, the premiums may be raised to the extent that Insurers believe that firms may default in their obligations to pay deductibles, the level of which would likely be reduced commensurately. Third, Insurers may offer to such firms, and may insist that they acquire, a separate policy, modeled on Officers' and Directors' Insurance, for coverage of the extra costs of defense and of additional liability for claims based on allegations of failure to supervise, or the additional cost of providing separate defenses to multiple partners. Thus, the perceived benefits obtained by legislation empowering such arrangements may well be re-regulated by Insurers seeking to avoid adverse consequences. Such re-regulation would be designed to avoid the transfer of risks from insured to Insurer for which traditional premium structures were not designed or calculated.

IV. THE INSURER'S ROLE AS PROFESSIONAL REGULATOR

In his remarks following the presentation of a largely abridged version of this Article, Professor Silver makes some extremely valuable comments which, with appropriate acknowledgment, I will appropriate at this juncture, because they help in establishing a context for evaluating the Insurers' role as regulators of lawyers.²⁸ Professor Silver first notes that the specific kinds of regulation to which I have pointed here must also be viewed in the light of well understood and fundamental principles of insurance, namely *adverse selection* and *moral hazard*.²⁹ He then gives very helpful definitions of those principles. Adverse selection he defines as the attempt by an insured to get into better risk pool than insured deserves to be in, because insured would like to pay less for the insurance.³⁰ He defines moral hazard as an insurance induced change in behavior of an insured who controls the level of risk that the insured incurs.³¹ He then points out that Insurers are well aware of the operation of these principles, and, significantly in the context of this Article, that the Insurers, therefore, design their policy language precisely in order to prevent insureds from getting into inappropriate (from the Insurer's perspective) risk pools, or from obtaining insurance in order to enable them to indulge in risky behavior without adverse financial consequences because of the existence of the insurance policy.³² Of course, I agree with everything Professor Silver says in this regard.

I do somewhat part company with him, however, in the conclusions to be drawn from the application of these general principles of the

28. See Silver, *Response to Davis*, *supra* note 9, at 236-38.

29. *Id.*

30. *Id.* at 238.

31. *Id.* at 237.

32. *Id.* at 236-38.

insurance process to the specifics of lawyers' professional liability insurance. Professor Silver notes that it is dangerous to assume that the exclusions which I have focused on here are directed peculiarly to lawyers, and that perhaps everything I have described is merely an adaptation for lawyers of solutions to generic insurance problems. My response is twofold. First, it is irrelevant to the question of whether it constitutes regulation of lawyers, in the manner and to the extent I have suggested, that the policy language mirrors exclusions drawn from other categories of insurance. The true question remains, as I have suggested here, when these principles are specifically applied to lawyers, does the resulting policy language actually amount to regulation of the practice of law different in scope and content from the other forms of lawyer regulation? Secondly, and picking up on a different point Professor Silver makes in his written response, it is important to distinguish between *motive* and *effect*. The Insurer's motive in drafting policy language to account for these well understood principles simply may be to exclude coverage for certain risks. Professor Silver rightly also points out that lawyers are then free to engage in uninsured conduct, or to pay extra for a separate policy to cover the previously excluded conduct. Yet, the exclusionary policy language may still be seen to have a regulatory effect *either* if lawyers change their behavior rather than act in a way that will leave them without coverage *or* if they then seek the kinds of additional coverage which he suggests that the insurers may offer in return for additional premiums. In fact, there is already evidence to support both of these propositions, which are not always mutually exclusive. Firms which change or tighten any of their internal management procedures to enable them to oversee, and avoid, conflict of interest issues, are obvious examples of the first effect. Similarly, I am aware of at least one insurer that offers a supplementary insurance policy covering the specific subset of conflicts cases where the lawyer is an officer or director of a client, where this risk is clearly excluded from that Insurer's standard, "basic" lawyers' professional liability policy coverage. Additionally, another Insurer is considering offering separate coverage for "failure to supervise" claims which it believes are likely to be made as an attempt by plaintiffs to circumvent firms' adopting limited liability.

In sum, while Professor Silver emphasizes that the Insurers' *motives* in writing policy language have nothing to do with deliberate regulation of lawyers or of their conduct, I am suggesting that the *effect*, and the consequence of the Insurers' behavior—consistent as it indeed is with their responses to standard insurance concerns, including, as he points out in his written remarks, their profit motive—is, nevertheless, the *regulation of lawyers!*

If, at this juncture you agree with me that the Insurers already perform very significant regulatory functions, whether deliberately or merely as a by-product of acting like insurers, the question is whether

this is an appropriate role for them to play, and whether they play it appropriately.

To some extent the answer to both questions will depend upon whether the other regulators of the profession are perceived to be doing an adequate job in performing these functions. If, as I believe, the bar has proved itself to be supremely self-serving in regulating itself, and is, in many respects, ill-equipped, or at least failing, adequately to protect those to whom it owes fiduciary obligations, then Insurer regulation may be welcomed. The principle example in this Article of the failure of the traditional professional regulatory mechanisms has been the issue of conflicts of interest. To the extent that there is general agreement that the profession has failed to regulate itself effectively in this regard, it is hard to argue with the proposition that others should undertake this role. If that proposition is accepted, it follows, at least from the bar's perspective, that the task is best performed by an agency such as the Insurers, with which the profession has a symbiotic relationship. This is likely to be more acceptable than an external agency with a purely adverse relationship to the profession, as would be the case, for instance, with government regulators. Conversely, because the Insurers also have a self interest in not regulating more than is absolutely essential to protect themselves and their profits, as opposed to the profession's clients, it may be argued that the public would be better served by purely neutral regulators.

In evaluating both the degree of insurance regulation to date, and my suggestions as to the likely future paths of such activity, there is a further issue which we have not addressed. Clearly, clients are protected, as well as Insurers, to the extent that firms change their practices in the manner required by Insurers to avoid loss of coverage. What is not quantifiable is the degree of harm that may be caused where firms fail to adapt their practices and are then subject to claims and awards which, as a result of this failure, are not covered by insurance. Only effective regulation from a neutral and independent source could prevent that harm. It is my impression, however, that if firms choose to pay insurance premiums, they intend to benefit from the expenditure by maintaining their insurance in effect. Accordingly, while this harm does exist as a theoretical possibility, and as a practical one for uninsured lawyers, it is probably not significant so long as the vast majority of lawyers are insured.

This brings us, finally, to an important issue which Professor Silver also raises—namely whether the bar, or other regulators of lawyers, should, in turn *regulate the insurers*.³³ Professor Silver suggests that this would be inappropriate³⁴ because the Insurers are driven by insurance concerns, not lawyer concerns. I agree with his conclusion in

33. *See id.* at 240-41.

34. *See id.*

part but dissent in part. To the degree that insurance acts as regulation of lawyers, it is on a consensual, contractual basis. As I noted at the beginning of this Article, however, there are beginning to be instances of insurance which are mandated by other regulatory authorities as a condition of practice generally or as a condition of practice when using particular business structures. It seems to me that once the bar engages in the process of requiring coverage, there will inevitably be an interest in determining and regulating the scope of that coverage. Accordingly, whether Professor Silver or I, or the Insurers, like it or not, I suspect that this additional layer of regulation of these regulators is inevitable. Hopefully, the Insurers will prove as adept in dealing with this regulation as they have when regulated in other areas.

Accordingly, the pragmatic conclusion would seem to be that, in the absence of others performing the particular functions in which I have suggested the Insurers are now engaged, the Insurers appropriately supplement other forms of lawyer regulation. Similarly, while there are potential weaknesses in the scope of Insurer regulation, that layer of regulation is often an improvement upon the profession's own regulatory structure. Thus, while there may be a theoretically better system for imposing regulation in the areas in which the Insurers get involved, Insurers do add value within the system as it currently exists. In our pragmatic, competitive world, where regulation is itself perceived as negative, neither lawyers nor clients can realistically expect any better outside, but non-governmental or professional, regulator than the Insurers. At least in the areas they now or in the future are likely to act as regulators, the Insurers' intervention and involvement appear to benefit the profession's clients and the Insurers themselves. Hopefully we can agree that any regulation which benefits clients is of value to the profession as well, and is to that extent and by that pragmatic measure, appropriate regulation from an appropriate source.