A DEBATE OVER HOW LAWYERS HAVE TO OPERATE

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Editor's note: No attorney wants to be grieved or sued for malpractice. So what can be done to avoid such claims? Texas Lawyer brought together six legal malpractice/grievance attorneys on June 30 to discuss these issues and offer some advice. The following discussion has been edited for length and style.

Brenda Sapino Jeffreys, senior reporter, Texas Lawyer: Tell us a little bit about your involvement with malpractice litigation or the grievance system just so that we know where you're coming from.

Broadus Spivey: . . . I started out in Lubbock about 28 years ago. [I] handled my first malpractice case against a local lawyer, and I found out what unpopularity amongst the Bar was. . . It was resentment not only by the Bar, but [also] by the judges especially. And that has, obviously, moderated in the clientele. The cases have changed from some person who cannot afford to pay the court costs to some of the largest corporations and wealthy families who hire lawyers in malpractice cases nowadays.

Steve Smoot: My involvement, I guess, started in 1982 when I went to work for the State Bar of Texas as a prosecutor in the General Counsel's Office. I worked for the State Bar for seven years, and, frankly, I look back extremely fondly on those years as my best years of practicing law as far as really enjoying practicing law, because I got to try lawyer disciplinary lawsuits all over the state. I got to meet the finest lawyers all over the state. Obviously, I got to meet some of the worst lawyers all over the state. That's how I got to meet Broadus, and that's how I met Tom. . . . I tried a lot of lawsuits and ultimately became the chief trial lawyer and very much enjoyed it. . . . I left the State Bar in 1988 and have been a solo practitioner since then, and I do plaintiffs' personal injury work, but much of the work I do is either plaintiffs' legal malpractice work or I represent lawyers when they have grievances filed against them. I suppose my latest claim to fame is I represented the 46 plaintiffs in a certain lawsuit filed in Harris County, Texas, styled Arce v. Burrows in which the politically correct term is [that] the case has been recently resolved.

Stephen E. McConnico: Well, I guess, I got into this just by happenstance. I tried a legal malpractice case 20 years ago in Pecos County, and I defended an attorney there. We got a successful jury verdict on behalf of the attorney, and then after that I just started getting cases. I've never counted up how many of these cases I've tried to verdict, but it's probably over 25 that I've tried to verdict in legal malpractice, and over time it's just become a larger part of my practice. When the FDIC and the RTC came in the mid-late '70s, early '80s, I defended a lot of the attorneys in the FDIC/RTC litigation. And that just really took off. For about two or three years I could have done that 110 percent of the time

if I wanted to. I've always tried to restrict the docket so it didn't become 100 percent of my practice. I've been successful in doing that. There's a lot of work. I'm always on the defense side. I don't do any plaintiffs' legal malpractice work. I do plaintiffs' work in other areas, but not legal malpractice.

Chuck Herring: Sort of like Steve, I guess, I had been with a large law firm and started defending some lawyers, and then the federal government started scapegoating lawyers throughout the state. I did a lot of that work for a period of time. And somewhere along the way I wrote a couple of books on legal malpractice and ethics, and then, like Steve, I've done both sides of the docket - representing lawyers in grievance matters, [handling] plaintiffs in the defense of legal malpractice. But more recently, I find I spend more time advising law firms that are trying to avoid all sorts of problems, like the Arce v. Burrows lawsuit and other issues.

Robert S. Bennett: . . . I've been doing very similar work as Steve and Charles do. And having been a former federal prosecutor, most recently, I was involved in Johnny Holmes' case in which he filed barratry charges against four attorneys in Houston. I represent two of those attorneys and got those charges dismissed. . . . I don't see that really as a trend in Houston or anywhere else. Certainly Holmes' office would no longer be involved in that since he's no longer a DA, but that may be something that happens in other areas, and I'll be happy to discuss that a little further then. Most recently I've written some articles on this new CAAP [Client-Attorney Assistance Program] . . . that we've instituted here at the State Bar. And I really find that to be a fascinating addition to the grievance process, so I'd like to discuss that a little bit, too. . . .

Tom H. Watkins: I probably got started in the grievance end of it first, because I was chairman of the local grievance committee a long, long time ago. After that I was chairman of the Board of Disciplinary Appeals and then served on a committee. At one time I claimed to have read over 4,000 grievances and along the way started to both defend and prosecute legal malpractice cases. That has developed quite a bit. I, too, try to restrict as much of that as I can, because I like the other stuff a lot better.

What Works?

Jeffreys: OK. Well, maybe, we could start with a real general question, but I was hoping we could get a little bit into the issues in this area right now. What's good and what's bad about the state's grievance system? What works? What doesn't work?

Herring: We should have the president-elect to speak to what's bad.

Spivey: Well, I'm not so sure there's much bad about our grievance system right now. We'll have to wait and see how the innovations work. But I think separating the general counsel's position is a lot more significant than most people do. Because the handling of grievances is such a massive job of the State Bar that when one person has to be the general counsel to the Bar and then supervise the grievance system there's just no way you can do an adequate job. . . . There [are] two big areas that I think are a problem: One is the congestion, especially in Houston. It is a really significant problem, and it affects the lawyers just as adversely as it does the public. And the second thing is, hopefully, we can get the point across to lawyers when they come before the grievance committees and procedures that due process is not the due process they learned in constitutional law.

Because all of us expect the ordinary procedures we deal with in court. You expect due process, as we think of it, and this is an administrative hearing. First of all, that surprises most lawyers. And secondly, the fact that there's not necessarily a confrontation of all the witnesses, and there's not necessarily a provision for the other basic principles of due process as we think, and it's making the lawyers very angry and understandably so.

Herring: Well, I would say Broadus is right that we're in flux right now. And we have some new things coming in. Bob is going to talk about the CAAPs program. But I would say right now in terms of grievances I see too many that have no business going down the system point of a hearing.

Smoot: My biggest complaint is everyone gets a hearing, and most of those hearings are useless.

Herring: We have a four-corners rule. And that is . . . if the disciplinary counsel's office reads the document and finds that it states a complaint, you go to hearing. That takes the lawyer's responding time, it takes the volunteer committees' time, it takes the Bar counsel time, and usually the responding lawyer has to hire a lawyer, and there is still a significant percentage . . . of those matters that just have no business going to that Bar. I mean, if we had had either a CAAPs-type program or an early mediation intervention-type program a lot of that could be held off. . . . You've still got to prepare for it; you've got to spend the time, money and effort, and it's painful to the lawyer. [I] think the Bar is working to pull those out. But I think that remains a necessary focus.

Watkins: Still, the public perception is that it's a good-old-boy group, and the grievance process is there to protect lawyers. The lawyers' attitude is that it's a witch-hunt out to get them, which means they're probably doing something right.

Herring: Or maybe they're doing both things wrong.

Watkins: Well, I don't know that you can do both of those things wrong at the same time. But I get it both ways. I mean, people think that they go down and a lot of them get this missed, by the way, in the first instance, and they still get kicked out pretty quick, because the investigator says this doesn't state a grievance. And every time that happens, boy, you hear from folks who are saying that you are just protecting lawyers again. So I don't know how we balance the two of those. Because there isn't any way for it not to be a good-old-boy, let's-protect-the-lawyer process that isn't going to be painful and hard for the lawyers to have to prove what is obvious to everybody.

Spivey: Tom, one of the problems that I didn't mention is that there seems to be an encouragement for lawyers to file grievances against other lawyers. I'm really suspicious of claims where a lawyer is involved in litigation and the other side files a grievance against that lawyer. Those grievances get the same standing and occupy a tremendous amount of our grievance time, I think, and I'm not sure that's healthy.

Smoot: Yeah. I'm defending more and more of those. And that is a trend I have seen in recent years that I do not like . . . because they're using it for leverage in civil litigation.

Watkins: I think a lot of us would tell a client who wants to file a grievance against the opposing lawyer, "Fine, but this lawsuit has to be over with before we do it." That ought to

be the standard phrase that all of us tell clients who are upset about something that they claim is unethical. Because to decide whether or not to file a grievance ought to be done after the lawsuit is over when there's no benefit against that litigation to see whether it's worth being filed. But I will tell you that most grievance committee people that I've talked to, and I know the local committee and the board, are very suspicious of grievances that get filed while the underlying litigation is still going on against the adverse lawyer. And so even though there's no rule against it, they get looked at pretty carefully.

Bennett: But they still end up in the grievance committee, and that's the problem.

Smoot: And they go to hearing.

Bennett: And there's not really a screening process, and that's the important point that this CAAP program hopefully will address. It's my understanding that it's now working in Austin; it's been here for six months. The next step it will take is a move to Fort Worth, and they're hiring some people to go there, and after that they'll go to Dallas, but on the low end of the totem pole is coming to Houston. And my question is why isn't the State Bar moving that to Houston almost immediately because of the benefit I see this program confers on both the public and the Bar?

Spivey: Yeah. I'm not sure just exactly what the benefits are. I mean, I know that's the program, but tell me about that.

About the Program

Bennett: Well, it's actually what's called the Georgia program. It first started in Georgia with the Bar there, where they had sort of an ombudsman who would listen to the public if they called in. It would be different than an investigator. And then it would try to work out situations where there's not, per se, grievable offense where it's a matter of, you know, "My attorney hasn't returned my phone call. I've asked for my file back, and I can't get it," and so forth. The Georgia person who didn't call the attorney can say, "Before this gets to be a grievance, will you meet with us? Will you call the person or get in contact with them?" This program has now come over to Austin for the last six months, and it's run by . . . Constance Miller. [She] is an attorney that's in charge of that, and she gets, according to the recent statistics, 70 to 80 calls a day from people who have complaints about their attorneys. And if it's not a grievable offense . . . she tries to sort of mediate. She has a standard letter that she sends out to attorneys. . . . and it says, mainly, "Somebody has been upset with what you've been doing. Will you please get in contact with your client?" She feels that of all the grievances this would probably catch as high as 15 to 20 percent of those and kick them out of the grievance system, which I think is a good thing for the public. The public then has somebody to talk to - they actually talk to an attorney. . . . And [it is] obviously a good thing for an attorney because the attorney says, "Well, I didn't know it had gotten this bad. I've been out of town. I didn't return the phone call. I didn't know she was upset about the fee I was charging. I will contact her." And so I think it's a wonderful screening process and should be implemented throughout the state.

Watkins: It has a much greater benefit, as far as the clients [are concerned], than the grievance process, because the grievance process is not after fixing the client's problem; the grievance process is trying to determine the license stature of the lawyer, and it's an administrative proceeding against the lawyer. It doesn't have as its goal, nor often does it

have as its result, curing the client's problem. This process is one which, if we can get statewide . . . is something that can be done for the client. We will get much better PR and much better justice out of any process that is focused on solving that client's problem than we will out of the grievance process that is just against the lawyers.

Smoot: I've heard about the program in Georgia, and I heard that it has a lot of good benefits. Facially, it's very appealing to me. It also sort of relates to something you were talking about, Tom, the concept that we changed the rules a little over a decade ago to give everyone a hearing. The big impetus for that was that we're going to make the complaining witness feel better because we're going to give them their hearing. I seriously question if they feel better after their hearing. And the real reason why is because they want their problem fixed, and the grievance committee - even if they vote out discipline - can't fix the problem.

Herring: Yeah. I've been to so many grievance hearings where the complainant comes out mad, because, just like you said, you can't really solve the fee issue or whatever the issue is . . . in that seating. I think it's a wonderful program, and the Bar is to be commended for trying. And I think it should be expanded, and I support it.

Smoot: OK. Broadus, we've all voted. Let's do it.

Bennett: . . . The other thing that's good about this is it's sort of a two-way street. That an attorney who's having difficulty with a client, the client's calling every day saying, "Where's my settlement check?" And, "I'm going to file a grievance against you if you don't get my settlement check." "Well," [the attorney says], "the insurance company hasn't sent it yet. I can't do anything about it." An attorney can call the CAAPs program, call Miller, and Miller can actually call up the client and say, "Spivey has not taken off to Mexico with your check. It hasn't come yet. I've talked to him. I assure you [that] in the next 30 days, it's going to be there." So you hear somebody else telling the client besides the attorney. I really hadn't realized that it could work both ways, but it's a good thing for the attorneys as well as the public to kind of take care of problems. The only down side I see to this kind of thinking is that there may be a situation where an attorney has done something and realized that something's going to happen and kind of gives them a heads-up and may try to cover it up. But I see that as really not a basis for questioning the good things that it will do.

Herring: What I would also like to see is some sort of summary adjudication procedure which could simply be by letter or something else to handle some of these matters that on their face of the complaint you don't have the facts. . . . Let me give you an example. A couple of months ago a lawyer gets a grievance filed against him by his former firm because he left and called one of his former clients after he left to solicit them. Of course, he is entitled under the Rule 703 to contact somebody he previously represented. Well, the former firm files a grievance complaint and says it's "improper solicitation. He's soliciting our clients." That's all it said on the complaint form. Well, we couldn't get the other facts out. With [this system] there's no way to have a classification to deal with every little category. There's a whole category there of things like that, [and] if there are other ways to get them out of the system without taking time, expense and pain of the hearing process for everybody on both sides. . . .

Smoot: I mean, as it is, the process is good for me because that means more clients for me. But I'm not sure it's good for the lawyers, and I'm not sure it's good for the public that everything goes to hearing.

Watkins: It is awfully easy, though, for a lawyer, a bad lawyer, a mean lawyer, to find out that one of his former clients is about to file a grievance [and] to fix it. And under the old system, a lot of those went away and nobody ever found out about them. So the fact that it kind of snowballs and picks up its own momentum and goes in and gets us to the point where, at least, we're talking to the client outside the presence of the lawyer to determine what's really going on has some merit. I don't know if it's enough merit to be worth the cost of the kind of situation Chuck just described. But illiterate, uneducated clients who get taken advantage of by bad lawyers need a lot of help in order to get their grievance properly before somebody. . . .

Herring: . . . The system that we have now should not have due process at the initial stage and certainly not the full canopy of due process rights. "Due process," as we all know, is a broad, inclusive term, and what's due process in one setting may not be due process in the other. But I think some of the high-profile prosecutions we've seen from the State Bar rates a lot of due process down the line. The situation where you have a lawyer who has a grievance filed against him and he goes through a loose process at the investigatory panel stage, then negotiates and does or doesn't work out a sanction, and then the case goes down the line and the State Bar, by time it gets to court, has 15 more charges, completely different issues, arise that the lawyer didn't really have at the beginning of the process, and didn't have the opportunity really to evaluate how to handle the situation because the situation he confronted. The issues he confronted at the investigatory panel stage [are] totally different than the situation that the lawyer confronts . . . down at the courthouse. Some of those sort of issues, it seems to me - and I think, maybe, the grievance oversight committee has been resurrected to address some of that - we can build in a little more due process for lawyers without undermining the system, without making it too expensive and too cumbersome.

Spivey: Let me reflect back on that, because I happened to suggest in my comment there, because I've stated publicly, and I believe very strongly, we need more due process built into the process. Because, of all people, lawyers ought to have an appreciation, if you don't have due process, if you don't have the Miranda warning, if you don't have a good legal prosecution of lawyer system, you don't have a good criminal system. Any democracy like ours will withstand the Miranda, and it will withstand a complete due process. I'm not advocating less due process. I'm advocating education. There's not as much due process, and I would strongly advocate we build in more due process. And I think Steve probably sees about as much of that as anybody, don't you, Steve?

McConnico: Well, where I see it is where you have a legal malpractice case as a first grievance. I think the CAAPs thing is a great idea. But that's not going to solve most of your legal malpractice cases, because you're dealing with smaller amounts, smaller disputes, and those aren't the ones that turn into legal malpractice cases. There's not enough money involved. But those are just as important, and I think that's a great solution. What we see is a legal malpractice case, and this is a little different than what you were discussing earlier, where somebody files a grievance to run tandem and try to do stuff in the grievance process they couldn't pick up or that they can't do at the courthouse.

Herring: Why shouldn't we have a rule that says that if there is a pending legal malpractice then, certainly, the grievance itself is abated until resolution. There's a statute of limitations issue now the way the rules have been. Why shouldn't we have it?

McConnico: Well, the problem is the venue, like in Harris County, maybe, you could have it abated for five years. And I don't think that's good. That wouldn't be a problem here in Travis County. It wouldn't be a problem in a lot of other counties. But depending upon the county, you could have the whole grievance process abated to where the claimant was really frustrated and really have a legitimate gripe.

Herring: No. I'm not necessarily advocating. I'm throwing it out as a question because I also have seen Rambo grievances, and I've seen two of them where they were filed three weeks before trial and mediation. It was clearly, purely for pressure purposes, and I wish there were way to address it; it is a difficult problem.

McConnico: Having dealt with five unit suspensions from district courts, if we abated the grievance, a serious grievance, during the pendency of a legal malpractice there would be a friendly malpractice suit filed in a court where it would never come to trial. In other words, I have tried to live where we try to structure the grievance process to coordinate with criminal prosecutions. I've tried to live essentially where we coordinate the grievance process with a legal malpractice case going on and, ultimately, the grievance process needs to tend to other issues, which is that lawyer dealing with more clients. That's not relevant to a malpractice case; it's not relevant to the criminal process; there is a public protection function of the grievance process that almost has to keep going.

Herring: Yeah. See, I don't buy that in the Rambo situation. I think you can build in some procedural flexibility, and you could have an abatement option where good cause is shown, or you can have an abatement presumption but with good cause shown, it could be limited. I think there are ways to do it for less that are less rigid and don't have to cost the individual lawyers that I see at times now. That to me doesn't really serve the purpose when the sole reason the legal system really is being used is a trial and discovery and collateral act.

McConnico: Well, I think the Bar has to really make the people in the field aware that the actual person that's being prosecuted, the attorney, is going to lose all confidence in the system if the Bar and the plaintiff's counsel who has the case against him are cooperating in the discovery, that they are passing information back and forth, and that they know what questions the other is asking. If they go in and testify in the grievance procedure and there's a deposition sitting in front of them, there's a legal briefing the plaintiff's counsel has already done for them, then that's when that person, who's the defendant in the lawsuit, completely loses faith in the system. At that point in time, he thinks he's being railroaded. And he might have some legitimate reasons to believe that.

Smoot: You know, I've seen these committee panels go, "Oh, we know how judges are." And so, you know, it's like in many things, they realize what's going on out there, and they don't necessarily take a sanction order as a res judicata or collateral estoppel.

Spivey: What about the case where a lawyer files under a Level 2 and fails to file his experts' reports within 90 days of the answer, is out of town or has some other - another - lawsuit? Suddenly, procedurally a perfectly valid lawsuit is kicked out of the system

because of failure to comply. But more importantly, for our discussion, some lawyer who's a darn good lawyer has just been subjected to a lawsuit when there are some absolute results there.

Herring: Well, but in that situation, was the client really injured by the failure to meet the Level 2 expert designation deadline? . . . Well, why shouldn't the client have a remedy?

Spivey: Well, they should. But why should that remedy be there when it's a technical violation of procedural rule and there's no discretion of the trial court to . . .

Herring: What you want to do is build more flexibility into the Rules of Civil Procedure, so that there is not that extreme result in that particular lawsuit and the client's rights are not severely prejudiced as, apparently, they were in those cases.

Smoot: We waived the death penalty in the civil rules.

Hot Issues

Jeffreys: What's the status of malpractice law right now? Where is it going? I know you can't predict what the Texas Supreme Court or appellate courts are going to do. But what things are the really hot issues that lawyers have to watch out for right now?

McConnico: What I'm seeing since the Supreme Court came out with the [McCamish v.] A.F. [Appling Interests] opinion a couple years ago on negligent misrepresentation is that the attorney might not be representing the person bringing the claim. Prior to that time, we were knocking out a lot of legal malpractice cases on lack of privity. That's all gone by the wayside. Now, they can use a negligent misrepresentation claim and generally get around that privity defense the attorney has. . . . That's really increasing. Because people realize the breach of fiduciary duty, [that] they may be able to escape paying the legal fees if they were not harmed, and the people don't like to pay legal fees. Unfortunately, the real big litigation fees are real big. So we're seeing a lot more of that.

Watkins: Well, we're seeing discordant cases under [the 1999 Texas Supreme Court case] Arce [v. Burrows] where there's not going to be any coverage.

Smoot: Another resolution to Arce cases is that, as you know, most malpractice policies do not cover fee forfeiture. And so you've got the dynamic that if the petition doesn't allege negligence as well as breach of fiduciary duty and fee forfeiture, you may not even get a reservation of rights letter. You may get no defense.

McConnico: What I'm seeing is the insurance companies doing the defense but with a reservation of rights letter. So some of these people come under the policy, "It's on your nickel," but going ahead and giving them a defense.

Watkins: But they're also filing [declaration] actions quickly to see if they can get out from under some of the defense costs by getting a declaration prior to the time the defense starts going on.

Herring: I think that goes to the two hottest areas right now, which fiduciary duty goes to the Arce v. Burrows theory of negligent misrepresentation of damage, and we see more of that end of it. The strong line that the Supreme Court has drawn in the sand, the stand behind privity and have privity be an absolute defense for some of the production in a tiny minority of states. . . .

Spivey: Well, you're also seeing a change in attitude, I think, in insurance companies themselves. A few years ago, you never saw an insurance carrier suing its own defense lawyer for negligent misrepresentation or for negligence in the handling of a claim. I've seen a number of those recently, and I was discussing it with a friend of mine who's in charge of a very major insurance company's distribution of claims, and I made the comment that it is a peculiar method of spreading the risk. And he said, "No, Broadus, that's not called spreading the risk. It's called shifting the risk." And it is a very, very clear and present activity in the insurance industry where they, instead of shifting or spreading the risk amongst their investors, shift the entire loss to the lawyer who lost the case.

Herring: Or the lawyer's carrier. . . . [T]he last estimate I saw shows 55 percent of Texas lawyers don't have any legal malpractice insurance. And that's an issue, I think, the State Bar in the future will get to.

Smoot: Or the Oregon investment.

Herring: Yeah. Oregon is another state now, I think, that's cracking down and having mandatory legal malpractice insurance for lawyers or at least requiring you to advertise if you don't have it. . . .

A Case for Insurance

Jeffreys: Well, should lawyers have it?

Herring: I believe lawyers should have malpractice insurance.

Spivey: I'll bet you there's nobody at this table who doesn't agree to that. But I'll bet you there's very few lawyers that would listen.

Herring: Well, and the majority don't. So obviously the majority disagree or financially think that they're unable to.

Spivey: Well, there's two reasons. One is economic intelligence and the other is concern for the welfare of your clients. . . . Negligence happens in law offices and doctors' offices constantly, and the saving grace is that there's usually not a proximate relationship or proximate cause of damages. But it's still present, and any prudent lawyer should have insurance. I'm not sure I'm ready to come out in favor of mandatory insurance but, on the other hand, I sure have a lot of empathy for people who get injured by lawyers and don't have any recourse.

Watkins: The question was just like with doctors. A lot of doctors decided to go without it when those premiums were getting higher and higher. And the insurance policy motivated the plaintiff's lawyer to come after them, and so there was a lot of conscious choices by,

particularly obstetricians, to go without it because it just wasn't helping. You couldn't buy enough insurance to cover their problems. For a while there I saw it going up and up for legal malpractice insurance, and I thought, "Well, we're headed toward the same thing." Now I think the trend is-

McConnico: Winding down.

Watkins: It's leveling down, and it's not going up that much. So I think generally we're going to still have [it] for lawyer referral services and for some of the other things, like when attorneys get businesses [as clients]; you can't get on those lists unless you demonstrate that you've got legal malpractice insurance, and I think that's a good thing.

Herring: Well, you still have this as a fact even that you have lawyers who don't want to have legal malpractice insurance because if Steve Smoot gets a big plaintiff's legal malpractice case and finds out that it's a solo practitioner who doesn't have legal malpractice insurance -

Smoot: Thanks for saying that, Chuck. Because, actually, I was pondering whether to announce this in something that's going to be published. The fact of the matter [is] that I don't sue the lawyers without insurance. I mean, that's no great secret. But if you're a solo practitioner, why not go bare because Steve Smoot's not going to sue me; Broadus Spivey isn't going to sue me; Tom Watkins isn't going to sue me.

Herring: So the person that's injured is the consumer, actually the public, who doesn't have a remedy.

McConnico: Well, the reality of what doctors have done is that hospitals require them to have insurance but when y'all's obstetrician's insurance went up they all limited their coverage. . . . Most of the obstetricians in Austin now have $ 500,000 in coverage. If you have a brain-damaged baby, that doesn't get anywhere near covering the future damage or anything else, but [the doctors] can keep their hospital privilege. We don't have that as attorneys. We don't have to have a hospital saying, "You're not going to practice here unless you have insurance." But I don't see how we could ever enforce it. I think there would probably be some real issues there because we all have such different practices.

Watkins: It seems to me [there are] more and more things that require us to have it. I mean, I know a lot of corporate clients that require it. Aren't there some organizations that you can't be in without having it?

McConnico: I haven't seen that. I've just seen the corporate clients. But the insurance is coming down. The interesting thing is that for the last two or three years the legal malpractice claims in Texas have also come down. We've had less legal malpractice cases filed almost every year for the last three years. Now, that goes against what the insurance companies are saying; that is not happening in the last seven or eight months. They see the claims up. They see them increasing.

Jeffreys: Why do you think that's happening?

McConnico: I think a lot of it has to do with negligent misrepresentation claims, and I think it has to do with the breach of fiduciary duty claims under Arce . But I think the other thing

it has is that historically legal malpractice has followed the economy. And I think when times are good, you don't see as many legal malpractice claims. When the times are bad, they increase. I think what you're seeing now, even though we're still in a good economic time, [is that] so many good people are making foolish investments. And it goes back to what Broadus was saying, they're looking for a place to shift the risk, or where they made those foolish investments; the pocket's not there to collect from so they've got to look at the attorneys and the accountants. So you're getting a little bit back to where we were in the RTC-FDIC days.

Herring: They made it less of a taboo, you know, kind of an industry self-protection, than it used to be. I mean, it still is some, but I think that's reflected also in Broadus' point about the insurance company's willingness to go after the lawyers. I think we've seen a dramatic transformation of the relationship between insurance defense counsel and the insurers. . . . The Professional Ethics Committee issued the opinions on litigation guidelines and the extent to which insurers can impose those on insurance defense counsel, and that's generally a negative thing for the insurers, and also the third-party audits are doing a lot of this. So I think we're seeing a lot [of] tension really between those institutional clients than we did a decade ago.

Litigation Guidelines

Jeffreys: How big an issue is that? Because I just did a story last week, and there's a case in Houston where the judge said that the insurance company could not use the litigation guidelines to limit reasonable fees. It was just summary judgment, but then they did win a jury verdict, too, so it'll probably go up. Is that a big issue right now, these litigation guidelines?

Herring: Nationally, it's a very hot issue. I mean, there are three or four ethics opinions in this issue of the ADA and BNA Lawyer's Manual on Professional Conduct. . . . So I think there's still the unauthorized practice of litigation going on in Dallas. . . . I don't know if it is or not, but that's an ongoing issue. And it's a real problem for insurance defense lawyers trying to represent clients as to how they relate to a carrier and how they relate to the insured.

McConnico: I think the real important point on that is that when the Supreme Court came out with that opinion last year - it might have been the year before -that the attorney that represents the firm captured by the insurance company, that they couldn't pass through him to sue the insurance company directly. That was a very important opinion. Because a lot of this is not between the attorney and that insurance company. A lot of it is clients not getting the legal representation that they might have in a different point in time. And they're mad about it, but don't have a legitimate lawsuit, because, like Steve was saying, that attorney either doesn't have insurance or has very limited amounts of insurance, and they can't get back to the insurance company that's controlling the litigation.

Spivey: But, Steve, isn't it a stretch to say that the client can't sue the insurance company for the negligence of the lawyer, but yet the insurance company can sue that same lawyer for the negligence?

McConnico: That's where we are.

Smoot: You expect consistency.

Watkins: Well, we are and we're there because everybody has believed that we have covered those things, that the three-party relationship between the insured, and the insurance company, and the client was solved, that we had the ethical problems in that relationship solved. And they've never been solved. There isn't any good answer. And it doesn't make any sense. And nobody knows whether that lawyer has one client or two clients. And they always globally say, "Oh, there's just one client, he has the insured." But then his duties to the insurance company look an awful lot like that's a client too. . . . [I]t is an uneasy relationship, without any real good resolution on the multiple duties to both masters.

Spivey: But don't you see a stretch to protect the insurance company's interest and an almost surprising stretch in the opposite direction to create liability on the lawyer almost arising out of the same issue?

Watkins: I know that that opinion was an important opinion. But if I am a defendant in a lawsuit and somebody is saying how many depositions can be taken and what rate we can pay for the kind of lawyer I'm going to get, and it turns out badly, I want those persons making those decisions to have responsibility for those decisions. And the court says that they don't.

New Resolution

Jeffreys: At the Bar meeting [recently], I'm sure you're aware, the No Sex with Clients Resolution passed. I have kind of a two-part question. How big of a problem is that? And where is that going to go? I know there's a few more steps. Realistically is that going to get through?

Watkins: It is a problem in family law. And other than family law, I don't think it's a problem. Now, I may be wrong about that.

Smoot: I mean, I've been practicing law a few years, and I kind of keep my ear to the ground as to what lawyers are up to. . . But as far as it arising to a huge level other than the [1999] Sarofin v. Piro, Lilly case in Houston, I really don't hear much about it.

Watkins: I think outside the family law situation - and I identify [it] because it is an area where the relationship between the lawyer and the client is such that it almost becomes a mental health provider. In that context, sex between the parties is very, very dangerous, and there are some lawyers, anecdotally, that I heard about that abused that situation. But I'm saying that outside of the family law situation, I don't think that a relationship between the lawyer and the client is of a sufficient power relationship emotionally and personally that the abuse is a problem.

McConnico: I agree with that from what I've seen. I have not seen it except in a family law context.

Jeffreys: There's not a whole lot of cases being filed along those lines at all?

Spivey: I don't think that changing the rules for lawyers will create a civil liability. You have a little bit different stretch to create a civil liability on a lawyer than you would a physician, even though you may have some of the same power dynamics. But it's difficult in a physician situation to attach liability. I know because I'm scheduled to go to trial on a case [soon].

Bennett: But the issue of whether the resolution should have been passed or whether it should be a violation, I think, is a very valid thing we haven't had before. And I think it's something that a lawyer should be on notice. Now, everyone agrees that no matter how often or when it occurs, it does occur, and that it puts the client in a very terrible and awkward position.

Herring: Well, [there were] different lawyers sanctioned all over the country for it before you had specific rules. The ABA opinion addressed it, essentially, in sort of fiduciary duty terms years ago. So, I mean, it's been a problem. I think what the rule does potentially is profile it and underscore that kind of common sense prohibition or restriction. The difficulty you get into when you write the rule is, "What about corporate clients?" Does that mean that there can't be a relationship between a lawyer and a clerk at a bank if the law firm represents the bank? It's the applications of those rules when they've adopted them in California and Oregon - and I assume other states - that get to be a little bit sticky. I think the basic prohibition everybody agrees on.

Watkins: A single lawyer who is on a six-lawyer trial team that's representing a major corporation that's got 32 in-house lawyers, are we saying that they simply can't date even though they're both single? I mean, the applications get really tough outside of family law.

Reaching the Limits

Jeffreys: Well, a couple weeks ago the Supreme Court said it's going to look at a couple of cases that have to do with the tolling of the statute of limitations in malpractice cases. Should there be changes in this? Where is this going to go?

Spivey: I think that's an indication that it's going to go downhill. I think the law as it stands today is really well balanced, and there's some discretion left for the jury and the judge to determine when there is a tolling and when there isn't a tolling. I'm afraid we're going to get into another one of those absolute rule situations which was meant to fix a problem that's going to create more problems than it mends. I don't mind commenting on that.

Herring: Voice of experience twice burned. I would probably take the other side of that. I think there is confusion right now in the litigation tolling setting. The Hughes v. Haney decision the Supreme Court came down with some years ago basically says that the legal malpractice claim is tolled with respect to a litigation lawyer until the litigation is over. But now we've had a number of lower court decisions after Murphy v. Campbell was handed down in the accounting tax setting that [have] said, "Well, maybe that doesn't apply if the lawyer got terminated or this fact or that fact." And I think there is a little bit of confusion. And I hope that the court will simply address those areas and not go too far in terms of rewriting the area, but I think it could use a little clarification on some of those settings. . . .