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INTRODUCTION

Many studies have considered the problem of increased liability insurance premiums and their effect on user fees in various industries.[1] Attorneys have not been exempt from such increases, caused in part by the rise in malpractice claims.[2] Among the

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[1] *See, e.g., Are Insurers Caught in a Squeeze or Putting It On?*, N.Y. Times, May 25, 1986, § 4, at 18; Strasser, *The Tort Crisis: One State's Quest for "Reform,"* Nat'l. L.J., Apr. 28, 1986, at 1, col. 3; *Business Struggling to Adapt as Insurance Crisis Spreads*, Wall St. J., Jan. 21, 1986, at 31, col. 1. One recent study found that the medical malpractice insurance "crisis" has been caused by two major factors: (1) an increase in the frequency of claims, and (2) a tremendous increase in the average size of damage awards, particularly in the size of the largest damage awards. Kelley & Beyler, *Large Damage Awards and the Insurance Crisis: Causes, Effects and Cures*, 75 ILL. B.J. 140 (1986). Others contend that the cause of the insurance crisis is mismanagement within the insurance industry. *See, e.g.*, Hunter & Borzilleri, *The Liability Insurance Crisis*, TRIAL, Apr. 1986, at 42; Nichols, *The Manufacturing of a Crisis*, NATION, Feb. 15, 1986, at 173; Rauter, *Report Says Litigation Explosion is a "Myth"*, Nat'l. L.J., Apr. 28, 1986, at 46, col. 1; Karr, *FTC Investigated Insurance Firms for Price Fixing*, Wall St. J., Apr. 24, 1986, at 23, col. 1. For an exhaustive treatment of the subject, see REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (Feb. 1986) [hereinafter REPORT OF THE TORT POLICY WORKING GROUP].

[2] *See* C. WOLFRAM, MODERN LEGAL ETHICS 207 (1986); *Suing Lawyers*, 72 A.B.A. J., Apr. 1, 1986, at 25; Callanan, *Firms Should Examine Insurance Options*, Nat'l L.J., June 9, 1986, at 14, col. 1 ("according to insurers nationwide, 8% of all lawyers are now defendants in malpractice cases"); Waldman, *Lawyers Adopt New Strategies to Avoid Suits*, Wall St. J., Apr. 28, 1986, at 27, col. 3; Galante, *Insurance Costs Soar; Is There Any Way Out*, Nat'l L.J., Mar. 10, 1986, at 1, col. 3; *Insurance Crisis Hits*

solutions that have been proposed,[3] permitting attorney/client agreements that prospectively limit attorney malpractice liability merits strong consideration.

Until recently, no cases or statutes addressed whether lawyers could limit their malpractice liability contractually.[4] Prior to the

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California Bars, Nat'l L.J., Nov. 11, 1985, at 5, col. 1; *Malpractice, Tort Reform Focuses on Bar Leaders* [New York] State Bar News, Oct. 1985, at 1, col. 1. According to questionnaire responses from Wisconsin State Bar members, 85% of attorneys practicing full time, aside from government attorneys and attorneys in legal departments of corporations, carry legal malpractice insurance. *See* Schneyer, *Mandatory Malpractice Insurance for Lawyers in Wisconsin and Elsewhere*, 1979 WIS. L. REV. 1019, 1030-31.

[3] Other possible "solutions" include limiting awards of punitive damages, capping attorneys' fees, limiting the scope of joint and several liability to make defendants' liability more closely correspond to their degree of fault, and placing a ceiling on noneconomic damages and on overall awards. *See, e.g.*, 132 CONG. REC. S5448-53 (daily ed. May 7, 1986) (statement of Sen. McConnell); 131 CONG. REC. S18321 (daily ed. Dec. 20, 1985) (Sen. Danforth introduced a bill to provide a uniform product liability law); Federal Incentives for State Health Care Professional Liability Reform, S1804, 99th Cong., 1st Sess., 131 CONG. REC. S14356-59 (daily ed. Oct. 29, 1985); *Limit Damage Suits? Reagan Enlists in Liability Wars*, U.S. NEWS & WORLD REPORT, Apr. 14, 1986, at 6; Barron, *40 Legislatures Act to Readjust Liability Rules*, N.Y. Times, July 14, 1986, at 1, col. 1 ("To reduce widespread difficulties in the liability insurance market, legislatures in more than 40 states passed a variety of new laws before adjourning for the [1986] summer."); Schmalz, *New York Accord Set on Liability Insurance*, N.Y. Times, June 20, 1986, at 12, col. 1 (under the New York bill, parties can only be held liable for pain and suffering if they have been found responsible for at least 51% of the injured party's pain and suffering; the collateral source rule has been eliminated in tort cases; jurors have discretion to make awards of more than $250,000 payable over a period up to 10 years; and the insurance superintendent establishes annual rates for how much insurers can raise or lower rates); *Changing Laws on Handling of Liability Claims*, Nat'l L.J., Apr. 28, 1986, at 49, col. 1 (outline of state liability reform laws); Pasztor, *Reagan Said to Find Senate Sponsor for Bill to Alter Product-Liability System*, Wall St. J., Apr. 22, 1986, at 16, col. 2; Kristof, *Insurance Woes Spur Many States to Amend Law on Liability Suits*, N.Y. Times, Mar. 31, 1986, at A1, col. 2. For criticism of legislation capping awards, see R. POSNER, ECONOMIC ANALYSIS OF LAW 158-59 (2d ed. 1977). Limiting the size of recovery in malpractice cases simply may have the effect of reducing training (for example, fewer L.L.M. degrees) or the time spent performing the requested service because there will be less incentive to avoid civil malpractice. *Cf.* Reder, *An Economic Analysis of Medical Malpractice*, 5 J. LEGAL STUD. 267, 290-91 (1976). Problems of economic efficiency arise because such a limitation is not negotiated individually between attorney and client but is the subject of uniform regulation. Such a limitation will make it more difficult for some clients to obtain the type of service they want even if they are willing to pay for it.

[4] The absence of cases and codifications of professional responsibility restricting attorneys from limiting their malpractice liability has at least two likely explanations. First, one might infer that provisions limiting attorney malpractice liablity were considered permissible. Alternatively, it is conceivable that, for whatever reason, attorneys were not asking their clients to agree to such limitations. Hence, no cases arose and there was no need to address the issue in a codification of legal ethics.

Model Code of Professional Responsibility (Code),[5] promulgated by the American Bar Association in 1969, no codification of the standards of legal ethics attempted to restrict an attorney's ability to limit malpractice liability contractually.[6] Disciplinary Rule 6-102(A) of the Code states: "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice."[7] When the ABA adopted the Model Rules of Professional Conduct (Model Rules) in 1983,[8] the restriction continued. ABA Model Rule 1.8(h)[9] effectively prevents attorneys from contracting with clients to limit their malpractice liability prospectively. The first clause of Model Rule 1.8(h) forbids attorneys from making agreements with clients to limit potential malpractice liability "unless permitted by law and the client is independently represented in making the agree-

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[5] MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) [hereinafter CODE].

[6] *See* D. HOFFMAN, *Hoffman's Fifty Resolutions in Regard to Professional Deportment*, in A COURSE OF LEGAL STUDY 752-75 (2d ed. 1836), *reprinted in* H. DRINKER, LEGAL ETHICS, app. 338-51 (1953); CODE OF ETHICS OF THE ALABAMA STATE BAR ASSOCIATION 118A1a.XXiii (1899), *reprinted in* T. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS AND DISCUSSION TOPICS app. I, 30-39 (1985); CANONS OF PROFESSIONAL ETHICS (1908), *reprinted in* R. WISE, LEGAL ETHICS app. 421-38 (2d ed. 1970).

[7] CODE DR 6-102(A). The rationale for this rule is explained in Ethical Consideration 6-6 as follows: "A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so." *Id.* at EC 6-6.

[8] MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES]. As of August, 1986, a version of the Model Rules has been adopted in the following states: Arizona, Arkansas, Connecticut, Delaware, Florida, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina and Washington. In addition, Oregon and Virginia amended their versions of the Model Code to incorporate the substance of some of the Model Rules. Law. Man. on Prof. Conduct (ABA/BNA) § 01:3 (1986).

[9] MODEL RULES Rule 1.8(h). Arizona, Arkansas, Connecticut, Delaware, Florida, Maryland, Minnesota, Missouri, Montana, Nevada and Washington have adopted Model Rule 1.8(h). Telephone interview with Elaine Reich, ABA (June 24 and Aug. 25, 1986). New Jersey has adopted Rule 1.8(h) but has added the following additional conditions regarding when an attorney can limit his malpractice liability prospectively: "(1) the client fails to act in accordance with the lawyer's advice or refuses to permit the lawyer to act in accordance with the lawyer's advice and (2) the lawyer nevertheless continues to represent the client at the client's request." NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1984). In addition, North Carolina adopted Model Rule 1.8(h), changing only the latter portion of 1.8(h) to make settlement of undisputed claims outside the scope of the rule. PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR Rule 5.8 (1986).

ment. . . ."[10] Professors Hazard and Hodes have suggested that this portion of Model Rule 1.8(h) was intended, *sub silentio*, to forbid contractual limitations on attorneys' malpractice liability because no state has any law regarding this subject except for the rules of professional conduct themselves.[11]

Major arguments against permitting attorneys to limit their liability contractually center on the "fiduciary" relationship between attorney and client. One major problem with this argument, however, is that it fails to weigh carefully all the pros and cons of malpractice liability limitations. The fiduciary analysis starts from the premise that malpractice liability limitations are for the benefit of attorneys and to the detriment of clients.[12] It fails to consider adequately the benefits to clients that permitting a greater range of freedom of contract might produce. In short, it seems to be little more than a label to justify a predetermined conclusion.

A better method for evaluating the desirability of exculpatory contracts would be to determine whether permitting such agreements maximizes economic efficiency. In other words, one might ask whether resources would be allocated to produce greater value with or without such contractual limitations. The economic efficiency model is appropriate for several reasons. First, economic efficiency analysis is particularly well suited to analyzing the effect that people's choices have on one another. In view of the impact that agreements permitting attorneys to limit their malpractice liability will have on clients and on third parties, economic efficiency seems to provide a useful analytical framework. Second, the goal of allocating resources in an efficient manner is a worthy objective which is promoted by economic efficiency analysis. There are some issues, such as euthanasia, for which norms other than promoting efficient allocation of resources might be considered more important objectives. Therefore, even though in such a case one might consider which solutions promoted efficient allocation of resources, most people would reject such a goal in favor of advancing more "moral"

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[10] MODEL RULES Rule 1.8(h).

[11] G. HAZARD, JR. & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 169-70 (1985).

[12] *See* CODE EC 6-6.

considerations. In the instant situation, however, there seems little reason to believe that the problem of whether to permit attorneys to limit their malpractice liability poses such a moral dilemma. Because most of the rules of professional responsibility were not intended to promote morality,[13] it would be rather anomalous to decide the instant question based on morality. Finally, economic efficiency analysis does not preclude the consideration of other competing normative values.

In this Article, the restrictive approach to malpractice liability limitations taken by the Code and the Model Rules is examined from an economic perspective. The effect of relaxing these limitations is discussed in terms of economic efficiency. The possibility of minimizing direct and indirect costs associated with a client's decision about entering into an exculpatory agreement is explored, while ways to reduce the costs associated with enforcing such an agreement are suggested. The various rationales that courts have used for refusing to enforce exculpatory agreements in other industries also are examined. The applicability of these arguments to attorneys' attempts to limit their malpractice liability contractually is considered. Finally, additional public policy objectives for refusing to permit attorneys to limit their malpractice liability are analyzed.

I. ESTABLISHING A MODEL OF ECONOMIC EFFICIENCY

One of the basic tenets of economic efficiency theory is that, in the absence of transaction costs, agreements between parties

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[13] For example, the Model Code of Professional Responsibility contains restrictions on attorney advertising and on nonlawyers practicing law that were motivated in large part by anti-competitive instincts of attorneys. *See* J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 41-50 (1976); J. HURST, THE GROWTH OF AMERICAN LAW 331 (1950). *See generally* Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968). The restrictions had very little to do with morality. Likewise, the Model Rules adopt a rather tentative approach toward policing attorneys' ethics in negotiation. This approach has been described by one commentator as motivated by a desire not to permit the large number of attorneys who would be unwilling to abide by a more severe restriction on negotiation ethics to take advantage of the clients of the ethical attorneys. *See* White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926. Once again, morality takes a backseat to practicality under the Model Rules. Therefore, it seems rather hypocritical to argue that morality dictates that limitations on malpractice liability should be prohibited by the ethics rules.

will produce greater economic efficiency than existed before the agreement.[14] "In general, transaction costs include the costs of identifying the parties with whom one has to bargain, the costs of getting together with them, the costs of the bargaining process itself, and the costs of enforcing any bargain reached."[15] When transaction costs exist, third parties outside the agreement also may incur costs (referred to herein as indirect costs).[16] Economic efficiency is defined as exploiting economic resources in such a way that value, as measured by consumers' willingness to pay for goods and services, is maximized.[17]

In a monopolistic market, agreements between consumers and a monopolist would not necessarily enhance economic efficiency.[18] The lack of competition among common carriers and among public utilities may explain why courts in modern times have refused to uphold exculpatory agreements in these industries.[19] On the other hand, the market for attorneys is highly

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[14] *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 11-13 (3d ed. 1986). Following is an illustration of the Kaldor-Hicks concept of efficiency:

> [i]f A values the wood carving at $5 and B at $12, so that at a sale price of $10 (indeed at any price between $5 and $12) the transaction creates a total benefit of $7 (at a price of $10, for example, A considers himself $5 better off and B considers himself $2 better off), then it is an efficient transaction, provided that the harm (if any) done to third parties (minus any benefit to them) does not exceed $7. The transaction would not be Pareto superior unless A and B actually compensated the third parties for any harm suffered by them. The Kaldor-Hicks concept is also and suggestively called potential Pareto superiority: The winners could compensate the losers, but need not (not always, anyway).

Id. at 11-12.

[15] A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 12 (1983).

[16] *See* R. POSNER, *supra* note 14, at 12, 13 n.3.

[17] *Id.* at 12.

[18] *See id.* at 249-60. In a world of zero transaction costs, absent real coercion, agreements entered into with monopolists would be economically efficient because consumers could get together costlessly to force monopolists to charge prices commensurate with what would be charged in a competitive market. Essentially, monopolists would not be able to command monopoly prices if there were no transaction costs. Because in the real world, consumers cannot costlessly band together, a monopolistic market means that voluntary agreements will not necessarily be economically efficient.

[19] *See* Note, *Validity of an Ordinary Bailment Contract Limiting Liability of Bailee for Negligence*, 86 U. PA. L. REV. 772, 777 (1938). *See also, e.g.*, Collins v. Virginia Power & Elec. Co., 168 S.E. 500 (N.C. 1933); Oklahoma Natural Gas Co. v. Appel, 266 P.2d 442 (Okla. 1954); Reeder v. Western Gas & Power Co., 256 P.2d 825 (Wash. 1953) (refusing to uphold exculpatory agreements in favor of public utilities); W. KEETON,

competitive.[20] Therefore, absent other transaction costs, either direct or indirect, permitting attorneys to limit their malpractice liability prospectively by contract will more efficiently allocate resources than will prohibiting such agreements.

In a world of zero transaction costs, allowing attorneys to contract away their liability for negligence would add no cost to clients in seeking good attorneys. At no cost, clients would be able to discover from friends or from some other source the records of attorneys before hiring them. They would also be able to find out individual success rates, the malpractice claims made against specific attorneys, informal complaints, and any disciplinary proceedings instituted against the attorney. Moreover, because the cost of information to clients would be zero, they could ask questions of as many attorneys as necessary to achieve a clear understanding of the exculpatory agreement. Finally, there would be no costs associated with determining whether a client voluntarily and knowingly waived his right to recover for any malpractice that might be committed by the attorney. As a result, many clients would seek to bargain for service at reduced cost in exchange for an agreement to limit malpractice liability. Economic efficiency would be increased over the current rule, in which attorneys' exculpatory agreements are forbidden, because, in the absence of transaction costs, voluntary agreements between parties are viewed as enhancing economic efficiency.[21]

In the real world, however, transaction costs are not zero. For example, prospective clients cannot discover cost-free the

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D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 482-83 (5th ed. 1984); RESTATEMENT OF CONTRACTS § 575(1) (1932).

> [A] bargain for exemption from liability for the consequences of negligence is illegal if . . . one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.

Id. For cases in which courts have refused to uphold exculpatory contracts in favor of common carriers, see Caribbean Produce Exch., Inc. v. Sea Land Serv., Inc., 415 F. Supp. 88 (D.P.R. 1976); Varian Assoc. v. Compagnie Generale Transatlantique, 149 Cal. Rptr. 534 (Cal. Ct. App. 1976); First Nat'l Bank of Girard v. Bankers Dispatch Corp., 562 P.2d 32 (Kan. 1977).

[20] *See* Weil, *Economically, It's Been a Decade of Running in Place*, Nat'l L. J., Feb. 10, 1986, at 15, col. 1.

[21] *See supra* note 14 and accompanying text.

reputations of attorneys whom they might hire. Consequently, decisions in selecting attorneys sometimes are made on the basis of scanty information.[22] Moreover, there are costs associated with adequately informing prospective clients of their rights to refuse to limit their attorneys' malpractice liability. Clients may agree to such limitations without fully understanding or appreciating the consequences. Conversely, because of lack of information, clients may refuse to agree to such limitations even when it is in their economic interest to do so. Furthermore, there are costs associated with determining whether there has been an informed and voluntary waiver of these rights. There are also costs to clients in ascertaining whether, in the absence of poten-

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[22] *See* Bates v. State Bar of Arizona, 433 U.S. 350, 375 n.30 (1977) ("Information as to the qualifications of lawyers is not available to many. . . . And, if available, it may be inaccurate [sic] or biased."); Spencer v. Supreme Court of Pa., 579 F. Supp. 880 (E.D. Pa. 1984), *aff'd*, 760 F.2d 261 (3d Cir. 1985) (prohibition against the use of subjective terms in attorney advertising, such as "experienced," "expert," "highly qualified" or "competent" which are misleading, is constitutional); AMERICAN BAR ASSOCIATION, FINAL REPORT OF THE SPECIAL COMMITTEE TO SURVEY LEGAL NEEDS 21-25 (1978); C. WOLFRAM, *supra* note 2, at 906 ("Whatever ability an average citizen once might have had to make an informed and wise choice of a lawyer based on community reputation, clients in a modern, transient, urbanized community clearly lack any reliable reputational basis for choosing a lawyer."). *Cf.* MODEL RULES, Rule 7.1 comment ("The prohibition in paragraph (b) of statements that may create unjustified expectations would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements."). *But cf. Ex Parte* Howell, 487 So. 2d 848 (Ala. 1986) (Alabama's blanket ban on advertising of attorney specialization that is not misleading or deceptive violates first amendment); *In re* Johnson, 341 N.W.2d 282 (Minn. 1983) (Minnesota Supreme Court Rule that prohibits attorneys from holding themselves out as specialists until the Court adopts a rule for attorney specialization held unconstitutional on its face and as applied to an attorney who held himself out as a civil trial specialist certified by the National Board of Trial Advocacy); State *ex rel.* Oklahoma Bar Ass'n v. Schaffer, 648 P.2d 355 (Okla. 1982) (attorney could not be disciplined, consistent with the Constitution, for an ad in which he promised to provide free legal service whenever his performance was not rendered expeditiously, even if the ad is analogous to guaranteed performance of quality of work). *See generally* B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 141 (1970) (arguing that attorneys should not be subject to discipline for quality claims in advertising, and that threat of civil liability is adequate deterrent to false claims in advertising); B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 200-03 (1977) (52% selected lawyer based on recommendation of a friend or relative; 33% chose lawyer who they had known personally).

For a discussion of the way in which corporate counsel select and evaluate outside counsel, see M. ALTMAN & R. WEIL, HOW TO MANAGE YOUR LAW OFFICE § 3.08, at 3-26 to 3-33 (1985).

tial malpractice liability, the attorneys they hire will have sufficient incentive to avoid committing malpractice. The latter costs may not be much different from the current costs of finding good attorneys because clients will look for attorneys who will do a good job without the clients having to bring malpractice lawsuits.

In addition to the direct costs between the parties to an agreement, there are indirect costs in permitting attorneys to limit their malpractice liability. These costs are borne by potential clients who are not privy to the agreement between the attorney and client. In particular, one must consider whether a change in the rule prohibiting attorneys from limiting their malpractice liability would cause the public to reduce their use of legal services to an economically inefficient level. In other words, one must consider whether the public's perception of attorneys would decline to such a degree that potential clients would avoid using attorneys even though it would be economically efficient for them to do so. Potential clients may face an increased cost in selecting a good attorney because a decline in the number of malpractice lawsuits is likely to reduce the supply of valuable information about attorneys. Permitting attorneys to limit their malpractice liability also may permit incompetent attorneys who otherwise might have been forced out of business to continue in practice. These problems are discussed together with suggestions for ways of minimizing transaction costs.

In order to ascertain whether a rule that restricts or forbids attorneys from prospectively limiting their malpractice liability is more economically efficient than a rule that permits all such agreements, one must look to the Coase Theorem. Under the Coase Theorem, in the absence of transaction costs, the efficient outcome will be produced by the parties' voluntary agreement regardless of the choice of rule adopted.[23] This is so because the parties will be able to adjust their behavior without cost in accordance with the rule of law in effect. When there are positive transaction costs, the legal rule that minimizes transaction costs

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[23] *See* Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

will produce the more efficient outcome.[24] Thus, in the instant situation, to determine which rule is more efficient, one must compare costs of the kind discussed above to the costs created by the current rule forbidding attorneys from limiting their malpractice liability. One cost of the current rule is that it precludes clients from contracting for a limitation on attorney's malpractice liability at a reduced price. Some clients may prefer to obtain legal services for a reduced fee in exchange for relinquishing their right to sue their attorney for malpractice. The current rule precludes such agreements. It also results in attorneys spending an inordinate amount of time practicing defensively in order to avoid potential malpractice claims.[25] Ultimately, a rule precluding attorneys from limiting their malpractice liability may produce increased legal fees because attorneys will refuse to accept cases unless they are adequately compensated both for their time and for the risk of being subject to malpractice liability.[26] Furthermore, clients presently are forced to bear the expense of enforcing a malpractice claim. Clients may

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[24] *See id.* at 15-16; A. POLINSKY, *supra* note 15

> We can now state the more complicated version of the Coase Theorem: If there are positive transaction costs, the efficient outcome may not occur under every legal rule. In these circumstances, the preferred legal rule is the rule that minimizes the effects of transaction costs. These effects include the actual incurring of transaction costs and the inefficient choices induced by a desire to avoid transaction costs.

Id. at 13.

[25] *See* Waldman, *supra* note 2, at 27, col. 3 ("[L]awyers are starting to practice much more defensively . . . . The new precautions consume precious billing hours, and, ultimately, clients pay for them."). *Cf.* Thompson, *Malpractice: Doctors, Patients Pay the Price: How Rising Insurance Premiums, Threat of Suits Have Changed American Medicine*, Wash. Post, July 24, 1985, (Health), at 7, col. 1 (as a result of malpractice concerns, 31% of doctors are maintaining more detailed medical records; 20% are ordering more diagnostic tests and performing more procedures; 17% have increased the number of follow-up visits; and 17% spend more time with their patients).

[26] This is not to say that in any given case the price of legal services will be a direct measurement of the costs. It is true that, in the long run, absent transaction costs and assuming a competitive market without entry or exit barriers, the price of services offered by the marginal provider will equal the marginal cost of those services. *See* A. POLINSKY, *supra* note 15, at 85-87. Thus, if the price exceeds marginal cost, more providers will enter the market and drive the price down to the marginal cost. Likewise, if the price is beneath the marginal cost, providers offering services at such a price will drop out of the market, thereby causing the price to return to the marginal cost. *See id.* However, in any particular case, a provider of services will try to obtain the highest price he can for those services, regardless of the cost of those services.

believe that the time and expense of enforcing a malpractice claim will exceed the value of the future right to that claim. Similarly, clients who perceive the risk of losing a malpractice suit as being too high might prefer to waive or to limit their rights to any future claim in exchange for reduced legal fees.

If a rule allowing attorneys to limit their liability were in effect, attorneys would have some incentive to agree to such limitations if their clients sought them. Competitive pressure might compel attorneys to seek to limit their liability. Moreover, the prospect of avoiding the time and expense of malpractice trials would be appealing to many attorneys. In addition, if the overall cost of attorneys' services were reduced, an individual attorney who was in no better competitive position as against other attorneys might still profit. For example, reduced legal fees generally might cause clients to make greater use of attorneys' services, thereby increasing the wealth of many attorneys.

II. APPLYING THE ECONOMIC EFFICIENCY MODEL

A. Direct Costs of Permitting Limitations on Attorney Malpractice Liability—Costs Incurred by the Client

The cost of negotiating the agreement is the first major transaction cost connected with a system that would permit attorneys to limit their malpractice liability. As a general rule, allowing parties to negotiate their contracts freely will effectively obviate the problem of negotiating expense because the parties will engage in the process only if they determine that the cost of negotiation is less than the cost of foregoing the agreement. However, freedom of contract may not promote economic efficiency if there are impacted information costs. Impacted information costs arise when one of the parties to a contract is better informed than the other, and the other cannot rely on the first party to disclose candidly the needed information.[27] There may be different reasons for the unwillingness to disclose. For ex-

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[27] *See* O. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 14, 31 (1975). Information impactedness typically causes the less knowledgeable party to consult outside sources, often at considerable cost, to achieve information parity with the more knowledgeable party. *Id.* at 14.

ample, the more knowledgeable party may wish to take advantage of the other party's lack of information. Alternatively, the information may not be conveyable at a reasonable cost. Particularly with respect to technical information, for which the less knowledgeable party may need additional background, the cost of conveying information may be prohibitive. Thus, an unsophisticated client might not fully appreciate the risk of relying on the advice of the attorney he was seeking to retain concerning the wisdom of entering into an exculpatory agreement. Under the current rule precluding exculpatory agreements, clients do not risk incurring costs associated with an incorrect decision based on insufficient or misunderstood information. Obviously, there is no opportunity to make this type of decision.

There may be ways, however, to minimize some of the transaction costs connected with the negotiation of an exculpatory agreement. Written agreements relieving attorneys from liability will reduce the likelihood of an incorrect decision by a client. A writing may reduce the chance of failure of communication between attorney and client in a much less costly way than hiring an independent attorney to counsel the client on the advisability of the agreement.[28] A writing also may decrease costs associated with conflicting oral testimony.[29] Finally, a writing probably will cause some people to reflect before they enter into a transaction.[30] Rather than being pressured to make a decision on the spot on the basis of an attorney's highly charged argument, a writing may enable an individual to consider more carefully the advisability of agreeing to an exculpatory clause. If a writing alone does not protect the client sufficiently from an overbearing attorney, a cooling-off period before the agreement becomes effective might be a solution.[31] For example, a

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[28] Hiring separate counsel is required by Model Rule 1.8(h) for an attorney to limit his liability. However, it is not sufficient. Such an agreement must still be permitted by state law. *See supra* text accompanying note 11.

[29] *See* R. POSNER, *supra* note 14, at 239 (cost of enforcing some oral promises may be disproportionately high in relation to the gains).

[30] J. CALAMARI & J. PERILLO, CONTRACTS § 19-1, at 673 (1970) (quoting Rabel, *The Statute of Frauds and Comparative Legal History*, 63 LAW Q. REV. 174, 178 (1947)).

[31] *Cf.* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454 (1978); *id.* at 469 (Marshall, J., concurring) ("The circumstances in which appellant Ohralik initially

client's agreement to limit his right to sue for malpractice would not be effective unless executed 24 or 48 hours after he received a written copy of the proposed agreement. Such a cooling-off period might reduce the likelihood that an attorney could unduly influence his client.

Enforcing an agreement to limit malpractice liability is another major transaction cost. Attorneys might be reluctant to offer their services at reduced fees in exchange for such an agreement if they know the cost of enforcing such an agreement is exorbitant. Using court-approved forms would reduce this problem.[32] For example, in *Miranda v. Arizona*,[33] the Supreme Court prescribed fairly explicitly what statements had to be made by the police to criminal suspects to insure that any confessions obtained would be admissible into evidence in a subsequent trial.[34] The rule in *Miranda* relieved the police of having to guess whether they had made adequate disclosure to the suspects.

Even after *Miranda*, however, courts still must determine whether the suspect's waiver of his rights is knowing and voluntary.[35] Presumably, this uncertainty would exist in the instant situation as well. Again, a writing is one way to remove some uncertainty without causing the client to incur the expense of hiring separate counsel. But a writing should not be conclusive as to the voluntary nature of an agreement. In short, a client should still be able to avoid the effects of the agreement if he can prove the traditional elements of undue influence.[36]

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approached his two clients provide classic examples of 'ambulance chasing'. . . . Ohralik, an experienced lawyer in practice for over 25 years, approached two 18-year-old women shortly after they had been in a traumatic car accident."); *In re* Primus, 436 U.S. 412, 438 (1978) (A state may constitutionally prohibit "solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence.").

[32] *Cf.* FED. R. CIV. P. 84 ("The forms contained in the Appendix of Forms are sufficient under the rules. . . .").

[33] 384 U.S. 436 (1966).

[34] *See id.* at 478-79.

[35] To secure admission into evidence of a confession over the defendant's objection, the government has a heavy burden of proof that the defendant's waiver of his rights was "made knowingly, voluntarily, and intelligently." *Id.* at 444. Constitutionally, the government is required only to prove the voluntariness of the confession by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489 (1972). *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 10.3(c), at 461 (1985).

[36] *See* RESTATEMENT (SECOND) OF CONTRACTS § 177 (1981) which provides in part:

B. Indirect Costs of Permitting Attorneys to Limit Their Malpractice Liability: The Public Perception of Attorneys

Allowing attorneys to limit malpractice liability contractually could impose a cost through the decline in public confidence in

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(1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that "that" person will not act in a manner inconsistent with his welfare.

(2) If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.

See also 13 S. WILLISTON, WILLISTON ON CONTRACTS §§ 1625-25A (W. Jaeger 3d ed. 1970).

An argument can be made that a statement signed by a client agreeing to limit an attorney's liability should be treated in the same way that a criminal suspect's signed waiver of his rights should be treated—as strong, though not conclusive, evidence that it is made knowingly, voluntarily, and intelligently. *See* United States v. Willis, 397 F. Supp. 1078, 1081 (E.D. Pa. 1975) (citing United States v. Blocker, 354 F. Supp. 1195 (D.D.C. 1973), *aff'd,* 509 F.2d 538 (D.C. Cir. 1975)). *See also* C. WHITEBREAD, CRIMINAL PROCEDURE § 15.05(d) (1980). Unlike the situation involving a confession, nothing in the United States Constitution would prevent a client's signed statement from being conclusive regarding whether the client had knowingly, voluntarily, and intelligently agreed to a limitation on an attorney's malpractice liability. The question remains as to whether it would be economically efficient to treat the writing as a conclusive waiver of the client's prerogative not to enter into a retainer agreement which limits the attorney's malpractice liability.

Just as there are incentives for the policeman to overbear the will of a suspect, there are incentives for the attorney to overbear the will of the client regarding execution of the waiver. In fact, the attorney stands to benefit personally and directly from the limitation on liability whereas the policeman may benefit only indirectly insofar as he may receive a promotion based on meritorious service. The policeman, however, also may receive some psychic benefit from doing what he believes to be a good job of locking up criminals, whereas even the most greedy attorney would not get the same thrill from victimizing his clients. The attorney likely would face a stiffer sanction if his conduct is detected than would the policeman. However, the policeman's conduct is more likely to be the subject of greater scrutiny (by defense counsel) than would the attorney's conduct (by the appropriate disciplinary agency). This arises in part from the fact that many uninformed clients who agree to limitations on malpractice liability will not realize that their agreement might be ineffective.

Even though an attorney may have greater incentive to overbear the will of a client than a policeman, the inherently coercive nature of the custodial setting may put greater pressure on the criminal suspect than a prospective client is subjected to. *See* 384 U.S. at 467. Arguably, however, clients are not as suspicious of their prospective attorneys as criminal suspects are of the police.

It can be argued that the public interest in favor of the admissibility of the confession—with the potential result of removing a criminal from the streets—is greater than the benefit (reduction of attorney's fees) produced by the agreement limiting the attorney's liability. However, this analysis ignores the public interest in deterring viola-

the profession which in turn could cause people to make inefficient choices regarding their use of attorneys. This could occur in either of two ways. First, clients who felt they were duped into giving up their right to sue for malpractice might be reluctant to use attorneys to handle their disputes in the future. This would cause those individuals to seek alternative means of resolving disputes. The alternative they choose might be less economically efficient for society than their hiring attorneys. For example, persons with civil complaints might seek to resolve their disputes by violence rather than by hiring lawyers. Furthermore, some clients duped into exculpating their attorneys from malpractice liability might become so disenchanted with the profession after their attorney actually commits malpractice that they would not consult another attorney regarding the validity of the exculpatory clause. This scenario, however, is unlikely to occur very often because in many instances individuals will have no real choice whether to retain an attorney. Moreover, even if some individuals victimized by bad attorneys acquire an unfavorable view of the legal profession, it may not be sufficient to cause them to cut off their noses to spite their faces. Second, there is the danger of misperception by third persons. By allowing attorneys to contract away liability, some members of the public may believe incorrectly that clients in general are being duped by their lawyers. As a result, they might decide to avoid using attorneys in situations where their use might enhance efficiency. The important question to be resolved, then, is whether

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tions of the fourth amendment by the police.

Finally, it can be argued that the harm to the suspect who voluntarily relinquishes his rights is much greater than the harm to the client who unknowingly or involuntarily agrees to a limitation on an attorney's malpractice liability. This argument assumes that individuals always will prefer to make monetary payments rather than spending time in jail, which may not be true.

In sum, there is probably no reason to think that clients will enter more frequently into inadvisable exculpatory clauses with their attorneys than criminal suspects will agree inadvisedly to relinquishment of their rights. Furthermore, in both contexts the costs attendant to failure to give great weight to the respective waivers would be high. Consequently, one could argue that a similar standard of proof is justified. Of course, a criminal suspect's rights are constitutionally mandated and in fact may not be economically efficient. Therefore, even though there are good reasons for equating the standard of proof for the client's written relinquishment of his right to sue his attorney with the suspect's waiver of his rights, neither may prove to be economically efficient.

a prophylactic rule totally eliminating exculpatory contracts does more harm than good.[37]

The argument that exculpatory clauses should be forbidden because of the dangers of tainting public perception of attorneys fails. It is premised on an outdated, if not wholly inaccurate, view of public opinion. For example, in contemporary urban society, in which clients are not familiar with all the attorneys in town or the nature or price of their services, clients need attorney advertising much more than they did 100 or even 50 years ago.[38] Although there were dire predictions about the impact of advertising on the public's perception of attorneys,[39] there has been no discernible decline in public opinion[40] since

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[37] In many instances, the cases decided under the current Model Code of Professional Responsibility have made clear that the value associated with the public's perception of the legal profession is not an absolute which must hold sway regardless of the costs involved. For example, in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975), the defendant, Chrysler, moved to disqualify plaintiff's counsel, Hammond & Schreiber, because Dale Schreiber of that firm had worked on certain matters for Chrysler while an associate with the law firm of Kelley, Drye, et al. The district court refused to disqualify plaintiff's counsel, and that decision was affirmed by the Second Circuit. *Id.* at 753. The court of appeals noted that the appearance of impropriety standard required under the Canon Nine of the Model Code should not "override the delicate balance created by Canon Four and the decisions thereunder." *Id.* at 757. The Second Circuit added that allowing individuals the counsel of their choice was also relevant. *Id.* In short, the appearance of impropriety standard is not considered in a vacuum. It is viewed in the context of the costs and benefits. To the same effect, see MODEL RULES, Rule 1.10.

[38] *See* B. CHRISTENSEN, *supra* note 22, at 128-35; C. WOLFRAM, *supra* note 2, at 906.

[39] *See* Bates v. State Bar of Arizona, 433 U.S. 350, 368-72 (1977):

> It is claimed that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth. The hustle of the marketplace will adversely affect the profession's service orientation, and irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve. Advertising is also said to erode the client's trust in his attorney: Once the client perceives that the lawyer is motivated by profit, his confidence that the attorney is acting out of a commitment to the client's welfare is jeopardized. And advertising is said to tarnish the dignified public image of the profession.

Id. at 368. *See also* C. WOLFRAM, *supra* note 2, at 778-80.

[40] *See Lawyer Advertising*, 5 LAW. ALERT 22 (Oct. 14, 1985) (80% of people surveyed believe advertising is a good way to learn about lawyers); Middleton, *Ads Pay Off-In Image and Income*, Nat'l. L.J., Mar. 5, 1984, at 1, col. 4, at 22, col. 1 ("[A] previously unpublished ABA study indicates that the public is not put off by legal advertising and that advertising can, in fact, help improve the image—and income—of

the Supreme Court decision in *Bates v. State Bar of Arizona*,[41] which found unconstitutional certain restrictions on attorney advertising. Likewise, changed public perceptions about the role of the attorney and the best economic interest of the client may prevent the public from viewing agreements which limit attorney's malpractice liability with a jaundiced eye.[42] In short, the public could be educated to the advantages of such agreements.

Furthermore, assuming, *arguendo*, that permitting attorneys to limit their liability for malpractice would change public perception of attorneys, it is entirely possible that the change might be favorable. Clients may start paying closer attention to agreements they enter into with attorneys. At present, some clients spend an inadequate amount of time discussing what services their attorneys will perform and the cost of those services. Allowing attorneys to limit their liability by contract may help raise client consciousness, thereby preventing clients from taking costs for granted.

Consumers who routinely purchase goods or services generally have a good idea of whether it is cost efficient for them to attempt to acquire more information about the costs of the services provided. For example, a mother with young children in a supermarket reasonably might determine that checking the cash register to make sure she is not overcharged is not worth her time and effort. She has learned from experience that the automatic scanners generally are accurate, and her children are more likely to damage some merchandise while she is watching the cash register. A client, however, may seek legal services only

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lawyers."). *Cf.* L. HARRIS, *Confidence in Major Institutions Down*, in THE HARRIS SURVEY (Dec. 16, 1985) (The percentage of people expressing a great deal of confidence in law firms has declined from 14% in 1977 to 12% in 1985, mirroring a similar decline in confidence in other major American institutions. A copy of the Harris Survey is on file with the author.). *But cf.* Cook, *ABA Study Says Lawyers' Professionalism Has Declined*, Nat'l. L.J., Aug. 4, 1986, at 10, col. 1 (ABA study of clients and judges found that they believe professionalism among lawyers has declined).

[41] 433 U.S. 350 (1977).

[42] *Cf.* Hazard, Pearce & Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1091-93 (1983) (supply and demand for legal services are elastic and can be influenced by lawyer advertising); *The Packwood Bill*, Wall St. J., May 6, 1986, at 26, col. 1 ("In the real world, individual behavior is dynamic; it changes, unlike the static behavioral models that drive economic policy making in Washington.").

once or twice in a lifetime. For that reason, he might not realize that the risk of harm due to ignorance, multiplied by the amount of harm likely to result, exceeds the cost of inquiring about the nature and price of the attorney's services. If allowing attorneys to contract away liability succeeds in causing more consumers to pay closer attention to the arrangements made, fewer fee disputes may result.[43]

Furthermore, the client may be less likely to assume that her attorney is on top of the problem and may keep closer tabs on the attorney. This may have the effect of improving the quality of services offered. It also may result in fewer disputes between the attorney and client because the client will have a better understanding of what is happening in her case.[44] As with the mother in the supermarket, however, keeping closer tabs on the attorney has its costs.[45] But if clients become more aware that attorneys seek to protect their own interests as much as those of their clients, then clients may be able to make more informed decisions as to whether it is worth keeping closer tabs on the services being performed.

Finally, the subjective nature of public perception of impropriety makes it a very shaky foundation on which to support a prohibition of exculpatory agreements.[46] The Supreme Court in *Zauderer v. Office of Disciplinary Counsel*[47] held that Ohio

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[43] *See, e.g.*, AMERICAN BAR ASSOCIATION, PREVENTING LEGAL MALPRACTICE 4, 7 (1978); T. BROWN, III, HOW TO AVOID BEING SUED BY YOUR CLIENT: PREVENTIONS AND CURES FOR LEGAL MALPRACTICE 35-40 (1981); D. STERN, AVOIDING LEGAL MALPRACTICE CLAIMS 11-14 (1982).

[44] *See generally* Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 919, 1008-09 (disputes between attorneys and clients are often the product of the "vagueness and nonmutuality of the legal service contract").

[45] *See* Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359, 373 (1976) ("A major problem . . . lies in determining whether consumers perceive the marginal benefits of possessing more information . . . to be greater than the marginal social costs, including law-making and enforcement costs, entailed in providing it.").

[46] *Cf.* Board of Educ. of City of N.Y. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979) ("[W]hen there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases."). *See generally* Gross, *Ethical Problems of Law First Associates*, 26 WM. & MARY L. REV. 259, 278 n.88 (1985) ("Although many if not most courts that have considered the issue have refused to disqualify an attorney on the sole basis of Canon Nine and the appearance of impropriety, a few courts have done just that.").

[47] 471 U.S. 626 (1985).

Disciplinary Rule 2-101(B), which restricts advertising by attorneys, could not be justified on the basis that some members of the public might find it offensive or embarrassing.[48] The Court stated:

> [A]lthough the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule. . . . [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.[49]

The same argument applies in the present context. First, even assuming that some attorneys would attempt to limit liability so as to make it difficult for their clients to understand their seeming loss of rights, this may not occur often enough to require a prophylactic rule. Many attorneys would be deterred from such behavior by concerns that the agreements would not be effective in limiting their liability or by the possibility that disciplinary proceedings would be brought against them. Second, even if some members of the public view liability limitations as inherently "improper," if they have suffered no harm personally as a result of the arrangement, it would be economically inefficient to permit them to prevent clients who are not perturbed by this arrangement from entering into such contracts.[50]

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[48] *Id.* at 648.

[49] *Id.* at 647-48.

[50] Interestingly, members of the public who have the most unfavorable impression of attorneys seem to be those that have never used attorneys. *See* B. CURRAN, *supra* note 22, at 234-37, 264 (Those who have never consulted an attorney were more likely to be concerned about the value of attorneys' services in relation to the cost and to be skeptical about attorneys' interest in them and their problems. Multiple users of attorneys were more likely to be positive about the value of lawyers' services, while being somewhat critical of their work habits); AMERICAN BAR ASSOCIATION, THE LAWYER'S HANDBOOK A2-14 (citing THE MISSOURI BAR, MISSOURI BAR PRENTICE HALL SURVEY, A MOTIVATIONAL STUDY OF PUBLIC ATTITUDES AND LAW OFFICE MANAGEMENT 37 (1963)).

Thus, allowing attorneys to limit their malpractice liability contractually may not cause a significant change in public perception of attorneys. Even if it did, the question remains whether it would alter the behavior of the public regarding their use of attorneys' services. Arguably, any change in the attorney/client relationship resulting from a relaxation of the prohibition might be beneficial if it caused clients to keep a more watchful eye on their attorneys.

C. Additional Indirect Costs of Permitting Limitations on Attorney Malpractice Liability

If attorneys are permitted ethically to limit their liability, there is a danger that some will commit more acts of malpractice because they will no longer be deterred by malpractice lawsuits. However, assuming that the agreement between attorney and client is optimal from an efficiency standpoint, we need not be concerned about loss to the client. What is of concern, however, is that other potential clients would no longer receive the possible benefits flowing from a malpractice suit which might have been brought against the attorney. In other words, permitting attorneys to limit or avoid malpractice liability may cause members of the public to be deprived of information concerning those attorneys. That loss may be costly, depending on whether the lost information is misleading.

Under a rule which precludes attorneys from limiting their malpractice liability, a few neglectful attorneys might be forced out of business by malpractice lawsuits. Still others would have their reputations affected by the malpractice lawsuit, causing fewer people to employ these attorneys unless adequate discounts were given. In a system that permits attorneys to avoid malpractice lawsuits, the information flowing to other potential clients concerning the negligent attorney is curtailed. Of course, disciplinary action could be taken against an attorney who neglects his cases.[51] However, at present many disciplinary com-

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[51] *See* DR 6-101(A)(3); Annotation, *Negligence, Inattentions or Professional Incompetence of Attorney in Handling Client's Affairs as Grounds For Disciplinary Action*, 96 A.L.R.2D 823 (1964). For the purpose of determining compliance with the Code of

mittees do not view cases of attorney negligence as subject to discipline unless gross negligence is involved.[52]

Relying on disciplinary proceedings to fill an information void, left when malpractice claims are barred by exculpatory clauses, is troublesome for other reasons. In particular, disciplinary proceedings generally are not as economically efficient as civil actions. First, disciplinary boards usually will not proceed against an attorney until a complaint has been filed.[53] In large part, this is due to the vast number of complaints filed and the limited resources available to most disciplinary agencies.[54] This problem is exacerbated by the unwillingness of many attorneys to file a complaint against a fellow member of the bar.[55] Second, many disciplinary boards are composed of attorneys who have no special interest in seeing others in the profession disciplined.[56]

Professional Responsibility, the ABA defines neglect as follows:

> Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith.

ABA Comm. on Professional Ethics and Grievances, Informal Op. 1273 (1973). *See also* Gaudineer, *Ethics and Malpractice*, 26 DRAKE L. REV. 88, 107 & n.123 (1976-77).

[52] *See* G. HAZARD, JR. & D. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 425 (1985); Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation*, 1974 U. ILL. L.F. 193, 216 ("Most agencies do not treat neglect or other negligence as within their jurisdiction, unless it is gross negligence.").

[53] AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT—FINAL DRAFT, 60-61 (1970) [hereinafter CLARK COMMITTEE REPORT], *reprinted in part in* G. HAZARD, JR. & D. RHODE, *supra* note 52, at 425-30; Marks & Cathcart, *supra* note 52, at 206.

[54] *See* CLARK COMMITTEE REPORT, *supra* note 53; C. WOLFRAM, *supra* note 2, at 100; Cook, *supra* note 40, at 10, cols. 2-3.

[55] *See* Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 717 (1981).

[56] *See* Arkin, *Self-Regulation and Approaches to Maintaining Standards of Professional Integrity*, 30 U. MIAMI L. REV. 803 (1976); Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619 (1978); Jost, *The Public's Stake in Lawyer Discipline*, L.A. Daily J., Apr. 8, 1985, at 2, col. 5. *See also* Kaberon, *ABA Study Released: ABA Panel's Evaluation*, Chi. Daily L. Bull., May 20, 1985, at 11, col 6 (recommending that the Illinois Attorney Registration and Disciplinary Commission change its rule, which excludes members of the public from its hearing boards, so that non-lawyers comprise one-third of the hearing and review board members). Recently there has been a trend toward greater public participation in the

This is particularly true in states where board members serve without compensation and where the few paid assistants are interested in maintaining, not maximizing, their workloads. In certain instances, attorneys paid for work on disciplinary boards may have some interest in increasing their workload in order to justify their positions or to allow them to press the legislature for more funding of their agency. On the other hand, in states short of funds, paid assistants on disciplinary boards may see any attempt to enlarge their empires as futile. Therefore, they have no incentive to do more work than the minimum required. Moreover, attorneys can exert pressure on disciplinary boards by lobbying state legislatures to limit funding for disciplinary panels.[57]

Third, many members of the public will not file disciplinary complaints against attorneys because there is no economic incentive for them to do so.[58] Some may, through their attorneys, file disciplinary complaints in conjunction with civil lawsuits against their former attorneys in an effort to coerce favorable settle-

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disciplinary process. *See* C. WOLFRAM, *supra* note 2, at 46, 84 ("Traditionally, bar discipline has been the exclusive province of judge and lawyers. The 1979 ABA Disciplinary Standards recommended, however, that a third of the members of hearing panels in discipline cases be nonlawyers. The concept has been adopted in a large number of states."). The most recent survey responses compiled by the ABA show 22 jurisdictions (including the District of Columbia) with public representation on disciplinary boards and grievance committees. In addition, the 10th Judicial District in New York and the district covering Cleveland, Ohio provide for representation by members of the public. STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE AND THE AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS Chart VI (Oct. 1985) [hereinafter SURVEY ON LAWYERS DISCIPLINE SYSTEMS]. The ABA has evaluated the disciplinary systems in 11 of those states. Interestingly, it found that "lawyer members of the boards are more likely to find misconduct and to vote for a stronger sanction than non-lawyer members." McPike & Harrison, *The True Story of Lawyer Discipline*, 70 A.B.A. J. 92, 92 (Sept. 1984). *See generally* Belgrad, *Public Participation in Lawyer Matters—A Statement of Confidence*, MD. B.J., Winter 1979, at 32 (arguing in favor of public participation in the disciplinary process).

[57] *Cf.* AMERICAN JUDICATURE SOCIETY, WORKSHOP: OFF-THE-BENCH CONDUCT OF JUDGES, 74-79 (1985) (attempts to limit funding to the Michigan Judicial Tenure Commission because of its actions in disciplining a judge).

Funding for disciplinary board has increased since the Clark Committee Report of 1970 stated that " 'lack of adequate financing is the most universal and significant problem in disciplinary enforcement.' " McPike & Harrison, *supra* note 56, at 94. In 1984, disciplinary agency budgets for all states totalled over $30 million. *See* SURVEY ON LAWYER DISCIPLINE SYSTEMS, *supra* note 56, Chart III.

[58] *See generally* Steele & Nimmer, *supra* note 44, at 946-64.

ments. Such conduct by the new attorneys, however, would likely be viewed as a violation of Disciplinary Rule 7-105(A) of the Code.[59] For these reasons, attorneys in general perceive the threat of discipline from state disciplinary agencies as insubstantial. As a result, voluntary compliance with the standards of professional conduct has been rather indifferent in many quarters.[60]

Finally, disciplinary proceedings generally will not serve to inform the public about the ethically questionable behavior of many attorneys because the initial proceedings, and sometimes even the actual discipline imposed, are kept confidential.[61] In

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[59] *See* CODE DR 7-105(A) ("A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."). *See also id.* at EC 7-21. DR 7-105(A) has been interpreted by at least one court to apply to threats to charge an attorney with unethical conduct. *In re* Madsen, 370 N.E.2d 199, 200 (Ill. 1977) (A lawyer, who was subject to discipline, violated DR 7-105(A) by threatening former associates that if they testified against him, "he would submit evidence that their conduct had been unethical, that they were guilty, 'on a civil basis,' of contractual violations and of violations of the Criminal Code."). *See also* Kentucky Ethics Opinion E-265 (1983) (attorney may not seek to gain an unfair advantage in a civil lawsuit by threatening to file a disciplinary complaint when the lawyer believes another lawyer has a conflict of interest), *cited in* Law. Man. on Prof. Conduct (ABA/BNA) § 801:3907 (1984). *Cf.* Cincinnati Bar Ass'n v. Gebhart, 431 N.E.2d 1031 (Ohio 1982) (frivolous threat that attorney would seek to have another attorney disbarred constituted violation of DR 7-102(A)(1) and (2) in that the purpose of the threat was to harass or maliciously injure the other attorney); *In re* Ellsworth, 486 A.2d 1250 (N.J. 1985) (having client sign a release exempting attorney from ethical charges and attempts to compromise ethical charges constituted violations of DR 6-102(A)).

The Model Rules of Professional Conduct have no provision comparable to DR 7-105. *See* T. MORGAN & R. ROTUNDA, 1986 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 180. However, such a threat in some jurisdictions might constitute criminal extortion and thereby cause the attorney to run afoul of Model Rule 8.4(b), which makes it professional misconduct for a lawyer to commit a criminal act that reflects upon his honesty, trustworthiness or fitness to practice law. *See* C. WOLFRAM, *supra* note 2, at 718.

[60] *See* Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RES. J. 953, 958. Enforcement has been weakest in the areas of greatest concern for clients: inattention, incompetence, delay, mishandling of client property, and fee abuses. *See* Gross, *supra* note 46, at 269 n.49 ("[A] large proportion of client complaints center on neglect and fee disputes. But fee disputes and cases of neglect or other negligence rarely result in either suspension or disbarment."); Marks & Cathcart, *supra* note 52, at 216.

[61] *See* Jost, *supra* note 56. *See also, e.g.*, Chronicle Publishing Co. v. Superior Court, 354 P.2d 637 (Cal. 1960); *In re* Klein, 166 N.Y.S.2d 549 (N.Y. App. Div. 1957); McLaughlin v. Philadelphia Newspapers, Inc., 348 A.2d 376, 381 (Pa. 1975) ("[a]ll proceedings involving allegations of misconduct by . . . an attorney shall be kept confidential until and unless the [Pennsylvania] Supreme Court enters its order for the imposition of public discipline or the respondent-attorney requests that the matter be

sum, under the current system, permitting attorneys to avoid malpractice liability contractually would deprive potential clients of much valuable information concerning attorneys who were able to obtain exculpatory agreements. Hence, compared to a system in which information about attorneys could be made more readily accessible, the current system would not deter malpractice adequately if exculpatory agreements were permitted.

If there existed other deterrents to attorney malpractice to protect potential clients adequately, the loss of information resulting from permitting attorneys to limit their malpractice liability contractually would not be so troubling. Although the attorney could be deprived, in whole or in part, of compensation for his services because of his negligence or breach of fiduciary duty,[62] this mild deterrent is inadequate, at least by itself, for two reasons. First, the client may not detect the attorney malpractice.[63] Second, even if detected, the client already may have paid a sufficiently large retainer to cover the attorney's time. Hence, instead of being able to assert the attorney's malpractice as a defense to the attorney's claim for fees, the onus will be on the client to initiate the lawsuit. Having already been burned by one attorney and faced with the prospect of a relatively modest recovery, the client may be unwilling to trust another attorney with a legal malpractice claim.[64] Even in those states in which the client can obtain arbitration of a fee dispute, the

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public or the investigation is predicated upon a conviction of the respondent-attorney for a crime. . . .").

[62] *See, e.g.*, Slade v. Harris, 135 A. 570, 572 (Conn. 1927); Joseph Land & Co. v. Green, 486 So. 2d 87 (Fla. Dist. Ct. App. 1986); Caverly v. McOwen, 123 Mass. 574, 578 (Mass. 1878); Rice v. Perl, 320 N.W.2d 407, 411 (Minn. 1982). *See also* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 9 (2d ed. 1981).

[63] *Cf.* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 25-26 (1982) (suggesting that punitive damage awards are appropriate when the probability of liability, for example, in cases of fraud or oppression—is less than the probability of loss).

[64] *Cf.* WOLFRAM, *supra* note 2, at 556. However, clients' unwillingness to sue their attorneys, as well as the reluctance of lawyers to participate in lawsuits against other lawyers may be disappearing quickly. *See* Waldman, *supra* note 2, at 27, col. 3 ("[T]he bar isn't immune to the menacing liability suits that lawyers have pressed so successfully against members of other professions. . . .").

confidentiality of the proceeding generally shields the attorney's conduct from public scrutiny.[65]

Permitting attorneys to exculpate themselves from malpractice liability without making other changes in the current system will result in a loss of valuable information to potential clients. Although the costs of this loss of information are difficult to quantify, they may be higher than the costs created by the rule precluding attorneys from contractually limiting their malpractice liability. Rather than rejecting the proposed change out of hand, however, we must determine whether other changes in the current system would adequately compensate the public with protection from unethical and incompetent attorneys.

III. LIMITING THE COSTS OF LIABILITY CLAUSES: MANDATING DISCLOSURE

A system which permits attorneys to limit their malpractice liability contractually while simultaneously increasing consumer access to information about the quality of legal services might well be more economically efficient than the current system. Potential clients currently have a great deal of difficulty discovering information regarding the quality of legal services. Consequently, many attorneys are not overly concerned about loss of business because of adverse publicity or word of mouth from dissatisfied customers.

As discussed above, the investigatory phase of attorney disciplinary proceedings generally is kept confidential. Often, even the discipline imposed is kept confidential. One step toward increasing consumer knowledge about unethical attorneys would be to make this information more readily accessible to the public. If all such complaints were made public, however, an attorney's practice could be seriously impaired by frivolous charges, leaving him with very little recourse. One solution, which is followed by about one-third of the disciplinary agencies, makes disciplinary

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[65] *See* Devine, *Mandatory Arbitration of Attorney-Client Fee Disputes: A Concept Whose Time Has Come*, 14 U. TOL. L. REV. 1205, 1236 (1983) ("Most fee arbitration procedures are designed to ensure confidentiality. Thus, aside from the exception which allows disclosure of the amount of the award, the records of the arbitration committee usually are protected."). *See generally* C. WOLFRAM, *supra* note 2, at 556-58.

proceedings public only upon the filing and service of formal charges against an attorney.[66] Professor Martyn has noted that this solution may be fair to individual attorneys insofar as it guarantees their privacy until official action is taken. Such a guarantee of privacy, however, "prevents public scrutiny of the vast majority of complaints received."[67] In support of Professor

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[66] *See* AMERICAN BAR ASSOCIATION, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS Standard 8.25 (1983), *reprinted in* T. MORGAN & R. ROTUNDA, 1986 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY ("Upon the filing and service of formal charges the proceeding should be public, except for: (a) deliberations of the hearing committee, board or court; and (b) information with respect to which the hearing committee has issued a protective order." The commentary to Standard 8.25 states: "Once a finding of probable cause has been made, there is no longer a danger that the allegations against the respondent are frivolous."). As of Spring, 1983, 16 states had adopted Standard 8.25 (These states are Connecticut, Georgia, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Nebraska, New Hampshire, North Carolina, Oregon, Texas, Utah, Washington, and Wisconsin.). AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, SURVEY OF LAWYER DISCIPLINARY PROCEDURES IN THE UNITED STATES Part I, at 22 (1984). *See generally* Annotation, *Restricting Access to Records of Disciplinary Proceedings Against Attorneys*, 83 A.L.R.3d 749 (1978).

[67] Martyn, *Lawyer Competence and Lawyer Discipline:Beyond the Bar?*, 69 GEO. L.J. 705, 737 (1981) (footnote omitted). Professor Martyn explains as follows:

> Publicity, however, is essential to the deterrence potential of the disciplinary process. Publicity educates both lawyers and the public and enables them more reasonably to evaluate their own expectations of the attorney-client relationship. Despite this benefit, the Standards for Discipline continue the tradition of barring publicity until a client complaint has been fully investigated and formal charges have been prepared by the agency.

Id. at 737 (footnotes omitted).

Most jurisdictions continue to place a tight lid on attorney disciplinary proceedings. Thus, most jurisdictions dispose of the bulk of their complaints without a formal hearing. Furthermore, there is generally no publicity when the sanction is a private reprimand. *See id.* Of late, there has been a trend toward opening up the attorney disciplinary process. For example, "Connecticut state judges and the Maine Supreme Judicial Court have changed [their] rules in order to increase public access to the grievance process." *Connecticut, California, Maine Rethink Discipline Procedures*, 2 [CURRENT REPORTS] Law. Man. on Prof. Conduct (ABA/BNA) 78, 78 (Mar. 19, 1986); *Discipline Goes Public in Washington*, IDAHO BAR L., Sept.-Oct. 1983, at 22. *See also* Egelko, *State Bar Discipline Under Fire*, CAL. LAW., June, 1986, at 55-56; Smith, *Open Disciplinary Hearings: Where Are All The People?*, THE WESTERN LAW JOURNAL, Winter 1983, at 9 (open disciplinary hearings have given the process added credibility even though hearings have been sparsely attended).

Professor Gillers has argued in support of making the facts and commission rulings public in all attorney disciplinary cases, even though the names of the attorneys and the identifying details remain secret. This procedure will educate attorneys as to what is expected of them; it will enable attorneys appearing before disciplinary commissions to

Martyn's position, one might cite *Bates v. State Bar of Arizona*,[68] wherein the United States Supreme Court stated that prohibiting advertising "assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information . . . . [W]e view as dubious any justification that is based on the benefits of public ignorance."[69] The same argument could be raised with respect to maintaining the confidentiality of disciplinary complaints against attorneys.

It appears that the principal basis for both the rule prohibiting attorney advertising and the rule maintaining the confidentiality, at least temporarily, of complaints against attorneys was to protect the public from making incorrect decisions based on erroneous information. In holding the blanket ban on advertising to be unconstitutional, the Court in *Bates* was operating on the belief that preventing the dissemination of such information would be more damaging to the public than permitting its release, even though some of the information might be misleading.[70] The same argument can be made with respect to the rule maintaining the confidentiality of disciplinary complaints. On the other hand, however, public misconceptions created by attorney advertising may be easier to correct than those created by client complaints. For example, persons who see an attorney's advertisement may very well try to learn additional information about the attorney. Persons who discover complaints lodged against an attorney may not take the time to learn anything further about that attorney. However, at least at the point at which the disciplinary agency decides that formal charges should be brought against the attorney, the informational value of the complaint is probably much greater than that of the self-serving advertisement of the attorney.

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argue for a sanction commensurate with that given in another case; and it will enable the bar and the public to monitor the work of disciplinary commissions. Gillers, *5 Ways to Improve Lawyer Discipline in New York*, N.Y.L.J., Jan. 8, 1986, at 1, col. 3, at 28, col. 2. *See also* Murphy, *Restructuring Is Proposed for Disciplinary System*, N.Y.L.J., Jan. 15, 1986, at 29, col. 5.

[68] 433 U.S. 350 (1977).

[69] *Id.* at 374-75.

[70] *See id.* at 372-75.

An additional concern about making public all client complaints against attorneys is whether the complainant should continue to be relatively insulated from civil liability. Currently, individuals filing disciplinary complaints against attorneys receive some form of immunity from civil liability.[71] The immunity protects the public from unethical attorneys by encouraging persons to be more forthcoming with complaints.[72] Because attorneys have little recourse by way of either a defamation or malicious prosecution action against a complainant, they need some measure of confidentiality to protect themselves from unfounded complaints.[73] On balance, allowing disciplinary complaints to become public only upon the disciplinary body's filing of formal charges against attorneys may well be more econom-

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[71] Actions for malicious prosecutions, although recognized in theory, are very difficult to prove. *See* Annotation, *Malicious Prosecution or Similar Tort Action Predicated Upon Disciplinary Proceedings Against an Attorney*, 52 A.L.R.2d 1217, 1219 (1957). Moreover, some jurisdictions have conferred blanket immunity from malicious prosecution actions on complainants who filed disciplinary complaints against attorneys. *See, e.g.*, Netterville v. Lear Siegler, Inc., 397 So. 2d 1109, 1113 (Miss. 1981); Toft v. Ketchum, 113 A.2d 671 (N.J.), *aff'd on rehearing*, 114 A.2d 863 (N.J.), *cert. denied*, 350 U.S. 887 (1955). Most recent cases have conferred absolute immunity from defamation actions on complainants filing charges against attorneys provided that the charge has some relationship to the proceeding. *See, e.g.*, Drummond v. Stahl, 618 P.2d 616 (Ariz. Ct. App. 1980), *cert. denied*, 450 U.S. 967 (1981); Mueller v. The Florida Bar, 390 So. 2d 449 (Fla. Dist. Ct. App. 1980); Wong v. Schorr, 466 P.2d 441 (Haw. 1970); Kerpelman v. Bricker, 329 A.2d 423 (Md. Ct. Spec. App. 1974); Sinnett v. Albert, 195 N.W.2d 506 (Neb. 1972); Wiener v. Weintraub, 239 N.E.2d 540, (N.Y. 1968); Ramstead v. Morgan, 347 P.2d 594 (Or. 1959). *Compare* Conley v. Southern Import Sales, 382 F. Supp. 121, 124-25 (M.D. Ala. 1974) (qualified immunity); Allen v. Ali, 435 N.E.2d 167 (Ill. App. Ct. 1982) (court found a qualified immunity for letters sent to bar associations not having jurisdiction over attorney discipline; however, if the letter had been sent to Attorney Registration and Disciplinary Committee, it would have been subject to an absolute privilege); McChesney v. Firedoor Corp. of Am., 361 N.E.2d 552 (Ohio Ct. App. 1976) (qualified immunity).

[72] 347 P.2d at 596. *See* RESTATEMENT (SECOND) OF TORTS Introductory Note, Chapter 25, Title B, at 243 (1977); Note, *Liability of Bar Associations for Libel During Disbarment Investigations*, 23 IOWA L. REV. 83, 87-88 (1938).

[73] *Cf.* Madda v. Reliance Ins. Co., 368 N.E.2d 580, 583 (Ill. App. Ct. 1977) (because attorneys have power to control confidentiality of investigatory phase of disciplinary proceeding, attorney could not maintain action for malicious prosecution because he could not show special injury); McAfee v. Feller, 452 S.W.2d 56, 58 (Tex. Civ. App. 1970) (absolute privilege from defamation accorded individual who filed complaint against attorney with grievance committee; privilege premised on fact that there was no repetition or republication of the charges).

ically efficient than keeping clients' complaints permanently confidential or making them public as soon as they are lodged.

There are, however, other ways in which public awareness about the competence, diligence, and ethics of attorneys could be increased without unduly damaging blameless attorneys. For example, at present, potential clients have difficulty obtaining access to information regarding attorneys who have had formal disciplinary charges brought against them. Likewise, there is no easy way for potential clients to discover whether attorneys have had any malpractice claims brought against them and, if so, the results of such claims. Consumer access to such information could be increased if a central registry, such as a bar association, kept records of formal disciplinary complaints and malpractice suits along with the actions' outcomes. Such an office would operate much like a better business bureau.[74]

This proposed solution, however, is not foolproof. If attorneys were able to completely avoid malpractice liability by contract, fewer malpractice actions would be reported to the registry because fewer malpractice complaints would be filed.[75] Perhaps, then, setting a dollar ceiling on an attorney's malpractice liability would be preferable to permitting complete exculpation.[76] There would still be some incentive for individuals to bring malpractice claims, and potential clients could still receive the benefit of the victimized client's knowledge concerning the malpracticing attorney.

Attempting to maximize the number of malpractice claims reported to the central registry would present a challenge. Attorneys would have a tremendous incentive to agree to malpractice claims settlements containing a proviso that clients not divulge

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[74] *See* California Senate Bill No. 1569 (July 24, 1986) (to be codified at CAL. BUS. & PROF. ch. 475) (discussed in 2 [CURRENT REPORTS] Law. Man. on Prof. Conduct (ABA/BNA) 284 (Aug. 6, 1986)). *Cf.* N.Y. Times, Dec. 26, 1985, § B, at 17, col. 1 (lawyers' group provides information regarding malpractice suits against individual doctors for $5 per inquiry).

[75] Even if more individuals personally filed complaints with the appropriate disciplinary agency because they no longer had the outlet of a malpractice action, there would still be fewer complaints than under a system in which dollar limitations on attorney malpractice liability were permitted, although complete exculpation was forbidden, and malpractice complaints and/or judgments and settlements were routinely transmitted to the bar association by the clerk of the court, for example.

[76] *See* RESTATEMENT (SECOND) OF CONTRACTS § 195, comment a (1981).

the terms of the settlement to the registry. This problem could be mitigated by requiring that all malpractice carriers who make any payments on malpractice claims report those payments to the central registry.[77] Attorneys, however, might try to conceal claims by making payments out of their own pockets. At least one court has suggested that a similar attempt to conceal malpractice was ethically improper and might constitute a basis for discipline.[78] Even if the attorney's misconduct is not discovered by the disciplinary agency, the prospect of having to pay malpractice claims out of one's own pocket may well be a sufficient deterrent to cause the attorney to exercise an appropriate degree of care.

Another alternative is to require the court clerk to report all complaints alleging attorney malpractice to the central registry. This approach would likely increase the number of claims reported, although an attorney would still be tempted to avoid having the clerk report the claim by settling with the client prior to the filing of the complaint. This suggested alternative, however, presents the risk that the client who has not really been victimized by malpractice will try, in effect, to blackmail the attorney with the threat of a complaint to the registry.[79]

In sum, to one degree or another, disciplinary proceedings, the threat of lost fees, and competition provide some deterrent to attorney malpractice. At present, however, they cannot fill the information void which would be caused by allowing attorneys to completely avoid malpractice liability through exculpatory agreements. Permitting exculpatory agreements which limit

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[77] *Cf.* ILL. ANN. STAT. ch. 111, ¶ 4437, § 16.04(3) (Smith-Hurd 1986) (requiring malpractice insurance carriers to report the settlement of medical malpractice claims).

[78] Mitchell v. Transamerica Ins. Co., 551 S.W.2d 586, 587 (Ky. Ct. App. 1977). *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1279 (1973). *But see* R. MALLEN & V. LEVIT, *supra* note 62, § 434, at 494 ("Notwithstanding moral considerations, however, it does not appear that any civil or ethical standard compels such disclosure in the abstract.").

[79] *Cf.* R. POSNER, *supra* note 14, at 117-19 (suggesting that to require specific performance for all breaches of contract would expose breaching parties to the threat of blackmail from nonbreaching parties who had suffered no serious damage from the breach. Requiring specific performance for all breaches of contract also would have the effect of eliminating many economically efficient breaches of contract). *Compare* Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 274-78 (1979) (stating that specific performance is the best method of compensation).

but do not extinguish liability is one solution. Taking steps to assure that more information concerning attorneys' records is made available to consumers is another possible solution.

IV. RATIONALES FOR REFUSING TO ENFORCE EXCULPATORY CLAUSES: DO THEY MAKE SENSE FROM AN ECONOMIC EFFICIENCY PERSPECTIVE?

Many courts have refused to sustain the validity of exculpatory agreements in favor of common carriers,[80] innkeepers,[81] employers,[82] telegraph companies,[83] professional bailees,[84] hos-

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[80] *See* T. COOLEY, A TREATISE ON THE LAW OF TORTS 721-28 (1907). At common law, a common carrier could limit its liability by contract only to the extent that the contract did not exempt the carrier from liability for its own or its servant's negligence. York Co. v. Central R.R., 70 U.S. (3 Wall.) 107 (1865); Southern Express Co. v. Hunnicutt, 54 Miss. 566 (Miss. 1877); Hance v. Wabash W. Ry. Co., 56 Mo. App. 476 (Mo. 1893); Dillard Bros. v. Louisville & N. R.R., 70 Tenn. (2 Lea) 288 (Tenn. 1879). *But see* Louisville & N.R. v. Sherrod, 4 So. 29 (Ala. 1888) (contractual stipulation limiting carrier's damage in exchange for reduced transportation charge upheld when no undue advantage taken of shipper, even though goods destroyed by carelessness of carrier's servants). *Accord* Duntley v. Boston & Maine R.R., 20 A. 327 (N.H. 1890); Zimmer v. New York Cent. & Hudson R.R., 16 N.Y.S. 631 (N.Y. App. Div. 1891), *aff'd,* 33 N.E. 642 (N.Y. 1893).

[81] Oklahoma City Hotel Corp. v. Levine, 116 P.2d 997 (Okla. 1941); Maxwell Operating Co. v. Harper, 200 S.W. 515 (Tenn. 1918). Today, most jurisdictions, by statute, permit innkeepers to limit their liability provided that there is strict compliance with the statutory provisions requiring notice to guests. *See, e.g.,* ILL. ANN. STAT. ch. 71, ¶ 1 (Smith-Hurd 1986) (innkeeper not liable for guest's personal property provided he makes a safe available to guest and posts notice of same and guest deposits property, unless the innkeeper or his agents are negligent and, even then, damage limited to $250 unless special agreement between innkeeper and guest); N.Y. GEN. BUS. LAW § 200 (Consol. 1987) (innkeeper not liable for guest's personal property provided he makes a safe available to guest and posts notice of same and guest deposits property, but no obligation on innkeeper to put property in safe exceeding $1,500 in value unless special agreement between innkeeper and guest); OHIO REV. CODE ANN. § 4721.01 (Anderson 1977). *See also* J. DOOLEY, MODERN TORT LAW § 25.09, at 638 (1982).

[82] Gatheright v. United States Fidelity & Guar. Co., 267 So. 2d 576 (La. Ct. App. 1972); Johnston v. Fargo, 77 N.E. 388 (N.Y. 1906); Western Union Tel. Co. v. Cochran, 102 N.Y.S.2d 65 (N.Y. App. Div.), *aff'd,* 302 N.Y. 545, 99 N.E.2d 882 (1951); Pittsburgh C., C. & St. L. Ry. v. Kinney, 115 N.E. 505, 506, 508 (Ohio 1916); Direct Transp. Co. v. Baltimore & Ohio Rd. Co., 121 N.E.2d 565 (Ohio Ct. App. 1953); Southwestern Bell Tel. Co. v. Gravitt, 551 S.W.2d 421 (Tex. Civ. App. 1976).

[83] Early cases permitted telegraph companies to avoid liability if they gave the customer the option of sending a message at a higher price. *See, e.g.,* Primrose v. Western Union Tel. Co., 154 U.S. 1 (1894). *See also* M. BIGELOW, ELEMENTS OF THE LAW OF TORTS 305-06 (5th ed. 1894); J. DOOLEY, *supra* note 81, at 728-30. However,

pitals, health care professionals,[85] and others. The six rationales most frequently given by these courts for invalidating a contractual provision relieving a party of liablity for his own negligence[86] are: (1) that negligence will be encouraged or at least not discouraged sufficiently if exculpation is permitted;[87] (2) that the meaning of the agreement was not made clear enough to the potential plaintiff to enable him or a person in his position to understand it;[88] (3) that the party seeking to enforce the exculpatory clause occupied a clearly superior bargaining position;[89] (4) that the clause was offered on a take-it or leave-it basis;[90] (5) that enforcement of the agreement would violate public policy;[91] and (6) that the party seeking exculpation was licensed by

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more recent decisions applying common law have held such exculpatory clauses to be void. *Id.* at 638, 639, n.3. The Interstate Commerce Act permits a limitation of liability for unrepeated interstate messages 49 U.S.C. § 1, *et seq.* (1982).

[84] *See* J. DOOLEY, *supra* note 81, at 636-37; W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 19, at 483, nn.31-32; Note, *supra* note 19.

[85] *See, e.g.*, Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 444-46 (Cal. 1963); 1 S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS § 5:39, at 1093-94 (1983).

[86] Almost all courts have held that a party cannot contract away liability for intentional torts, wanton or willful misconduct, or gross negligence. *See* 1 S. SPEISER, C. KRAUSE & A. GANS, *supra* note 85, § 5.39, at 1098 n.52; RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981).

[87] *See* Lloyd v. Service Corp. of Ala., Inc., 453 So. 2d 735, 737-38 (Ala. 1984); Fidelity Bank v. Tiernan, 375 A.2d 1320, 1327 (Pa. 1977). *But see* Abel Holding Co. v. American Dist. Tel. Co., 350 A.2d 292, 301 (N.J. Super. Ct. Law Div. 1975), *aff'd*, 371 A.2d 111 (N.J. Super. Ct. App. Div. 1977).

[88] *See, e.g.*, Poslosky v. Firestone Tire & Rubber Co., 349 S.W.2d 847 (Mo. 1961); Gross v. Sweet, 400 N.E.2d 306, 309 (N.Y. 1979); 1 SPEISER, KRAUSE & GANS, *supra* note 85, § 5.39, at 1288-89; 15 S. WILLISTON, WILLISTON ON CONTRACTS § 1751, at 151 n.6 (3d ed. 1972).

[89] *See, e.g.*, 383 P.2d at 444-46; Meiman v. Rehabilitation Center, Inc., 444 S.W.2d 78 (Ky. 1969); Olson v. Molzen, 558 S.W.2d 429 (Tenn. 1977). *See also*, Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 COLUM. L. REV. 248 (1937).

[90] *See* Schlobohm v. SPA Petite, Inc., 326 N.W.2d 920, 924-25 (Minn. 1982); Obstetrics and Gynecologists v. Pepper, 693 P.2d 1259 (Nev. 1985). *See also* Ponder v. Blue Cross of S. Cal., 193 Cal. Rptr. 632, 636-37 (Cal. Ct. App. 1983) (for exculpatory clause in adhesion contract to be valid it must be precise; the exclusion must be conspicuous; and the language of the exclusion must be plain and clear).

[91] *See* Gardner v. Downtown Porsche Audi, 383 P.2d at 447-48, 225 Cal. Rptr. 757 (Cal. Ct. App. 1986); Jackson v. First Nat'l Bank of Lake Forest, 114 N.E.2d 721, 725-26 (Ill. 1953). RESTATEMENT (SECOND) OF CONTRACTS § 195(2)(b) (1981) provides in

the state and held himself out as an expert in the area.[92] For the reasons set forth below in the examination of each rationale, only (1) and (2) have any support at all on an economic efficiency basis.

As previously discussed, the question of whether giving effect to exculpatory agreements will sufficiently deter attorneys from committing malpractice is vital to an economic efficiency analysis. It should not be presumed, however, that more deterrence always increases economic efficiency. Clients who agree to a contractual limitation on the attorney's malpractice liability have decided implicitly that the attorney is subject to sufficient deterrence (from disciplinary agencies, from the possibility of loss of fees, from competition, or from other sources) that any added deterrence provided by malpractice liability is unnecessary. Permitting attorneys to limit their liability contractually may not produce any change in public perception.[93] Moreover, any change may have more positive than negative effects.[94] Furthermore, insofar as permitting attorneys to limit their malpractice liability could result in a reduced flow of valuable information to potential clients, increasing public access to information about attorney disciplinary proceedings and malpractice complaints would more than offset the loss.

One might counter on behalf of the public interest that weakening the deterrence to malpractice may be facilitating the establishment of "bad" precedents. Attorneys who commit malpractice during an appeal of a case could create precedent that will be "bad" law. As a result, clients will have to spend more on attorneys' fees to change the law or devise less efficient contractual means to circumvent the "bad" law. This potential cost is remote, however, because only a very small percentage

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pertinent part as follows:

> (2) A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if . . .
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> . . .
>
> (b) the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty . . .

[92] *See, e.g.*, 558 S.W.2d at 430, 432.

[93] *See supra* text accompanying notes 37-50.

[94] *See supra* text accompanying notes 43-45.

of the malpractice committed by attorneys occurs during the appellate process.[95] Moreover, a weak oral argument or brief may not necessarily affect the outcome of the case.[96] In addition, a few erroneous appellate decisions may not prove costly to nonparties because the precedent may be distinguished or overruled in later cases. In short, the added deterrent effect provided by a rule which precludes attorneys from contractually limiting their malpractice liability is not necessarily "better" for the clients or for the public generally.

The fact that the meaning of an exculpatory agreement is not made clear to a potential plaintiff is a serious problem which would cause most courts to refuse to enforce such an agreement. It cannot be presumed, however, that all attorneys will fail to inform their clients adequately or that the clients will be incapable of understanding the consequences of such an agreement. A blanket prohibition on all attorney exculpatory clauses might make sense from an economic efficiency perspective only if the costs in preventing clients from being duped exceed the benefits produced by freedom of contract. The previous analysis suggests, however, that a blanket prohibition on all attorney exculpatory agreements might not be necessary to protect the ignorant client.

The third basic rationale for refusing to enforce exculpatory agreements is that the party seeking to enforce the exculpatory clause occupies a clearly superior bargaining position. If by "superior bargaining position" we mean that one party has more information about the risks and benefits concerning the transaction than the other, there is cause for concern. Such a position could affect economic efficiency, as impacted information costs can cause parties to agree to transactions which are economically inefficient. A court interested in economic efficiency might subject a transaction involving unequal access to information to more intensive scrutiny in order to determine whether both par-

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[95] *See* Gates, *Lawyers' Malpractice: Some Recent Data About A Growing Problem*, 37 MERCER L. REV. 559, 561 (1986) (2.6% of the malpractice claims against attorneys arise from appellate work).

[96] *See* Jones v. Barnes, 463 U.S. 745, 762 (1983); *Justices' Minds Made Up Long Before Arguments*, S. Illinoisan, May 18, 1986, at 32, col. 2, *reprinted from* Associated Press, May 17, 1986, available on NEXIS (speech by Justice O'Connor stating that Supreme Court Justices' minds generally are made up by the time they hear oral argument).

ties knew and understood the contract provisions.[97] For example, courts often refuse to enforce "fine print" clauses in contracts because of lack of knowledge by one party concerning the terms of the agreement.[98] We cannot presume, however, that the attorney always has greater knowledge than the client[99] or that the knowledge differential cannot be equalized at a cost less than that imposed by denying freedom of contract.

If, by "superior bargaining position," we simply mean that one person, because of his economic position, can drive a harder bargain than the other, economic efficiency does not preclude enforcement of an exculpatory agreement. As explained above, in a competitive market, assuming no transaction costs,[100] agreements between parties will increase economic efficiency. Because transaction costs are not zero, it is necessary to determine whether the costs connected with limiting malpractice liability, reduced to the extent possible, are greater than the costs imposed by the Ethics Rules, which effectively prohibit attorneys from contracting away their malpractice liability.[101] This determination is unaffected by whether the attorney or the client occupies a superior bargaining position. The economic efficiency model is premised on the assumption that there is no known change in the manner in which wealth and income are distributed that will produce greater economic efficiency.[102] Conceivably, the "superior economic position" rationale for declining to enforce exculpatory

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[97] *See, e.g.*, Anton v. Greyhound Van Lines, Inc., 591 F.2d 103 (1st Cir. 1978); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 19, at 483-84; Note, *supra* note 89.

Whether in fact efficiency is enhanced by courts subjecting to greater scrutiny transactions when one party has "superior bargaining position" is an open question. The answer requires a comparison of the court costs, the costs attributable to incorrect decisions and the transaction costs created by court decisions with the current costs attributable to impacted information.

[98] *See* 1 S. WILLISTON, WILLISTON ON CONTRACTS § 90C (3d ed. 1957).

[99] *See* Kane, Kane & Kritzer, Inc. v. Altagen, 165 Cal. Rptr. 534 (Cal. App. 1980), discussed *infra* in text accompanying note 124.

[100] Transaction costs include the costs "of identifying the parties with whom one has to bargain, the costs of getting together with them, the costs of the bargaining process itself, and the costs of enforcing any bargain reached." When there are transaction costs, third parties may also incur indirect costs. *See supra* notes 15-16 and accompanying text.

[101] *See supra* text accompanying notes 23-24.

[102] *See* R. POSNER, *supra* note 14, at 13.

agreements simply represents a refusal to accept this underlying assumption. This assumption is explored in Part IV. B. below.[103]

Likewise, the fact that an exculpatory clause is offered on a take-it-or-leave-it basis does not justify refusing to enforce it. This may simply be an indication that, in the judgment of the service provider, the cost of individually bargaining for exculpatory clauses is too high relative to the possible benefits that might be derived for the few clients who prefer them. As long as the market is competitive so that a client can secure a different exculpatory clause from a different attorney, or no exculpatory clause at all, there are no negative effects (except the cost of shopping for an attorney who will provide an agreement satisfactory to the client).[104] If concern exists that a lack of competition among attorneys would cause all attorneys to offer their services with malpractice liability limitations, attorneys could be compelled statutorily to offer clients a choice of services with or without a limitation of malpractice liability. Furthermore, the differential between those fees could be fixed in relation to the amount of malpractice insurance premium that the attorney pays in order to buy protection from the prospective client's malpractice claim.

Many courts deny effect to exculpatory contracts on the grounds that they are "contrary to public policy."[105] This rationale is question-begging at best, as what is in the public's interest is far from clear.[106] In addition, the inquiry should not end simply because the party seeking exculpation is licensed by the state. Implicit in the argument that state licensure should preclude contractual exculpation is the assumption that occupations licensed by the state are vital to the public interest. Therefore, the argument goes, permitting exculpation from liability must necessarily be damaging to the public interest. If public interest is equated with economic efficiency, for the reasons discussed in this Article, this conclusion would seem erroneous.

It could be argued, however, that public policy goals other than economic efficiency may be served by forbidding certain

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[103] *See infra* notes 116-18 and accompanying text.

[104] *See* Trebilcock, *supra* note 45, at 363-65.

[105] *See supra* note 91.

[106] *See* Note, *supra* note 89, at 248-29.

classes of persons from exculpating themselves from liability for negligence. There are two principal "public policy" arguments against exculpatory contracts. The first is premised on a desire to "spread the risk" of attorney malpractice among all potential clients who have to pay increased malpractice insurance premiums. This will prevent any individual client from being damaged too heavily by his attorney's malpractice. The second argument relies on the erroneous premise that preventing attorneys and clients from entering into exculpatory agreements results in a net transfer of wealth from attorneys to clients, which is viewed as a positive social good. From an economic perspective, neither argument justifies a rule prohibiting an attorney from limiting his malpractice liability.

A. Spreading The Risk of Attorney Malpractice

It would be reasonable to assume that both clients and attorneys as a group are risk averse when it comes to bearing the large risk of loss attributable to attorney malpractice. More specifically, most clients and most attorneys would prefer to pay an insurance premium which exceeds the product of the risk of a malpractice judgment and the amount of the expected judgment. For example, if in any given case the risk of malpractice is 1% and the expected malpractice judgment is $100,000, most clients and attorneys would pay more than $100,000 x 1%, or $1,000, to avoid suffering that loss.

Moreover, attorneys as a group may be able to bear this risk more cheaply than clients as a group. Attorneys are better positioned to measure accurately the likelihood as well as the magnitude of loss. They are, therefore, in a better position to know how much insurance to purchase. Furthermore, when insurance is purchased by attorneys, it is risk specific. Insurance purchased by clients is likely to cover a wide range of risks. Thus, even assuming that such a policy were available, a client might be forced to purchase an omnibus liability policy to insure against attorney malpractice. As a result, clients as a group will be less able to take cost efficient steps to avoid the risk of loss occasioned by malpractice. This assumes, of course, that insurance companies could be pressured into adjusting their premiums based on reductions in attorneys' malpractice exposure for those

clients willing to agree to liability limitations. Finally, because of administrative cost efficiencies gained in handling numerous cases, attorneys are likely to pay lower insurance premium rates than clients for identical coverage on a per capita basis.[107]

Assuming most clients would prefer to have their attorney subject to malpractice liability in exchange for their payment of their allocable share of the attorney's malpractice premium, particularly as attorneys can more cheaply insure than clients, the risk of loss for attorney malpractice should be borne by the attorney, absent an agreement to the contrary.[108] However, many clients might not perceive the benefit attributable to increased deterrence of attorney malpractice to be worth the added cost in legal fees. Furthermore, many clients might prefer paying no insurance at all to paying a premium (albeit a smaller one than they would have to pay for self-coverage) through increased attorney fees in order to insure against malpractice.[109] The clients who would be most willing to have their attorneys limit their malpractice liability are those who have longstanding relationships with attorneys in which they have confidence. For example, large corporations employing outside counsel might have an incentive to agree to such malpractice liability limitations. They would be best able to investigate cost-effectively whether they were well served by having their attorneys subject to the added deterrence of malpractice liability. Moreover, in instances in which the potential malpractice liability is large, the client potentially may save more if he does not have to pay a large malpractice insurance liability fee.

On the other hand, one can envision a situation in which a rule precluding exculpatory clauses might be more efficient than a rule permitting freedom of contract. If virtually no client was

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[107] *See* Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1236 (1984).

[108] When many people want a consumer contract containing similar terms, the use of a standard form contract reduces the transaction costs connected with individually negotiating and drafting the contract. *See* R. POSNER, *supra* note 14, at 102. *See also supra* text accompanying note 32.

[109] *Cf.* Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1056-59 (1977) (suggesting that a poor person, because he has less to lose, for example, through lost wages, may be more willing than a rich person to forego the insurance a warranty provides).

interested in allowing his attorney to limit his malpractice liability, a rule permitting attorneys to do so would be counterproductive. In such a scenario, the transaction costs, including those associated with misunderstanding of risks and removal of information blockages to potential clients, could exceed the benefits of freedom of contract. It seems, however, that a sufficient number of people, if aware of the risks, would be willing to take advantage of a discount in legal fees in exchange for liability limitations. Offering a range of choices between comprehensive liability for all errors and exemption from any errors would increase the likelihood of finding a large enough pool of potential clients to make the system economically efficient. For example, clients might prefer to continue to have attorneys liable for outrageous mistakes that the clients would have no way of preventing, such as failure to file claims within the applicable statute of limitations. On the other hand, clients might willingly waive malpractice liability against certain risks, particularly those in which they would be unlikely to recover anyway. For example, clients might be willing to waive liability for attorney errors in trial tactics, such as failure to call a particular witness. Conceivably, agreements to waive potential attorney liability for such "errors" would not have an appreciable effect on malpractice premiums because the insurance carrier probably would not have been liable anyway. However, the cost of defense, which has consumed an increasingly larger portion of liability insurance premiums,[110] would be saved.

Evidence consistent with the thesis that an ample number of people would be willing to contract away certain risks of malpractice liability is provided by the way in which clients purchase legal services. Even though clients may perceive that some firms, such as specialty law firms, provide a higher quality of service,

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[110] The report of the experiences of American Home Assurance Company during the period 1969-78 shows that the expenses of defending the claims constituted 43.7% of the total amount paid by the company on lawyers' professional liability claims. *See* Pfennigstorf, *Types and Causes of Lawyers' Professional Liability Claims: The Search for Facts*, 1980 AM. B. FOUND. RES. J. 253, 274 (figure obtained by dividing expenses paid by sum of paid claims and expenses). *Cf.* REPORT OF THE TORT POLICY WORKING GROUP, *supra* note 1, at 42 ("out of every dollar paid out by the asbestos manufacturers and their insurers as a result of asbestos litigation, 62 cents on the [a]verage is lost attorneys' fees and litigation expenses. . . .").

many still choose to purchase mediocre legal services at reduced prices. Assuming 100 is the maximum level of service attainable, the Ethics Codes permit clients to purchase levels of attorney services in a range of, for example, 60 to 100. Although a level of "55" might be considered malpractice, arguably, clients should be permitted to purchase legal services if they are aware of the risk of malpractice and the lack of recourse by way of a lawsuit.[111] Underlying the fact that the Ethics Codes permit consumers to contract freely for attorneys' services at vastly different prices based on differences in quality of services provided even though relevant information regarding quality of attorney service is often very scanty,[112] there is an implicit assumption that there are enough potential clients who can make informed judgments regarding the quality of legal services. Logically, we can assume also that a sufficient number of potential clients would be willing and able to make informed decisions regarding the wisdom of agreeing in advance to a limitation of attorney malpractice liability.

B. Prohibition of Malpractice Liability Limitations as a Form of Wealth Transfer

Conceivably, a redistribution of wealth through prohibiting contractual limitations of liability might serve to increase economic efficiency. This would be true if the beneficiaries of such a redistribution place a higher value on the property than the people from whom the property was obtained. Apart from consideration of efficiency, the redistribution of wealth may achieve some "equitable" result desired by society. If either efficiency or equity can be achieved by such a redistribution and if the

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[111] *See* Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639, 660-673; McChesney and Muris, *The Effect of Advertising on the Quality of Legal Services*, 65 A.B.A. J. 1503, 1504 (1979). *See also* Rosenthal, *Evaluating the Competence of Lawyers*, 11 LAW & SOC. REV. 257, 263-64 (Special 1976) (quoting D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 59 (1974)) (In 77% of the cases surveyed (all personal injury actions), "clients did worse than they should have according to the arithmetic mean of the values assigned to their claims by each of the five [expert] panelists." Clients fared worse than expected, yet it appears that in the vast majority of the cases, no error was significant enough to constitute malpractice.).

[112] *See supra* note 22.

cost of redistributing wealth in this manner is less than the cost of redistributing wealth through some other vehicle (for example, taxation), then an ethical limitation on attorneys' avoidance of malpractice liability may have some justification.

The first question to be addressed in this analysis is whether a redistribution of wealth from attorneys to clients will take place at all as a result of the ethical limitations on attorneys' avoidance of malpractice liability. It seems unlikely that such a redistribution will take place. Unlike cases in which attorneys are appointed by courts to represent clients without a fee,[113] a client paying an attorney who cannot limit his malpractice liability is unlikely to be getting something for nothing. The attorney will not willingly accept a risk of malpractice liability unless he is compensated adequately. Thus, the attorney is likely to charge his client a higher fee for accepting a risk of malpractice liability than he would if there were no such risk.[114] Alternatively, the attorney may simply be less willing to take cases in which he perceives the risk of a malpractice claim as high.[115]

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[113] *Compare* State v. Richardson, 631 P.2d 221 (Kan. 1981), *and In re* Hunoval, 247 S.E.2d 230 (N.C. 1977) (attorneys can be appointed to serve as counsel without fee in criminal cases), *and Ex Parte* Dibble, 310 S.E.2d 440 (S.C. Ct. App. 1983) (attorneys can be appointed to serve as counsel without fee in civil cases) *with* State *ex rel.* Scott v. Roper, 688 S.W.2d 757 (Mo. 1985) (en banc) (court lacks inherent power to appoint attorneys to serve without fee in civil cases). *See generally* Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980); Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366 (1981); Note, *Courts—No Inherent Power to Compel Uncompensated Representation in Civil Cases—State ex rel. Scott v. Roper*, 37 MERCER L. REV. 873 (1986).

[114] *See supra* note 26 and accompanying text.

[115] *See* Goodman & Mitchell v. Walker, 30 Ala. 482, 495 (1857). This phenomenon exists in the medical community where doctors now are less inclined to specialize in high risk areas such as obstetrics because large malpractice judgments have so increased the cost of malpractice insurance premiums. *See Hospital to Drop Obstetrics Unit*, S. Illinoisan, Feb. 21, 1986, at 9, col. 4. *See generally* AMERICAN MEDICAL ASSOCIATION SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY AND INSURANCE, PROFESSIONAL LIABILITY IN THE 80's, REPORT # 1, at 3 (Nov. 1984).

Liability rules in other areas have had similar effects. For example, in many states, lessors cannot limit their liability to lessees by lease provisions. *See, e.g.*, ILL. REV. STAT. ch. 80, ¶ 91 (1985); N.Y. GEN. OBLIG. LAW § 5-321 (Consol. 1978). If rent controls are imposed to prevent landlords from passing on the cost of their inability to limit their liability, a few tenants in the short run might benefit, but housing stock as a whole would deteriorate. Thus, individuals would be less willing to invest in rental housing under these conditions. *See* R. POSNER, *supra* note 14, at 445-48.

If some attorneys, in order to increase their clientele in the face of competition from their colleagues, refrain from passing along the full cost of malpractice insurance to their clients, then, to a limited degree, there may be some wealth transfer from those attorneys, or from those with whom they are competing, to their clients. It is far from clear, however, what purpose is served by such a redistribution. Attorneys are not uniformly wealthier than the clients they represent. Therefore, a Robin Hood-like transfer could be achieved more effectively by taxation than by prohibiting contractual limitations of liability. Moreover, taxation would probably effect redistribution more cheaply as well.[116] Finally, the absurdity of preventing attorneys from limiting their malpractice liability in order to promote wealth transference is underscored by the fact that attorneys are often clients.[117] Wealth transference from attorneys to clients is not possible if attorneys can be on either side of the transfer.

Even if preventing attorneys from limiting their malpractice liability may effect a transfer of wealth, economic efficiency is not necessarily promoted. Clients as a class may not employ their incremental gain in wealth to any greater utility than attorneys.[118] Assuming, *arguendo*, that transferring wealth from

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[116] *See* A. Polinsky, *supra* note 15, at 110-13.

[117] "He that is his own lawyer has a fool for a client." THE FACTS ON FILE DICTIONARY 104:41 (R. Fergusson ed. 1983).

[118] Judge Posner has argued that it cannot be assumed that transferring wealth from rich to poor will result in a net increase in economic efficiency. To the contrary, he suggests that it is plausible "that income and the marginal utility thereof are positively correlated—that the people who work hard to make money and succeed in making it are on an average those who value money the most, having given up other things such as leisure to get it." R. POSNER, *supra* note 14, at 434-36. *Compare* Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality*, 84 YALE L.J. 39, 40-48 (1974). ("[P]eople have a declining marginal utility for wealth. People place a higher value on their first dollar than their second, on their second dollar than on their third. A poor man would thus value an extra dollar more than would a rich man. . . ." (footnote omitted)). For an interesting nontechnical discussion of the pros and cons of income redistribution, see INEQUALITY AND POVERTY 1-49 (E. Budd ed. 1967). Poverty imposes some costs on the nonpoor (for example, crime). *See* Ehrlich, *Participation in Illegitimate Activities: An Economic Analysis, in*, ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 68, 94 (G. Becker & W. Landers eds. 1974) (positive correlation of commission of crimes against property with criminals' families earning less than one-half of the median income). Thus, an individual living in poverty may steal, believing that his marginal gains exceed his marginal costs. *Id.* at 111-12. Even if preventing attorneys from limiting their malpractice liability did result in a wealth transferrence to

attorneys to clients produced a net gain in economic efficiency, a greater gain would be produced by means-tested transfers that could be accomplished by taxing everyone rather than only attorneys. In summary, either from an economic efficiency or from an "equitable" perspective, none of the so-called public policy rationales in favor of precluding exculpatory clauses is entirely persuasive as applied to agreements limiting attorneys' malpractice liability.

V. THE ATTORNEY/CLIENT RELATIONSHIP—A CONTRACT MODEL

As discussed above, for a variety of reasons and in many areas, courts have refused to permit individuals the full measure of freedom of contract, specifically regarding agreements to limit liability. On the other hand, in certain contexts, some courts have considered clients fully capable of dealing with their counsel on an arm's length basis. For example, the courts of Georgia follow the "read-or-perish" rule where a competent client who reads and signs a document that is not ambiguous or laced with legal jargon will be unable to maintain successfully a malpractice claim if the document does not fulfill the client's desires.[119] This rule is premised on a contract rather than a fiduciary model. By holding that the client's claim does not perish if the legal document is ambiguous or full of legal jargon, the Georgia courts are, in effect, striving to reduce the transaction costs associated with impacted information.

One exception to the "read-or-perish" rule, however, involves a situation in which the client has relied on the attorney's

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clients as a class, there is little reason to believe that such a transferrence would make the recipient less likely to commit a crime.

[119] *See* Berman v. Rubin, 227 S.E.2d 802 (Ga. Ct. App. 1976).

> [W]here the document requires substantive or procedural knowledge, is ambiguous, or is of uncertain application, the attorney may well be liable for negligence, notwithstanding the fact that his client read what was drafted. [However,] . . . when the document's meaning is plain, obvious, and requires no legal explanation, and the client is well educated, laboring under no disability, and has the opportunity to read what he signed, no action for professional malpractice based on counsel's alleged misrepresentation of the document will lie.

Id. at 806.

advice for a length of time and therefore has no reason to read the particular document in question.[120] This exception would probably not be relevant to the limitation of attorney liability situation because the client has little reason to rely unquestioningly on the attorney at the time of the initial retainer.[121] Moreover, a client might perceive the inherent conflict of interest in an agreement drafted by an attorney who is a party. The client, therefore, would be likely to read such an agreement more carefully than he would an agreement drafted by his attorney between himself and a third person.[122]

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[120] *See* McWhorter, Ltd. v. Irvin, 267 S.E.2d 630 (Ga. Ct. App.), *appeal dismissed,* 271 S.E.2d 216 (Ga. 1980).

[121] There is authority for the proposition that the attorney-client fiduciary relationship commences when "the attorney is consulted and renders advice or receives the confidences of a client," but not before. D. HORAN & G. SPELLMIRE, JR., ATTORNEY MALPRACTICE: PREVENTION AND DEFENSE 12-4 (1986). *See* DeVaux v. American Home Assurance Co., 444 N.E.2d 355, 357 (Mass. 1983); *In re* McGlothlen, 663 P.2d 1330, 1334 (Wash. 1983). The client's perception that an attorney-client relationship exists is also relevant in determining whether such a relationship exists. *See In re* Lieber, 442 A.2d 153, 156 (D.C. 1982); Note, *Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship,* 63 MINN. L. REV. 751, 759 (1979).

If a client tells an attorney his story, and the attorney decides not to take the case, the attorney would still have a duty of confidentiality with respect to the information acquired. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied,* 439 U.S. 955 (1978); King v. King, 367 N.E.2d 1358 (Ill. App. Ct. 1977). *See* R. MALLEN & V. LEVIT, *supra* note 62, § 123, at 216.

[122] Of course, in all cases an attorney will look after his own interest to the extent that he wants to retain the client and avoid a malpractice suit or a disciplinary action.

In sharp contrast to the virtual ban on attorneys contractually limiting their malpractice liability in advance of representing the client are the positions of the Model Rules and many cases decided under the Model Code with regard to attorneys settling malpractice claims with clients after the malpractice has taken place. One would think that there would be greater concern when attorneys settle malpractice cases with their clients. The client has come to rely on the attorney certainly more than he would at the time the attorney was initially retained. *Cf. In re* Drake, 642 P.2d 296, 301-02 (Or. 1982) (en banc) (suggesting that the formal conclusion of representation often does not end an attorney's influence over a client). Moreover, the malpractice already has been committed. For these reasons, the conflict between attorney and client is more pronounced at that point than it is at the initial retainer stage. Nevertheless, Model Rule 1.8(h) and many of the cases decided under DR 6-102(A) permit releases of malpractice claims to be entered into between an attorney and a client provided that the client is advised of the nature of the document and of his right to seek independent counsel before executing the release. MODEL RULES Rule 1.8(h). *See* The Florida Bar v. Nemec, 390 So. 2d 1190 (Fla. 1980); *In re* Tallon, 447 N.Y.S.2d 50 (N.Y. App. Div. 1982); *In re* Goldberg, 442 N.Y.S.2d 551 (N.Y. App. Div. 1981). *See also* New York State Bar

Further support for a contract model can be found in those cases that permit an attorney to avoid malpractice liability when the scope of his duties has been narrowly defined by prior agreement with the client.[123] For example, in *Kane, Kane & Kritzer, Inc. v. Altagen*,[124] an attorney was employed regularly by the plaintiff to handle collection matters. The plaintiff was a sophisticated businessman with more knowledge "than the typical layperson with regard to legal matters."[125] The court held that the scope of the attorney's duties did not impose upon him an obligation to file a complaint before he was instructed to do so nor an obligation to notify the client of the necessity of filing a complaint before being so instructed. Therefore, the attorney was not liable for malpractice when the client's claim was barred by the statute of limitations. As in *Kane*, when a client has sufficient information regarding the scope of representation sought, courts have respected contractual limitations on the *scope* of an attorney's duties. For similar reasons, a rule permitting contractual limitations on the *depth* of an attorney's duties may make sense.

Ass'n Comm. on Prof. Ethics, Op. 275 (1972), *reprinted in* 45 N.Y. ST. B.J. 201 (1973). *But see* The Florida Bar v. Leopold, 320 So. 2d 819 (Fla. 1975) (release which was not a general release and executed by client after client received advice of independent counsel was still held to violate DR 6-102 (A)).

On the other hand, many of the reported decisions under DR 6-102 have involved post-malpractice attempts by attorneys to obtain releases from clients through improper coercion. The attorneys uniformly have been disciplined for such conduct. *See, e.g.*, People v. Good, 576 P.2d 1020 (Col. 1978) (en banc); *In re* Darby, 426 N.E.2d 683, 684 (Ind. 1981); *In re* Judd, 682 P.2d 302 (Utah 1984). *See also In re* Craven, 390 N.E.2d 163 (Ind. 1979); C. WOLFRAM, *supra* note 2, at 238-39 & n.57.

[123] *See* Johnson v. Jones, 652 P.2d 650, 652 (Idaho 1982) (attorney retained to draft contract did not commit malpractice by failing to advise plaintiffs of their right to receive certain assets in transaction and of the need to inventory certain corporate assets which were supposed to have been conveyed to the plaintiff); Schmidt v. Hinshaw, 394 N.E.2d 559, 564 (Ill. App. Ct. 1979); Warmbrodt v. Blanchard, 692 P.2d 1282, 1285 (Nev. 1984) ("[E]ven with regard to a particular transaction or dispute, an attorney may be specifically employed in a limited capacity."); Cleveland v. Cromwell, 112 N.Y.S. 643 (N.Y. App. Div. 1908). *See also* MODEL RULES Rule 1.2(c) ("[A] lawyer may limit the objectives of the representation if the client consents after consultation."); R. MALLEN & V. LEVIT, *supra* note 62, § 101, at 175; C. WOLFRAM, *supra* note 2, at 212 & n.71; Kaplan, *Professional Competence: How to Measure It, What to Do About It*, 63 A.B.A. J. 1645, 1649 (1977).

[124] 165 Cal. Rptr. 534 (Cal. App. 1980).

[125] *Id.* at 537.

In sum, a "fiduciary" model has not been employed in the read-or-perish cases, which relieve an attorney from malpractice liability when the client should have realized from reading the drafted documents that his wishes were not being executed. Likewise, a "contract" rather than a "fiduciary" model has been used in relieving attorneys from malpractice liability covering matters beyond the scope of their agreements. By the same logic, there is no inherent reason for rejecting out of hand a "contract" model for limiting an attorney's malpractice liability where the contract is entered into before the attorney begins representing the client. The contract model may prove efficient if the transaction costs normally associated with negotiating and enforcing an agreement limiting an attorney's malpractice liability can be reduced.

CONCLUSION

The question of whether attorneys should be permitted to limit their malpractice liability contractually demands more than simply characterizing the attorney-client relationship as "fiduciary" and then responding in the negative. Likewise, the aphorism that limiting attorneys' malpractice liability violates public policy merely begs the question of what policy is being implemented. A more fruitful method of inquiry involves determination of whether such a limitation would be economically efficient. To make that determination, one must consider the direct costs to clients and attorneys of negotiating and enforcing such agreements. One must also consider the risk that some clients may agree to a limitation on attorneys' malpractice liability without realizing the full consequences of such an agreement. This would produce an increased volume of litigation by former clients seeking to avoid the effects of such an agreement. In addition, one must consider whether and how permitting attorneys to limit their malpractice liability could affect the public's perception of attorneys. Finally, one must consider how permitting attorneys to limit their malpractice liability may reduce consumer access to valuable information concerning attorneys and the quality of legal services offered.

In this writer's opinion, there are sufficient ways to minimize the costs associated with negotiating, drafting, and enforcing

agreements to limit attorneys' malpractice liability so that a contractual limitation (though perhaps not complete exculpation) on attorneys' malpractice liability should be permitted. Even if the costs of permitting attorneys to limit their malpractice liability are ultimately determined to exceed the benefits produced by greater freedom of contract, the focus on economic efficiency may produce some positive results. Thus, the inquiry may enable us to find ways to increase access to information about malpractice claims and complaints against attorneys without unduly harming competent and ethical attorneys.[126]

[126] Whether it would be more efficient to have such information transmitted to the public by the government or by private enterprise is an open question.