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A NO-FAULT REMEDY FOR LEGAL MALPRACTICE?

*Melissa Mortazavi**

I. INTRODUCTION

The last forty years have seen a marked rise in legal malpractice lawsuits.¹ Recent numbers show that no abatement is in sight; instead the number of large legal malpractice claims is steadily increasing.² Some have estimated that as many as one in five attorneys is sued for legal malpractice over the course of their careers.³ Malpractice insurance providers note “elevated defense costs” as an element in these large judgments.⁴ Although lawyers have a personal interest in limiting liability, they also have a professional one in protecting clients from harm arising due to malpractice. But how can the legal profession curtail and manage malpractice liability while also providing relief to injured clients?⁵

Here, no-fault systems could provide an alternative to traditional civil suits to compensate clients for harm. But is it possible to create a no-fault system where injured clients would trade causes of action

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1. See Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1681 (1994) (examining reasons why, since 1970, there has been an unprecedented growth in legal malpractice claims and lawsuits); *Law Firms Facing Rise in Large Malpractice Claims: Study*, INS. J. (June 13, 2012), <http://www.insurancejournal.com/news/national/2012/06/13/251170.htm> (noting that, in 2011, more than half of the insurers polled had reported increases in legal malpractice claims of six to ten percent).

2. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 687 (9th ed. 2012) (noting an “uptick in successful malpractice claims” when analyzing recent ABA malpractice data).

3. Ramos, *supra* note 1, at 1661 n.22, 1666 tbl.1; see *id.* at 1664-66, 1728, 1731.

4. *Law Firms Facing Rise in Large Malpractice Claims: Study*, *supra* note 1.

5. These questions leave aside, for the moment, the normative question of whether fewer malpractice suits are good or bad for the legal profession and law in general. I save this exploration for a fuller treatment elsewhere. Instead, this Article assumes the goal of decreasing malpractice suits while increasing client compensation.

in tort for predictable, expedient (albeit partial) compensation?⁶ What would injury look like? What would partial compensation entail? Despite these important questions, the advantages of a no-fault system for sued lawyers are clear: predictability and the ability to plan ahead by setting aside funds for payouts. The chief benefits for the client are expediency, predictability, and a guarantee of compensation once harms are established.

Applying existing tort scholarship on no-fault alternative systems to professional legal services, this Article argues that no-fault may be a viable option in many common malpractice circumstances, particularly those involving true mistake and inevitability. Part II lays out a brief definition and history of no-fault systems as alternatives to traditional torts. Part III outlines how a no-fault system could work in the context of legal malpractice claims.⁷ In particular, I examine the infrastructure already in existence in current state bar systems of “lawyers’ funds for client protection” as a possible nesting ground for a more expansive and innovative alternative to traditional malpractice suits. Part IV concludes that while expanded no-fault coverage is a feasible alternative to current practices, increased fact-finding is needed to support the political will for reform.

II. NO-FAULT ALTERNATIVES TO TORT

This Part provides a brief overview of dominant examples of no-fault regimes used as alternatives to tort recovery in the American legal market. This Part seeks to establish a familiarity with these systems and the conceptual lexicon associated with their implementation.

A. *What Is No-Fault?*

A no-fault system is one that removes the disposition of claims regarding harm away from the typical tort analysis of whether or not a given action was reasonable.⁸ Instead of engaging in fact-intensive

6. Increasingly, jurisdictions are recognizing limited rights of third parties to sue lawyers other than their own—those they did not have an attorney-client relationship with. Though these suits remain relatively limited, they would not be avoided by the no-fault system proposed here.

7. The current system requiring proof of fault results in disproportionate and inconsistent outcomes. See Jeffrey O’Connell, *A “Neo No-Fault” Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CAL. L. REV. 898, 899 (1985) (“The inherent difficulty of proving fault leads to huge transaction costs. . . . The result is that many accident victims are left either totally or relatively unpaid for their losses, while others in similar or identical circumstances are awarded far more than their actual losses.”).

8. See JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 799-800

adjudication of whether or not there was a breach of duty in a given situation, a no-fault regime simplifies the inquiry into a question of harm and the status of the parties involved.⁹ Once a qualifying harm to a covered party is established, the injury is compensated at a set rate, regardless of fault.¹⁰ The paying party cannot escape liability by proving reasonable action or unreasonable action on the part of the aggrieved.¹¹ On the other hand, the recovering party cannot argue that they are entitled to additional compensation.¹² However, a crucial caveat to the scope of no-fault is that such claims typically do not negate the ability of the injured party to bring a concurrent suit for intentional harms.¹³

American no-fault alternatives to tort liability share common elements. No-fault systems typically have three components: a “triggering event” (thus far, a physical injury); a “payment mechanism” for compensating the plaintiff; and a “measure of compensation” to award payment.¹⁴ Participation in the no-fault system is generally not mandatory and negates the ability to bring the same claim under a theory of negligence in tort, thereby alleviating (in theory) judicial-efficiency concerns about clogging the docket with claims (even meritorious ones) related to routine and unavoidable harms. Essentially, aggrieved parties waive the right to sue for garden-variety negligence claims in order to participate in the alternative compensation system. Perhaps intuitively,

(3d ed. 2012). At one time, several prominent scholars argued that the abolition of the tort system was an ideal policy choice for accidental harms and proposed no-fault-based alternatives that would not engage in reasonableness inquiries. See, e.g., Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 794-802 (1967) (advocating for the creation of a blanket tort alternative to be largely funded by taxes and which would provide selective reimbursement for accidental harm); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 603-08 (1985).

9. See Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 616 (2000); Sugarman, *supra* note 8, at 622-23.

10. See Schwartz, *supra* note 9, at 616-17, 616 n.18 (comparing a “pure” no-fault system of unlimited recovery for economic losses with the “hybrid” cap-on-recovery system that is commonly applied in the context of auto accidents); Sugarman, *supra* note 8, at 622-23; Peter Nash Swisher, *Virginia Should Abolish the Archaic Tort Defense of Contributory Negligence and Adopt a Comparative Negligence Defense in Its Place*, 46 U. RICH. L. REV. 359, 363 (2011).

11. See Schwartz, *supra* note 9, at 616; Swisher, *supra* note 10, at 363. This concern was particularly salient in the time of contributory negligence regimes when any plaintiff fault would negate recovery in its entirety. See Swisher, *supra* note 10, at 361-64.

12. See Schwartz, *supra* note 9, at 616 (“[R]ecovery is limited to economic losses; the victim’s noneconomic pain and suffering is ignored.”).

13. See O’Connell, *supra* note 7, at 905 (discussing a proposal for a no-fault system in the personal injury context).

14. Kenneth S. Abraham, *Alternatives to the Tort System for the Nonmedical Professions: Can They Do the Job?*, 1981 BYU L. REV. 57, 58-59 (breaking down the component parts of mandatory no-fault systems to this triumvirate).

no-fault does not engage in an inquiry into fault: defendant fault or plaintiff fault are not necessary to ascertain. Rather, all that needs to be established is the qualifying “triggering event.” Through a set payment method and rate of compensation for types of injuries, no-fault promises prompt, predictable, and guaranteed recovery.¹⁵ However, in exchange for expediency and clarity, potential plaintiffs sacrifice the ability to fully recover because no-fault systems offer only partial recovery.¹⁶ Punitive damages are unavailable, and pain and suffering is usually not compensable.¹⁷ For example, in the case of workers’ compensation, recovery is usually limited to one-half to two-thirds of the employee’s average weekly wage in lieu of compensation for full economic harm.¹⁸

B. Examples of No-Fault

The quintessential and most historically entrenched model of a no-fault alternative to the tort system is workers’ compensation. Workers’ compensation was conceived at the turn of the century in conjunction with growing public acknowledgment that the industrial revolution had left entire classes of employees vulnerable to workplace injury and virtually uncompensated for such physical harms.¹⁹ Workers’ compensation legislation attempted to address these issues while simultaneously providing incentives to employers to support reform.²⁰ In exchange for waiving the right to sue for negligence, employees injured on the job are provided with a set amount of compensation based on the injury sustained.²¹ No-fault advocates argue that this system also

15. See *supra* notes 8-12 and accompanying text. Some would argue this is an empty promise as alternative systems may become more and more adversarial in nature as time passes, and traditional adversarial proceedings may adopt elements of alternative systems. John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 268-69 (2007) (discussing the author’s convergence theory).

16. See, e.g., Franklin, *supra* note 8, at 799 (proposing that parties would recover, at maximum, eighty-five percent of lost wages).

17. Key auto accident no-fault plans limited recovery by not allowing pain and suffering claims and placing monetary caps on medical expenses. See Nora Freeman Engstrom, *An Alternative Explanation for No-Fault’s “Demise”*, 61 DEPAUL L. REV. 303, 320 (2012); Franklin, *supra* note 8, at 799 (mentioning that the author’s proposed no-fault system would exclude compensation for pain and suffering); Noel T. Dowling, *Compensation for Automobile Accidents: A Symposium*, 32 COLUM. L. REV. 785, 798-800 (1932) (discussing what came to be known as the “Columbia Plan”).

18. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS 1232 (2010).

19. See Employers’ Liability Act, Pub. L. 100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. § 51 (2012)).

20. Jeffrey O’Connell, *Neo-No-Fault Remedies for Medical Injuries: Coordinated Statutory and Contractual Alternatives*, 49 LAW & CONTEMP. PROBS. 125, 128 (1986).

21. Jeffrey O’Connell, *Alternatives to the Tort System for Personal Injury*, 23 SAN DIEGO L.

minimizes externalities and maximizes the amount of money reaching injured parties as opposed to lawyers representing the injured.²² Over time, however, that assumption has been called into question as workers' compensation boards and other inquirers examining what exactly falls within the scope of covered injuries have taken on their own adversarial qualities.²³

In modernity, no-fault has remained a viable and creative solution to situations that raise a large number of routine tort claims. The consumer protection movements of the 1970s drove a renaissance of support for no-fault alternatives to tort in the auto accident context, as injuries from auto accidents reached disturbing highs.²⁴ At its apex, sixteen states had enacted laws restricting the right of motorists to sue.²⁵ More recently, victims' compensation funds have applied no-fault principles to the mass tort context through programs such as the National Vaccine Injury Compensation Program,²⁶ the September 11th Victim Compensation Fund,²⁷ and the Gulf Coast Compensation Fund.²⁸

III. THE NUTS AND BOLTS: THE DIFFICULTIES OF THE PARTICULAR CASE OF LEGAL MALPRACTICE

This Part explores the complicated nature of how a no-fault system could apply in relation to professional legal services. Recall from Part II the triumvirate of identifiable elements present in other no-fault

REV. 17, 21-23 (1986).

22. See *id.* (highlighting the high transaction costs associated with tort litigation).

23. See *Nemchick v. Thatcher Glass Mfg. Co.*, 495 A.2d 1372, 1372-75 (N.J. Super. Ct. App. Div. 1985) (finding an employee's injury sustained while driving home from an off-premises task was covered by workers' compensation); Engstrom, *supra* note 17, at 313 ("No-fault has become increasingly lawyer driven and adversarial.").

24. See Engstrom, *supra* note 17, at 306; *infra* notes 90-91 and accompanying text.

25. See Engstrom, *supra* note 17, at 306. Since then, a third of those jurisdictions have repealed the no-fault legislation. DAVID S. LOUGHRAN, RAND INST. FOR CIVIL JUSTICE, THE EFFECT OF NO-FAULT AUTOMOBILE INSURANCE ON DRIVER BEHAVIOR AND AUTOMOBILE ACCIDENTS IN THE UNITED STATES 7 (2001).

26. National Childhood Vaccine Injury Act of 1986, Pub. L. 99-660, 100 Stat. 3756, 3758 (codified as amended in scattered sections of 42 U.S.C.).

27. James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. 111-347, 124 Stat. 3623, 3660 (2011) (codified at 42 U.S.C. § 40101 note (2012)); *About the Fund*, SEPTEMBER 11TH VICTIM COMPENSATION FUND, <http://www.vcf.gov/genProgramInfo.html> (last visited Feb. 15, 2016).

28. Jackie Calmes & Helene Cooper, *BP to Set Aside \$20 Billion to Help Oil Spill Victims*, N.Y. TIMES, June 17, 2010, at A1 (detailing how the Gulf Coast Compensation fund will be administered to provide expedient aid to injured parties); Nicholas Guidi, Note, *Oil, Fire, Smoke and Mirrors: The Gulf Coast Claims Facility and Its Dangerous Precedent*, WM. & MARY ENVTL. L. & POL'Y REV. 739, 745-46 (2015) (criticizing the administration and structure of the Gulf Coast Compensation Fund).

models: a triggering event, a payment mechanism, and a measure of compensation.²⁹ Each of these elements can be problematic in the legal setting, but not impracticable. This Part goes through each element to tease out how harms arising from legal malpractice would fit. It concludes that while no-fault would not be ideal for all legal malpractice claims, a sizeable swath of current claims could fall within successful parameters and, thereby, avoid some of the pitfalls of civil litigation.

A. What Is the Trigger? Defining Harm

How does one recognize and define the triggering no-fault event in the legal services context? What is the harm one would be willing to recognize as qualifying for compensation? Existing no-fault regimes all seek to compensate clients for clear physical harm. One can recognize in many instances whether a physical injury exists and arises out of operating a vehicle or occurs in a workplace during the course of work.³⁰ But how does one apply no-fault principles to a system of accidents in legal practice? The parallel formulation to current no-fault systems would require the overly vague standard of compensating economic losses “arising out of professional services.” Surely a client is not entitled to redress every time they lose a claim or suffer any economic harm arising from representation in a case; so, how do we identify qualifying economic harms?

An initial factor that aids in the harm inquiry, and in the formation of an alternative compensation system generally, is narrowing the type of parties eligible for compensation. Because of a lack of a finite and static potential recipient pool, critics of auto accident no-fault tort systems argued that auto accident claims were too dissimilar to workers’ compensation claims to be a viable basis for no-fault (particularly as related to the regularity of contact between the parties and their place in a relative hierarchy).³¹ In this context, attorney malpractice is a better no-fault candidate, as it is a stronger parallel to workers’ compensation. The narrowing of potential claimants is intuitive in the legal services context. The relationship between a client and an attorney is ongoing in nature, not haphazard, and premised on a hierarchy where the client

29. Abraham, *supra* note 14, at 58-59.

30. See UNIF. MOTOR VEHICLES REPARATIONS ACT § 2, 14 U.L.A. 53 (1972) (defining “injury” as “arising out of maintenance or use of a motor vehicle”); *supra* notes 23-24 and accompanying text.

31. See *Compensation for Automobile Accidents*, *supra* note 17, at 804-07; Donald W. Kramer, *Fallacies of a Compensation Plan for Automobile Accident Litigation*, 26 INS. COUNS. J. 420, 423 (1959).

relies on the specialized knowledge of the lawyer.³² Workers' compensation is available to employees from their employers. Likewise, legal malpractice-based no-fault would be available to clients through their attorneys.

But even if the attorney-client relationship has the advantage of presenting a relatively clear scope of potential claimants, this does not make clear which economic harms are compensable. In rendering professional services, a certain degree of client dissatisfaction is inevitable, and clients may view the failure to obtain their optimal outcome as a loss. However, every loss of a legal claim cannot be a compensable harm. When is it fair for attorneys, not clients, to be responsible for these harms?³³

One way to engage concretely with this question is to specify which unsatisfactory results are avoidable through reasonable care and which ones are not.³⁴ This sorting can be used as guidance to generate a list of compensable events and circumstances. Once this list is generated, the inquiry would not be whether or not a party was *at fault*, but simply whether or not the qualifying event in fact *occurred*.

What types of infractions could potentially be covered? The most useful guiding principle in composing such a list is whether or not, as a matter of good faith, such instances are actually avoidable through due care. Prominent tort scholars have long argued that accidents cannot be deterred because they are, by their very nature, unavoidable.³⁵ Certain common legal malpractice issues are identifiable, relatively cut and dry, and can happen inadvertently despite best efforts to avoid them. They are common and true accidents in modern legal practice—things that do not happen consciously or with intention, but which can, and do, routinely happen inadvertently despite best efforts to the contrary. No-fault acknowledges that such events will occur at times even if all reasonable care is taken.

Consider the following scenarios that may meet these criteria.

32. Some would argue this is one of the hallmark qualities of being a professional versus a straightforward businessperson. Eliot Freidson, *Theory and the Professions*, 64 *IND. L.J.* 423, 429 (1989). That said, lawyers remain reliant on clients for fees.

33. See Abraham, *supra* note 14, at 63.

34. Some have suggested an attorney's reasonable decision to call or not call a witness to testify (who in hindsight would have had a positive impact on the outcome of a case) would be a potential example of such a qualifying professional action. See *id.* at 62.

35. See Sugarman, *supra* note 8, at 587 ("[E]xisting regulatory, economic, moral, and self-preservation pressures fail to control all dangerous conduct that society would like to deter. . . . Based on a review of the literature, I conclude that theorists who defend torts on deterrence grounds have no convincing empirical support for their position.").

1. Inadvertent Disclosure of Confidential Information

Recent studies by the ABA indicate that inadvertent disclosure is one of the top sources of alleged malpractice error.³⁶ However, one could argue that this is simply a function of modern practice. The electronic age has led not only to the proliferation of documents generated, but has also dramatically increased the ease with which they may be transmitted, viewed, and duplicated.³⁷

Furthermore, clients increasingly have the expectation of twenty-four-hour availability and connectivity. However, this availability comes at the price of security. Even if all reasonable measures are taken to review client communications privately, the mobile nature of modern practice on various portable devices that are digitally connected leads to the inevitable inadvertent disclosure of confidential information sooner or later. Rather than engage in a fault inquiry (such as whether the client who texted their attorney demanding an immediate answer is at fault, or whether the lawyer who responded on the airplane where another passenger read the message and the lawyer's reply bears fault), no-fault would simply require that where the disclosure caused an economic harm, and an injury can be shown arising from the inadvertent release of confidential information, compensation at a set rate would be due.³⁸

2. Certain Conflicts of Interest

Conflicts of interest continue to be one of the most frequently alleged malpractice claims.³⁹ Where the number of attorneys in a given firm may be very large and dispersed geographically and across many practice areas, the presence of inadvertent conflicts is increasingly likely. Moreover, complex relationships between clients and the full

36. Dan Pinnington, *The Most Common Legal Malpractice Claims by Type of Alleged Error*, LAW PRAC. (July/Aug. 2010), http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_webonly_webonly07101.html (listing inadvertent disclosure as the third most common source of malpractice claims).

37. Some would view this as an issue of inadequate discovery, particularly where one was unable to show a breach of the standard of care.

38. For a discussion on how to create a set rate of compensation based potentially on set percentages of overall claims, see Part III.C below. Linking claimed harms to potential no-fault liability would have the collateral positive impact of providing a countervailing force to pressures to make exaggerated or frivolous claims.

39. Ames & Gough, News Release: Most Leading Law Firms Insurers See Rise in Malpractice Claims Frequency, Severity (June 18, 2013), <http://www.amesgough.com> (follow "New & Events" hyperlink) (ranking conflict of interest violations as the first or second most common error leading to malpractice judgments by five of seven major insurers).

extent of corporate entities with overlapping and transient personnel spread over many industries may not be readily apparent to lawyers or disclosed by the client. It is not obvious who is at fault for such conflicts. Rules governing conflicts among current and former clients are more lenient, allowing waiver as a general matter.⁴⁰ While conflicts between current clients may be cured by waiver under certain circumstances,⁴¹ other current client conflicts cannot be so cured and require that a lawyer remove herself from representing one of the clients, or possibly both.⁴² Since there is no alternative work-around for these conflicts, the presence of such conflicts may constitute a situation where triggering the no-fault system would be merited. While one could argue that a malpractice suit would ultimately fail in situations where clear breaches of the duty of care are not established, the fact-intensive inquiry needed to discern fault in these accident situations does not preclude the loss of resources to lengthy discovery and trials. If anything, these are precisely the situations where lengthy trials may ensue—to establish negligence on the part of the lawyer-defendant on the one hand, and to establish comparative negligence on the part of the client-plaintiff, on the other hand.

3. Failure to Timely File or Respond to Written Discovery

Another common form of attorney misconduct is failure to timely file or respond to written discovery.⁴³ The failure to timely file a claim or respond to written discovery is an error, not a poor strategic choice. As lawyers juggle increasing caseloads and rely on novel electronic systems to file and remind them of calendaring requirements, a certain number of cases or motions may inevitably be subject to default on the basis of such error, subjecting the lawyer responsible for the error to liability.

4. Failure to Know the Law

The failure to know the law is another frequent source of malpractice insurance claims.⁴⁴ One could argue that given the common

40. MODEL RULES OF PROF'L CONDUCT r. 1.8(b) (AM. BAR ASS'N 2013).

41. *Id.* r. 1.7(b)(4).

42. *Id.* r. 1.7(a), (b)(2)–(3) (disallowing waiver by clients where the conflict is prohibited by law or where it arises from clients being directly adverse in a given litigation).

43. See Edward R. Blumberg, *Ten Scenarios That Provoke Motions for Sanctions—And How to Avoid Them*, 28 ABA LAW. MAN. PROF. CONDUCT 613 (noting that failure to respond to time-sensitive discovery is a breach of Rule 1.3 of the ABA *Model Rules of Professional Conduct* (“*Model Rules*”) and one of the most common attorney errors).

44. Pinnington, *supra* note 36; Barbara Power, *Good Client Communications Can Help*

law system, increasingly-complicated intersections between statutory and regulatory law, and heavy caseloads, some failure to know the law errors may be inevitable. The law changes rapidly, and, while diligence requires a lawyer to do research and be prepared, one can also imagine a no-fault system covering economic harms arising out of changes in the law that have occurred in a pre-set small time horizon, such as the previous ten days or less.

5. Failure to Communicate with a Client

Wrongs arising from failures in client communication continue to make up a sizeable portion of malpractice claims.⁴⁵ These claims include failure to obtain client consent or follow client instruction.⁴⁶ While sufficient communication with a client is not a perfect art, and the terms governing client communication are somewhat open ended,⁴⁷ certain communications regarding decision making are more clear-cut and might provide a good basis for a no-fault presumptive harm. For example, rules of professional responsibility make clear that clients have full autonomy concerning the objectives of a representation; meaning, it is the client's decision, not the lawyer's, whether to accept a plea, waive a jury trial, or testify in the criminal context or settle in the civil one.⁴⁸ Error in this area may also be somewhat inevitable—communication is not always an exact science particularly in the digital age when, increasingly, communication can take the form not only of traditional writings or spoken word but also email or even text messages.⁴⁹

Lawyers Avoid Malpractice Claims, L. PRAC. TODAY (Aug. 2009), <http://apps.americanbar.org/lpm/lpt/articles/mgt08091.shtml> (estimating ten percent of legal malpractice claims arise from not knowing the law).

45. Dan Pinnington, *Avoiding Malpractice—Are You at Risk?*, LAW PRAC. (July/Aug. 2010), http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_webonly_webonly07101.html (summarizing ABA studies of malpractice claims from 2004-2007 and listing failure to obtain client consent as 5.4% of total malpractice claims and failure to follow instructions as 4.4% of total malpractice claims). This is a conservative estimate. Some would argue that an even larger swath of malpractice claims can be categorized as a lack of proper communication. See Power, *supra* note 44 (stating that the “overwhelming majority” of the ninety percent of claims not arising out of failure to know the law are really about poor communication).

46. Pinnington, *supra* note 45.

47. MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2013) (using terms like “prompt” and “reasonable,” both terms that are easily subject to interpretation and debate).

48. *Id.* r. 1.2(a).

49. Carolyn Elefant, *Maybe the Time Has Come for Lawyers to Have a Conversation About Texting or SnapChatting With Clients*, MYSHINGLE (Sept. 8, 2015), <http://myshingle.com/2015/09/articles/client-relations/maybe-the-time-has-come-for-lawyers-to-have-a-conversation-about-texting-or-snapchatting-with-clients> (reporting on states, including Florida and Wisconsin specifically adopting ethics rules regarding texting); Wendy L. Patrick, *Why Talk When You Can Text?*, CA. B.J. (Oct. 2010), http://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=42

6. Death of an Attorney During the Course of Litigation or Negotiation

Given that death and taxation are the only certainties applicable to everyone, lawyers sometimes will die during the course of a representation. This is not a result of carelessness. One can hardly imagine a situation where the incongruity between liability and deterrence in the tort context could be more apparent than in the case of a lawyer's death. Lawyers are not deterred from avoiding their own demise due to civil liability. Death is a truly unavoidable accident that may inevitably happen in the course of professional practice.⁵⁰

Tort law is often referred to as "the law of accidents."⁵¹ Indeed, each of these triggering situations can occur as the result of accidents. However, that does not mean that they are not the subject of malpractice suits. On the contrary, we know that these are common topics of malpractice litigation. One could argue, however, that these situations, where the harm occurs regardless of whether reasonable care was taken, would not give rise to malpractice liability. Malpractice liability requires a breach—a lapse in the use of a reasonable standard of care. As such, would no-fault based on these types of scenarios really lessen potential malpractice suits? The answer is yes, it would. No-fault need not provide an alternative to only potentially successful malpractice claims. The purpose is to avoid their adjudication and increase the breadth of potential recovery on the part of harmed parties. Like other no-fault systems such as workers' compensation and auto accident no-fault, legal service no-fault would also sweep into its ambit conduct that would not have met the standards of malpractice liability. In this way, no-fault is, by definition, over-inclusive. This is its trade: in exchange for not having to engage in the often nuanced and difficult inquiry into fault, on both the plaintiff's and defendant's sides of the conflict, no-fault sweeps both blameworthy and non-blameworthy conduct into its ambit.

B. *Payment Mechanism: The Potential of Client Protection Funds*

A strong no-fault system would be mandatory and carry with it the force of law, having been passed through the legislative process. However, even if such a form of no-fault is not available, the bar

(discussing trends and pitfalls of lawyers using email and text to communicate with clients).

50. In the event of suicide, the bar would need to consider whether or not the intentional nature of the act would disqualify it from coverage.

51. See, e.g., John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 694 (2001).

may be able to use no-fault principles to guide the use of existing compensation structures in a way that is mutually beneficial for lawyers and their clients.

How to compensate clients for harms resulting from legal malpractice is not a new issue. It was keenly discussed in the 1970s and 1980s when there was a strong push to require mandatory malpractice insurance as a condition of bar membership.⁵² One format this discussion took was the consideration of generalized “professional liability funds.” A form of self-insurance, these funds would have compelled every member of the bar to contribute to a fund that would be available to clients in instances of attorney malpractice.⁵³ Ultimately discussions of mandatory malpractice insurance and professional liability funds fizzled out. Today, Oregon is the only state that requires mandatory malpractice insurance for practicing attorneys.⁵⁴ Initiated pursuant to statute and membership approval in 1978, Oregon has since had a professional liability fund that provides mandatory malpractice primary coverage for Oregon lawyers.⁵⁵

However, one remnant of these initiatives remains: most states in the United States have client protection funds (“CPF”).⁵⁶ CPFs are funds usually administered by the bar of a given state to compensate certain classes of injured clients for particular enumerated claims. Substantively, CPFs cover intentional torts arising from “dishonest conduct,” particularly misappropriation.⁵⁷ CPFs list as key claims the mishandling of funds and property, improper borrowing or retention of client funds, and conversion. Essentially, where a lawyer steals or retains advanced fees unjustly,⁵⁸ the bar in most states steps in and makes sure

52. See Nicole A. Cunitz, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO. J. LEGAL ETHICS 637, 644, 651 (1995).

53. Oregon actually ratified such a fund in the late 1970s. OR. REV. STAT. §§ 9.080(2)(a), 9.191(3) (2013). California considered a similar plan, but ultimately rejected it. Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 836 (1978).

54. Herbert M. Kritzer & Neil Vidmar, *When the Lawyer Screws Up: A Portrait of Legal Malpractice Claims and Their Resolution* 3 (July 7, 2015) (working paper), http://scholarship.law.duke.edu/faculty_scholarship/3491.

55. *Professional Liability Fund*, OR. STATE BAR, <https://www.osbar.org/plf/plf.html> (last visited Feb. 15, 2016).

56. See *For the Record: NCPO Speaks to Professionalism*, CLIENT PROTECTION WEBB (Nat'l Client Prot. Org., Inc., Loudonville, N.Y.), Summer 2001, at 1.

57. See, e.g., Carol G. Green, *Profile: Client Protection in Kansas*, KAN. JUDICIARY BRANCH (last visited Feb. 15, 2016), <http://www.kscourts.org/appellate-clerk/general/lawyers-fund-for-client-protection/profile.asp>.

58. See, e.g., COLO. R. CIV. P. 252.10(c)(1)–(2); RULES OF THE CALIFORNIA STATE BAR

the aggrieved party receives some sort of recompense. CPFs are available to clients only (not their heirs, dependents, or assigns) for infractions by practicing and admitted members of the bar.⁵⁹

As they stand today, CPFs cover claims involving particularly clear intentional fault (such as in cases of embezzlement) rather than no-fault claims.⁶⁰ As such, the CPF structure fails to provide a key benefit of no-fault systems—removing costly and lengthy adjudications from the civil system. Commonly, CPFs also require that the claimant exhaust civil remedies or obtains formal disciplinary action against the attorney prior to filing a claim.⁶¹ In jurisdictions with such a requirement, claimants must have brought a civil action prior to availing themselves of the opportunity to potentially receive CPF funds. Finally, many states require claimants to sign subrogation agreements, entitling the bar to pursue indemnity from the offending lawyer or firm.⁶² Therefore, the CPF structure implies at least the potential of increased civil litigation in the future for indemnity claims.⁶³

Still, the presence of CPFs do show a willingness on the part of bar associations across the country to collectively provide compensation to clients for qualifying events. Building on this base understanding, one

r. 3.431 (STATE BAR OF CAL. 2007).

59. See, e.g., RULES OF THE SUPREME COURT OF THE STATE OF HAWAII r. 10.1(a) (HAW. SUPREME COURT 1981); CLIENTS' FIN. ASSISTANCE FUND OF THE INDIANA STATE BAR ASS'N RULES OF PROCEDURE r. 2(a)(i) (IND. STATE BAR ASS'N 2008).

60. See, e.g., *Client Protection Fund: Frequently Asked Questions About the Fund*, ST. B. ARIZ. (last visited Feb. 15, 2016), http://www.azbar.org/legalhelpandeducation/clientprotectionfund#not_reimbursable.

61. See, e.g., GEORGIA STATE BAR PROGRAMS r. 10-106(c), (h) (STATE BAR OF GA. 2015) (requiring a formal disciplinary action in order to obtain client protection fund payments); PENNSYLVANIA RULES OF DISCIPLINARY ENFORCEMENT r. 521(f)(2) (PA. SUPREME COURT 2015) (authorizing fund administrators to require a claimant to file a complaint against an attorney with the disciplinary board as a condition of payment); VERMONT BAR ASS'N CLIENT'S SEC. FUND RULES r. 8(c)(1) (VT. BAR ASS'N 2003) (disallowing payment from the fund unless disciplinary proceedings have been commenced and the attorney has been suspended or disbarred, or has resigned).

62. See, e.g., SOUTH CAROLINA LAWYERS' FUND FOR CLIENT PROT. RULES OF P. § IV (S.C. BAR ASS'N 2015) (requiring subrogation by the client in the event of reimbursement for a claim); TENNESSEE SUPREME COURT RULES r. 25, § 9.02(o) (TENN. SUPREME COURT 2005) (requiring an initial claim form to include a subrogation agreement and an assignment of any claims against the offending lawyer); VERMONT BAR ASS'N CLIENT'S SEC. FUND RULES r. 15(A) (requiring a client to execute a subrogation agreement prior to payment if the fund administration approves a claim).

63. See, e.g., SOUTH CAROLINA LAWYERS' FUND FOR CLIENT PROT. RULES OF P. § IV ("Upon commencement of an action by the South Carolina Bar pursuant to its subrogation rights, it shall advise the reimbursed client at his last known address. A reimbursed client may then join in such action to press an application for his loss in excess of the amount of the above reimbursement.").

could use CPFs as the payment mechanism for a no-fault system.⁶⁴ Current coverage should not focus exclusively on “hyper-fault” situations involving intentional torts, but could be reformulated to a no-fault injury based inquiry. Instead of asking if the lawyer engaged in dishonest conduct, a no-fault system could simplify the inquiry: were there economic damages arising out of one of the qualifying scenarios? These scenarios could include misappropriation of client funds, intentional or not. If such misappropriation occurs, the system is triggered. While establishing the necessary causal links would still be fact-intensive and potentially require expert testimony, it would avoid time-consuming and costly breach inquiries.

Alternatively, CPFs could be augmented to include two types of harms. The first would be to continue to provide coverage for intentional misappropriation; the second would be to offer redress for true no-fault situations that cannot be deterred effectively through civil liability—accidents. Again, this would require drafting of a list of qualifying events. However, once drafted, these claims could be administered expeditiously.

A key challenge would be finding the money to fully fund such efforts. One option is to raise the money from the bar, which is sure to be unpopular. Another option is to increase court fees and seek legislative appropriation on the state level. Yet another possibility would be to re-appropriate Interest on Lawyer Trust Accounts (“IOLTA”) funds for this purpose. However, when interest rates are low, such funds are typically already depleted. Moreover, re-purposing such funds would face resistance from legal services organizations that currently depend on IOLTA funds.

C. Measure of Compensation: How to Evaluate Claims

The final element in a plausible no-fault proposal is to consider how to evaluate the economic value of claims. How to determine damages in this context is an interesting puzzle. Certain types of practices, like residential real estate and bankruptcy, usually give rise to smaller malpractice claims. However, they arise with greater frequency.⁶⁵ In other areas, like corporate and securities law, legal

64. That said, current funding of these systems is low at best. It is not that current funds could be stretched to cover no-fault, but that the basic infrastructure of CPFs could provide a basis for expansion.

65. *Law Firms Facing Rise in Large Malpractice Claims: Study, supra* note 1; Martha Neil, *Real Estate Now Tops Legal Malpractice Claims List, ABA-Published Study Shows*, ABA J. (Sept. 6, 2012, 2:00 PM), http://www.abajournal.com/mobile/article/aba_professional_liability_

malpractice lawsuits are less frequent but the stakes per claim are higher.⁶⁶ It is not difficult to imagine a table, with each covered infraction listed with a corresponding payout amount, similar to that for physical injury in workers' compensation, where injuries to different parts of the body are monetized. Given the range of harms available in different practices, the payout amount should likely be variable, and may best be standardized by having the damage amount multiplied by a percentage of the overall damages alleged in the matter. In addition to other benefits, this approach would provide an added incentive for lawyers not to overly inflate the damages they seek against opposing parties and plead reasonably. For example, instead of suing for the largest amount possible based on rough estimates and research, pleading lawyers would have a stronger incentive to think carefully about what damages are truly defensible, especially where that amount could become the basis of the lawyer's own potential payout.

As an administrative matter, CPFs may provide some guidance as far as how to deliberately structure compensation to minimize transaction costs and maximize distribution of funds to the broadest number of possible applicants. Since removing negative externalities is a strong selling point for no-fault, it is essential that it actually reduces aggregate costs. This is accomplished with CPFs in several ways. First, CPFs do not provide coverage for losses already compensated through other sources such as civil suits, settlement, or insurance.⁶⁷ This runs counter to the traditional common law tort "collateral source rule," which disregards any other forms of compensation, particularly from insurance, when calculating losses.⁶⁸ Second, a majority of states have set limits between two and five years for clients to make their claims for compensation from a CPF.⁶⁹ Finally, CPFs also typically have damage

committee_says_study_shows_real_estate_now_tops_ (discussing how the results of the 2008-2011 survey of over 50,000 insurance providers revealed that real estate transactions were the most frequent source of malpractice claims).

66. See *Law Firms Facing Rise in Large Malpractice Claims: Study*, *supra* note 1.

67. For example, in Alabama, "losses recoverable from some other source" are non-reimbursable. ALABAMA STATE BAR SEC. FUND RULES r. 2E(h) (AL. STATE BAR 2015).

68. DAN B. DOBBS, *THE LAW OF TORTS* 1058 (2000) ("The traditional rule is that compensation from 'collateral sources' is none of the defendant's business and does not go to reduce the defendant's obligation to pay damages, either in negligence or in strict liability cases."). The failure to negate the collateral source rule is one factor that has been identified in limiting the proliferation of auto no-fault. Engstrom, *supra* note 17, at 337-41.

69. See GEORGIA STATE BAR PROGRAMS r. 10-106(d), (h) (STATE BAR OF GA. 2015) (requiring that claims be brought within two years unless extenuating circumstances exist, but under no circumstance more than seven years after the occurrence of the injuring event); RULES AND REGULATIONS CONCERNING THE LAWYERS' FUND FOR CLIENT PROT. r. 6.1 (HAW. SUPREME COURT 2009) (mandating that claims must be brought within two years of the qualifying event). *But*

caps that can range from as little as \$10,000 to upwards of \$300,000.⁷⁰ Each of these elements potentially lowers costs and allows for broader coverage of harmed claimants.

D. Legislative and Contractual Proto-Proposals

Ideally, a no-fault amendment to common tort would originate from a legislative source. Such a statute could be structured to allow a lawyer accused of malpractice not arising from intentional injury a set period of time (for example, 180 days) to offer payment of economic losses and attorney's fees in satisfaction of all tort claims against them.⁷¹ Alternatively, a statute could set out types of injuries and set payment amounts for each type of injury. In determining the payment amounts, the legislature could consider a formula, which could take into account factors like the clients' overall claim value, hourly billable rate, or pay structure of the lawyer-client engagement if based on a flat fee.

How is this different than any other settlement? The statute could require that plaintiffs must accept such an offer. The guiding idea here remains that most clients subject to legal malpractice receive otherwise no compensation, and, therefore, a guarantee of prompt payment is a fair disposition of their case. Lawyers, like employers before them in the workers' compensation context, may support the enactment of such statutes to increase predictability and the concurrent ability to manage risk without any seeming admission of guilt. Undoubtedly, more careful lawyers, or lawyers in fields less prone to suit, would be less supportive of such a no-fault statute as they would perceive their malpractice risk as low. The next Part will discuss in more detail how a key element in making this system plausible is the high threat of litigious behavior.⁷² Malpractice risk is growing, and at a certain tipping point, no-fault could be a more attractive alternative to potential malpractice risk for most practicing lawyers.

see RULES OF THE CALIFORNIA STATE BAR r. 3.434 (STATE BAR OF CAL. 2007) (capping claims on qualifying events occurring before January 1, 2009 at \$50,000—half of the maximum amount of compensation for claims after that date).

70. For example, Wyoming and New Mexico set limits at \$10,000, while New York sets limits at \$300,000. Standing Comm. on Prof'l Responsibility, *2008-10 Survey of Lawyers' Funds for Client Protection*, ABA CENT. PROF'L RESP., http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/29th_forum_2008_2010_survey_of_lawyers_funds_for_client_protection.authcheckdam.pdf (last visited Feb. 15, 2016).

71. This option is substantially modeled after proposed no-fault legislation relating to medical malpractice. See, e.g., Medical Offer and Recovery Act, H.R. 3084, 99th Cong. § 2 (1985); O'Connell, *supra* note 20, at 129.

72. See *infra* Part IV.

A comprehensive statutory no-fault system akin to workers' compensation would require either the political will to mandate it as a matter of statutory law or at minimum the unified will of the bar to create an internal no-fault-style system by expanding client protection funds. This is unlikely though, given longstanding resistance on the part of the bar to mandatory insurance and disclosure of insurance status.⁷³ In the interim, the ability of parties to enter contractually into no-fault-style arrangements may be a viable alternative. One option is to offer, at the outset of representation, a schedule of payments that are available to the client in the event that a qualifying injury occurs. Injured parties could have a set amount of time (for example, ninety days after the discovery of an injury) to take advantage of such automatic payouts in exchange for not bringing a tort suit.⁷⁴ Because pain and suffering is difficult to determine, such payouts would likely follow the dominant existing no-fault plans and compensate for economic losses rather than non-economic pain and suffering.

The attorney-client relationship may be more conducive to contractual modification of traditional torts rights. Specifically, the parties involved are finite and clear, as opposed to no-fault in the auto accident context where the drivers at issue are virtually impossible to ascertain prior to the accident. In an attorney-client conflict, we also know who the allegedly injured party is, and who the alleged wrongdoer is. These types of accidents are far less likely to originate from an unpredictable or unknown source than a typical personal injury tort.

Such agreements would require endorsement by the bar of many states, since existing professional norms would need to be modified to provide a no-fault exception. Current rules of ethics impede such contractual agreements as they bar limitation of prospective liability without consultation of outside counsel and set specific parameters for settlement of malpractice claims.⁷⁵ That said, there is precedent to carry

73. See Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 *FORDHAM URB. L.J.* 177, 192-93 (2012) (quoting Leslie Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 *GEO. J. LEGAL ETHICS* 1549, 1588 (2009)) (discussing the rejection of a mandatory insurance requirement as well as lawyers' resistance to mandatory disclosure).

74. See O'Connell, *supra* note 20, at 131-32. This would parallel the "discovery rule" in terms of tolling a claim in the statute of limitations context.

75. Specifically, Rule 1.8(h) of the *Model Rules* states that a lawyer shall not

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
- (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking

out necessary exceptions to general rules. While lawyers generally may not have an economic interest in the outcome of a client's case, the bar specifically allows contingency fee arrangements in order to increase access to civil counsel.⁷⁶ Here, too, there is a public interest justification for a no-fault exception—the ability of more injured parties to be compensated.

IV. WHAT DO WE WANT? NO-FAULT! WHEN DO WE WANT IT? NOW?

Having established that no-fault has had measured success in other contexts and how it could work as an alternative to legal malpractice litigation, I will now turn to the question of how viable it is to implement such a legal malpractice no-fault compensation regime.

Several prominent tort scholars have argued that successful implementation of an alternative no-fault scheme rests on a convergence of factors, particularly the presence of political will to enact a no-fault system.⁷⁷ In her article entitled *An Alternative Explanation for No-Fault's Demise*, Professor Nora Freeman Engstrom identifies precursors present in prominent no-fault movements.⁷⁸ Drawing from these observations, certain common factors emerge. No-fault systems are most viable when four factors converge: (1) a general ethos of public reform (for workers' compensation, it was the "Progressive Era," and for auto accident no-fault, it was known as the "Public Interest Era"); (2) a shift in how the public views the harm itself (as inevitable rather than as a function of individual carelessness); (3) the harms themselves need to be on a notable rise; and (4) there is relatively little insurance, along with a general dissatisfaction with how private legal actions, and specifically tort claims, are handling the allocation of funds (the notion that while some people get a lot, a lot of injured people get nothing).⁷⁹

and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

MODEL RULES OF PROF'L CONDUCT r. 1.8(h) (AM. BAR ASS'N 2013).

76. *Id.* r. 1.5(c).

77. See Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 18 (1988) (arguing that existing systems of discerning harm, compensation, and adjudication are "likely to be altered only when tort reform rides on the coattails of a more powerful ideological impulse").

78. See Engstrom, *supra* note 17, at 310-12. Engstrom focuses her inquiry in this regard on a discussion of the history of workers' compensation and auto accident no-fault. *Id.*

79. See *id.* Robert Keeton and Jeffrey O'Connell stoked discussions regarding auto accident no-fault compensation by highlighting how relatively few injured parties received any compensation and how even amongst those that have been compensated, few were fully compensated for egregious harms. See Robert E. Keeton & Jeffrey O'Connell, *Basic Protection—A Proposal for*

This Part will examine these criteria as applied to legal malpractice.⁸⁰ Subsequently, this Part will conclude that certain antecedents are in place, and that the time may be near to pursue no-fault options as an alternative to legal malpractice.⁸¹ However, this plausibility hinges predominantly on the presence of political will, interest in reform, and general public concern over areas of undercompensated client harm that could use substantial development.

A. *An Era of Reform?*

Legal scholars have linked successful no-fault legislation to eras of public mobilization, arguing that they correlate closely with a historical context open to their adoption.⁸² When discussing previous “eras of reform” necessary for no-fault development, tort scholars have identified two key time periods—the “Progressive” and “Public Interest” eras.

The “Progressive Era” at the turn of the century is viewed as the igniting force behind the development and adoption of workers’ compensation.⁸³ A combination of industrialization and the realization that the workplace had fundamentally changed galvanized a new scrutiny of the ability of traditional tort claims to adequately provide compensation to injured parties. The world of the workplace had changed and there was a political willingness to readjust compensation schemes for that reality.

The second period of reform identified in relation to the growing popularity of no-fault systems has been dubbed the “Public Interest Era.”⁸⁴ Spanning from roughly the late 1960s through the 1970s, reform during this time was focused on individual rights, the environment, and the protection of consumers.⁸⁵ Another characteristic of this time period was a broad skepticism of government, particularly legal institutions and

Improving Automobile Claims Systems, 78 HARV. L. REV. 329, 349-50 (1964).

80. See *infra* Part IV.A–C.

81. See *infra* Part IV.D.

82. See, e.g., KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* 97 (2008) (discussing the history of the adoption of the no-fault system and linking it to a distinct historical context); VIRGINIA E. NOLAN & EDMUND URSIN, *UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY* 56 (1995) (noting auto accident no-fault’s appearance “during the consumer movement . . . [as] the right plan at the right time”).

83. See ABRAHAM, *supra* note 77, at 97.

84. See Rabin, *supra* note 72, at 21; Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1278-95 (1986).

85. See generally MARK V. NADEL, *THE POLITICS OF CONSUMER PROTECTION* (1971) (discussing the general consumer protection movements of the late 1960s and early 1970s); Rabin, *supra* note 79, at 1278-95.

the justice system in general. The Public Interest Era is associated with the proliferation of auto accident no-fault proposals, which in the mid-1970s were active in every state and by some accounts numbered into the hundreds.⁸⁶

Is American society currently in a general “era of reform”? Without the benefit of hindsight, gauging this particular measure is difficult. However, there is a historical climate indicating a radical change in the American workplace and lifestyle that allows the drawing of parallels to industrialization. The workplace reality, and the way Americans live their lives, have changed markedly in the last ten years with the advent of widespread connectivity, smart phones, and tablets. The age of “digital natives,” has led to altered ways of communicating, created modified expectations of availability and responsiveness, and exposed new tensions relating to privacy and the availability of data that was once private.⁸⁷ A service-driven economy has triumphed over one that is goods-based. This technological shift from in-person to online and from manufacturer to operator can be analogized to the radical shift from the rural model of production to the industrial one at the turn of the last century.

Not unlike the Public Interest Era, the public’s views of governmental and industry institutions and its confidence in them is weak. The “Occupy Wall Street” movement, with its amorphous set of claims, may not have had a clear policy agenda, but it was clearly anti-establishment, highlighted inequity, and possessed broad geographic appeal.⁸⁸ The division of the haves and have-nots in American society has been further publically exposed in the failures of public entities to administer relief effectively and equitably in response to natural disasters.⁸⁹ Likewise, recent events involving law enforcement and the failure of the justice system to adequately reckon with racially-charged

86. *No-Fault Motor Vehicle Insurance: Hearings on H.R. 285, H.R. 1272, H.R. 1900, H.R. 7985, and H.R. 8441 Before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 600-01 (1975) (statement of Paul Blume, Vice President and General Counsel, National Association of Independent Insurers) (stating that the states had paid “serious consideration” to “well over 600 no-fault measures”).

87. See generally Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205 (2012) (discussing how data is related to privacy concerns).

88. Charles M. Blow, *Occupy Wall Street Legacy*, N.Y. TIMES (Sept. 13, 2013), http://www.nytimes.com/2013/09/14/opinion/blow-occupy-wall-street-legacy.html?_r=0 (noting the slogan “we are the 99 percent” and a Pew Poll indicating that, in 2013, forty percent of Americans felt that government policies benefit the large corporations and fewer than eight percent reported feeling that government policies benefit the poor).

89. See Paul Krugman, *Sandy Versus Katrina*, N.Y. TIMES (Nov. 4, 2012), <http://www.nytimes.com/2012/11/05/opinion/krugman-sandy-versus-katrina.html>.

incidents have renewed skepticism of institutional legitimacy and sparked the “Black Lives Matter” campaign.⁹⁰ Environmental concerns run high as tensions over oil and hydraulic fracturing clash against growing concerns over global climate change.⁹¹ Through social media and other Internet sources, individuals are mobilizing around causes and pooling funding with a speed and ease that is revolutionary.⁹²

Thus, the presence of both a shift in how Americans work and live, (not unlike the Progressive Era), coupled with decreased confidence in governmental institutions (mirroring the Public Interest Era), indicates that American society is either in, or on the cusp of, a reform era.

B. Inevitable or Careless?

However, the presence of a reform era alone is not enough to successfully implement a no-fault regime. Success of no-fault proposals also requires shifts in public viewpoints regarding the culpability attaching to specific harms. For tort liability to be set aside, there must be an understanding that a certain degree of harm is an inevitable product of a specific enterprise.⁹³ In the no-fault context that was relatively easy—even with all reasonable care taken—a certain percentage of car accidents will arise. In the workers’ compensation arena, one could argue that workplace injury was also inevitable given the time employees spend at work and the frequency of exposure to

90. See, e.g., *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159 (9th Cir. 2013) (recounting the refusal of a lower court to dispose, on summary judgment, claims against police officers involved in the shooting of Oscar Grant, an unarmed black man, on a train platform in Fruitvale, California); Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, The Prosecutors’ Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL’Y 271, 274-84 (2012) (discussing the divisive impact of the shooting of Trayvon Martin); Celestine Bohlen, *Students See New Hope in Bias Protests*, N.Y. TIMES (Dec. 16, 2014), <http://www.nytimes.com/2014/12/16/education/students-see-new-hope-in-bias-protests.html?ref=topics> (reporting on the “Black Lives Matter” movement).

91. See Lynn Cook, *In Fracking, the Energy Business Gets Neighborly*, WALL STREET J. (Mar. 10, 2014), <http://www.wsj.com/articles/SB10001424052702304020104579431290205031238>.

92. Although the ability to pool funding and mobilize around common interests is now widespread, the trend towards the use of the Internet for such purposes was trail-blazed in the late 1990s by organizations like MoveOn.org. Ronald Brownstein, *MoveOn Steps into DNC Chair Contest*, L.A. TIMES (Jan. 26, 2005), <http://articles.latimes.com/2005/jan/26/nation/na-dnc26> (noting that MoveOn was started in 1998 in response to President Clinton’s impeachment and grew over time to have broader influence over Democratic Party politics).

93. See, e.g., JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 63-65 (2004) (explaining that the success of workers’ compensation was linked to the idea of “inevitable risks” in contrast to human fault).

potential, even quotidian, harms.

But are certain injuries an inevitability of legal practice? Modern legal practice is fundamentally different and more complicated than what it was at the turn of the century. The rise of the administrative state has complicated the law itself and introduced entire areas of law that did not exist at common law. Technological innovations of recent decades have created new challenges in lawyering and in relationships with clients.⁹⁴ There is, quite simply, much more law to know and sources of law to monitor for change than ever before. Likewise, there are more facts to discover, as well as more ways to discover them and more ways to lose sight of them.

One way to meet this element is to tailor no-fault proposals to cover only those harms that meet this criterion of “inevitability.” Part IV attempts to list situations that arise in modern practice that I believe are inevitable and are not fully preventable through reasonable care—true accidents. As such, I believe that a no-fault plan covering harms arising from such situations would not only be plausible, but also ideal. These accidents are not well-suited to fault inquires and therefore can be lengthy. The question is not whether these cases would eventually succeed as malpractice claims, but whether these are harms best compensated through the tort system. Or does it just make sense to simply view legal malpractice claims as the cost of modern practice? The examples in this Article illustrate that situations giving rise to malpractice liability do arise in legal practice. Some may arise from fault, and some may not; but, regardless of how they arise, when they do, a harm has occurred and litigation may be a poor system to rectify that harm.

C. Harms on the Rise

In both the auto accident no-fault and workers’ compensation scenarios, there was clear evidence that harms were widespread and growing.⁹⁵ This documentation, particularly when from governmental sources, lent credibility and urgency to reform movements and made for a winning combination.⁹⁶

94. See SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION* 2-3 (2008) (arguing that modernization of legal practice, including technological advances that distance clients from lawyers, makes risk of malpractice “a daily reality for practitioners”).

95. See, e.g., JOHN A. VOLPE, *DEP’T OF TRANSP., MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES* 1-3 (1971); WITT, *supra* note 88, at 63-65.

96. See, e.g., VOLPE, *supra* note 95, at 2 (stating that loss of human life to automobiles was

In the legal malpractice context, the marked rise of malpractice actions and the harms they cause should be a forgone conclusion. Conventional wisdom is that legal malpractice is experiencing a boom as law firms create internal in-house counsel for professional liability issues and retain outside counsel to assess and defend them from malpractice. Reputable sources note that pre-1970s legal malpractice claims were relatively rare and have risen exponentially since that time.⁹⁷ There are limited studies confirming the general wisdom that there has been a proliferation of malpractice claims, but the mandatory reporting requirements of jurisdictions like Florida provide some window into the current state of affairs, as do private studies by the insurance industry.⁹⁸

However, the numbers are piecemeal. Increased empirical attention is needed to ascertain not only how many insurance claims are filed, but also how many lawsuits are filed and how many are dismissed or settled without filing insurance claims. Most of all, it is unclear whether there are increased instances of improper professional conduct. The current measures only show that malpractice claims are on the rise, but what they do not show is a crisis of more and more clients being harmed.⁹⁹ Reporting misconduct to the bar is a poor proxy of client harm, although that is also on the rise.¹⁰⁰ It is entirely possible that clients are being harmed more frequently since the bar is larger and more dispersed. Law practices are increasingly hierarchical, leading to less mentorship and oversight. The law itself is more nebulous and the facts more voluminous and elusive. Thus, there is circumstantial evidence indicating that harms to clients are in fact rising, but further study is needed to know if that is in fact true.

D. Public View that the Existing Compensation System Is Ineffective

No-fault regimes have been considered and successfully

“truly monstrous”).

97. See FORTNEY & JOHNSON, *supra* note 89, at 11 (noting that malpractice decisions went up four hundred percent during the 1970s as compared to the 1960s, and three hundred percent in the 1980s as compared to the 1970s); David J. Beck, *Legal Malpractice in Texas*, 43 BAYLOR L. REV. (SPECIAL ISSUE) 1, 43 & n.1 (1991) (reporting that between 1976 and 1991, legal malpractice decisions in Texas nearly doubled).

98. See, e.g., Ames & Gough, *supra* note 39.

99. See *id.* (identifying the most recent increase in claims volume as a result of the recession, not actual malpractice).

100. See, e.g., Abby Simons, *Rising Number of Minnesota Lawyers Punished for Misconduct*, STAR TRIB. (May 13, 2013), <http://www.startribune.com/rising-number-of-minnesota-lawyers-punished-for-misconduct/207070851>.

implemented where the public recognizes that significant harm is occurring and that it is going uncompensated.¹⁰¹ As a general matter, societal norms over the past fifty years have shifted to be less and less comfortable with the idea of uncompensated harm.¹⁰² This is particularly true in the context of physical harms. However, the expansion of tort to be more inclusive of recognizing and compensating non-physical harms also supports the assertion that public conceptions of harm have broadened.¹⁰³

Although more than thirty years have passed since scholars identified that empirical studies were needed to determine “whether nonmedical professional services cause losses which ought to be compensated but which do not find redress within the current system,”¹⁰⁴ no such comprehensive studies exist today. Such studies are needed to substantiate the intuitions that those harmed by attorney malpractice are being underrepresented through litigation. One consideration in determining the need for client protection is insurance coverage. What are current insurance rates amongst those who are injured? Are payouts through insurance even a real possibility? At the turn of the century, very few employees had medical insurance, life insurance, or disability insurance.¹⁰⁵ This lack of redress confirmed a need to implement workers’ compensation. With respect to legal malpractice, however, it is unclear how many clients are currently covered against the possibility of attorney malpractice and the attendant economic damages.

Other factors may also lead to under-compensation of harmed clients. Not unlike medical malpractice claims, provider-fault in legal malpractice claims can be very difficult to measure. Some have argued that in these situations “a lay jury is apt to be influenced more by its subjective and emotional reaction to the injured [party]’s plight than by the appropriateness of the defendant’s conduct. Thus, lengthy and costly litigation can yield unpredictable results”¹⁰⁶ Because of the difficulty of ascertaining fault, legal malpractice is a good candidate for

101. For example, auto accident no-fault was most seriously and widely considered at a time when contemporary Department of Transportation studies estimated fifty-two percent of those seriously injured in car crashes received no recovery under the tort liability system. Engstrom, *supra* note 17, at 364-65.

102. Abraham, *supra* note 14, at 58 (noting that “society has come to find uncompensated injury less and less tolerable”).

103. For example, the recognition of emotional distress as a free-standing injury is a product of modern tort jurisprudence. See GOLDBERG ET AL., *supra* note 8, 683-85.

104. Abraham, *supra* note 14, at 68.

105. ABRAHAM, *supra* note 77, at 44-45 (documenting workers’ limited life, accident, and disability insurance around the turn of the century).

106. O’Connell, *supra* note 20, at 126 (discussing medical malpractice claims).

potential no-fault recovery.

Finally, the lack of legal representation of small claims may skew current perceptions of the frequency of malpractice. Conceptually, there is likely a group of claimants with meritorious small claims that is unable to find a lawyer that would be willing to represent it.¹⁰⁷ In such cases, contingency fees would be unattractive. However, currently there are no statistics clarifying to what extent this is a real and prescient problem. This number of small claimants may be large. As such, this is a key information gap that must be filled to build a comprehensive understanding of the implications of attorney misconduct and client harm. Depending on the size of this group and the scale of their aggregate harms, a no-fault system may garner increased traction as the best solution to compensate such parties.

V. CONCLUSION

A no-fault system is likely a workable alternative to legal malpractice tort principles. However, is American society currently at the point where the “policy window” is open to propose a no-fault solution to rising rates of legal malpractice claims?¹⁰⁸ Despite the fact that legal malpractice liability is increasing—albeit at what precise rate remains unclear—there is little public discourse surrounding the idea of limiting such suits. Concerns over medical malpractice judgments have long been a hot button trigger for tort reform leading to limitations on punitive damages, pain and suffering compensation, restrictive statutes of limitations, and strict overall damage caps.

No such public outrage exists in relation to the professional liability of lawyers. Lawyers are typically viewed as responsible for overall excesses of litigiousness.¹⁰⁹ Whether it is a product of general public disdain for lawyers or the view that lawyers provide optional and unnecessary services, the likelihood of relief from legislative action

107. There is evidence indicating that parties with meritorious claims are generally reticent to bring suit through civil actions regardless of the amount of the claim in question. See DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 110 (1991) (noting only about ten percent of those who suffer from accidents file suit).

108. JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 177 (1984) (“Once the window opens, it does not stay open long. An idea’s time comes, but it also passes.”).

109. Historically, lawyers have been viewed as opponents of no-fault systems that would remove disputes from formal legal adjudication. ABRAHAM, *supra* note 77, at 93, 96 (discussing the lengths to which the plaintiffs’ bar mobilized to defeat no-fault); Editorial, *Who Faults No-Fault?*, NEW REPUBLIC, Jan. 20, 1973, at 9 (“No-fault . . . would have become law except for the fact that it deprives a whole class of lawyers of their income.”).

limiting lawyer liability in these terms is unlikely. It would be politically unsavory to propose legislation directly capping liability against lawyers in tort actions or limiting client redress through specialized statutes of limitations.

A no-fault proposal might be the best reform proposal left—not because the public wants to limit lawyer liability or because lawyers love sharing risk, but because it supports maximizing available coverage for harmed claimants. With the benefits of expediency and efficiency, a no-fault system is more likely to avoid the fox-guarding-the-henhouse notion of self-regulation. While no-fault limits lawyer liability in a specific case, it also protects a broader scope of clients predictably and with minimal additional lawyer involvement.¹¹⁰ As such, once more facts and statistics are known regarding the frequency and impact of client harms, the no-fault system for legal malpractice claims may amass political support, protect more clients, and provide greater predictability to the legal profession.

110. It is longstanding wisdom that tort verdicts are unpredictable, and some would argue that they provide little more than an entry into a “lottery” for potential claimants. Franklin, *supra* note 8, at 790 (calling tort verdicts the “defendants’ lottery”); O’Connell, *supra* note 20, at 127 (“[T]he legal system’s effort to devise a fair and rational method for compensating injured persons and disciplining poor professional practice has produced only a litigation lottery.”).