
**FIGHT CLUB: DOCTORS VS. LAWYERS—A PEACE PLAN
GROUNDED IN SELF-INTEREST**

*Andrew Jay McClurg**

Doctors and lawyers have been at odds since the first medical malpractice “crisis” occurred in the mid-nineteenth century. Their modern fight plays out publicly in a variety of forums, principally the national tort reform movement. Like professional wrestlers, the fighters sometimes resort to dirty tactics. It is an unseemly, embarrassing spectacle for what have traditionally been considered the two most prestigious professions. Given the importance of the healthcare and legal systems they serve, the doctor-lawyer conflict has implications for all Americans. Previous calls for doctors and lawyers to improve their relationship have been met with scorn. This Article takes a different tack in calling for improved relations: an appeal to self-interest. It argues that doctors and lawyers have shared tangible and intangible interests in reducing their conflict and improving communication. The Article also sets forth several steps toward accomplishing these goals, including the need for each side to acknowledge certain core, uncomfortable truths about our medical liability system.

TABLE OF CONTENTS

I.	INTRODUCTION	310
II.	THE ANTAGONISM BETWEEN DOCTORS AND LAWYERS	313
III.	THE TORT REFORM SMEAR	322
IV.	PUMMELED PROFESSIONS, TATTERED TRUST, UNHAPPY LIVES	330
	A. <i>Tarnished Images</i>	330
	B. <i>Trust Busters</i>	334
	1. Dependency Conflict: “I Don’t Want You, but I Need You.”	335
	2. The Implications of Declining Trust for Doctors and Lawyers.	337
	C. <i>Of Yacht Clubs and Suicide Rates</i>	341
V.	PRESCRIPTIONS FOR IMPROVING RELATIONS BETWEEN DOCTORS AND LAWYERS	345
	A. <i>Acknowledge Core Truths About Medical Negligence and Malpractice Lawsuits</i>	345
	1. Medical Errors Are Common and Frequently Result in Serious	

* Herbert Herff Chair of Excellence in Law, University of Memphis Cecil C. Humphreys School of Law. The author is indebted to Professor Nancy Levit for reading a draft of this article and offering excellent editorial and substantive comments. Professors Ralph Brashier, Elizabeth Foley, Lee Harris, Sheldon F. Kurtz, and Ernest Lidge, and Drs. Robert W. Bailey, MD, Catherine Lawhead, PhD, and Denton J. Stewart, PhD, also provided valuable help. Research assistants Eric McEnerney, Sarah Spitzer, and Meredith Blake Stewart all qualify for an “I Couldn’t Have Done It Without You” award. Librarian Howard Bailey tracked down many hard to find sources.

	Patient Harm.....	346
2.	Medical Lawsuits Are Not Personal Attacks.....	348
3.	Lawyers Cause Harm to Doctors When They File Lawsuits.....	348
4.	“Frivolous” Medical Lawsuits Are Uncommon and the Legal System Functions Reasonably Well in Sorting Meritorious from Unmeritorious Claims.....	350
5.	Most Valid Claims for Medical Negligence Are Never Brought, Yet Too Many Unfounded Claims Are Filed.....	352
6.	Malpractice Litigation Increases the Cost of Healthcare.....	354
B.	<i>Fight Fair</i>	355
C.	<i>Facilitate More Interaction and Direct Communication</i>	359
1.	Establish More Medico-Legal Courses for Medical and Law Students.....	360
2.	Create Joint Continuing Education Programs for Doctors and Lawyers.....	362
3.	Organize Joint Social Events, Perhaps with Friendly Competition.....	363
4.	Establish an AMA-ABA Committee on Improving Doctor-Lawyer Relations.....	363
5.	Launch a Balanced Medico-Legal Blog Moderated by Both Doctors and Lawyers.....	364
D.	<i>Encourage and Fund Research of Doctor-Lawyer Views and Relationships</i>	364
VI.	CONCLUSION.....	365

I. INTRODUCTION

*“Congratulations on your article about improving relations between attorneys and physicians. It is a wonderful job. I can just predict your next article: Improving Relations Between Rapists and Their Victims.”*¹

A physician sent the above e-mail to Peter Jacobson, a health law professor, in response to a coauthored article in which Jacobson suggested that doctors and lawyers should work to repair their antagonistic relationship.² The reply, one of several less than effusive responses from doctors to Jacobson’s article,³ is reflective of a malignant antipathy between doctors and lawyers, one that “appears to be deeper and more

1. Peter D. Jacobson, *Mutual Distrust: Mediating the Conflict Between Law and Medicine*, 37 U. MEM. L. REV. 493, 499 (2007) (emphasis added) (internal quotation marks omitted) (quoting from e-mail message).

2. Peter D. Jacobson & M. Gregg Bloche, *Improving Relations Between Attorneys and Physicians*, 294 JAMA 2083, 2083 (2005).

3. Some other responses Jacobson received included: “I just read your article; you are an imbecile.” Jacobson, *supra* note 1, at 498. “I just completed reading the commentary followed immediately by 800 milligrams of ibuprofen and a cool compress for my aching head.” *Id.* “I know a lot of lawyers, at parties they are nice people. Otherwise, they are a blight on society.” *Id.* at 499.

pervasive than ever before, making it hard to imagine that relations between attorneys and physicians can get much worse.”⁴ The fight between doctors and lawyers plays out publicly in a variety of forums, principally the national tort reform movement. Like professional wrestlers, the fighters sometimes resort to dirty tactics. As the offensive⁵ opening quotation reflects, it’s an unseemly, embarrassing spectacle for two such distinguished professions.

Jacobson argued in his article, as he had previously in a book,⁶ that doctors and lawyers share core social and ethical values that provide a basis for reducing the conflict between the two groups and enhancing collaboration.⁷ This Article takes a different approach in calling for greater doctor-lawyer cooperation. Rather than appealing to shared values as a reason for improving relations, it appeals to the baser motivation of shared self-interest. Moral philosophers and psychologists alike have long asserted that self-interest is one of the strongest, if not the strongest, of all human motivations.⁸

Doctors and lawyers have both professional and personal interests in de-escalating their attacks on one another. Name-calling, belittling, assertions of superiority, and other business-as-usual relations between the professions work to further injure the already battered public images of both groups.⁹ This, in turn, contributes to diminished trust in doctors and lawyers,¹⁰ which carries several harmful side effects, including damage to their most cherished relationships (i.e., with their patients and clients)¹¹ and potentially a greater public willingness to endorse restrictions impinging the autonomy of both professions.¹²

Evidence suggests the public is losing confidence in *all* professions.¹³ As members of “the most elite of the traditional professions,”¹⁴ doctors and lawyers have a mutual self-interest in promoting, rather than tearing down, the reputations of the

4. Jacobson & Bloche, *supra* note 2, at 2083 (footnote omitted).

5. The quotation is more offensive to rape victims than to lawyers, but analogizing lawyers to violent criminals is unfair and tasteless.

6. PETER D. JACOBSON, *STRANGERS IN THE NIGHT: LAW AND MEDICINE IN THE MANAGED CARE ERA* 210–13 (2002).

7. Jacobson & Bloche, *supra* note 2, at 2084. Specifically, Jacobson and his coauthor listed as commonalities the strong value doctors and lawyers attach to professional autonomy, their primary obligation to their patients/clients, their ethical duties to society, that both professions are governed by self-regulating codes designed to advance similar moral aspirations, and the modern reality that doctors and lawyers are increasingly subservient to their institutional environments. *Id.*

8. See *infra* notes 354–57 and accompanying text for a discussion of self-interest as a strong motivator of human behavior.

9. See *infra* Part IV.A for a discussion of the tarnished public images of lawyers and doctors.

10. See *infra* notes 162–80 and accompanying text for a discussion of the public’s diminished trust in doctors and lawyers.

11. See *infra* notes 182–87 and 204–08 along with accompanying text for a discussion of the consequences that result from diminished trust.

12. See *infra* notes 188–91 and accompanying text for a discussion of how diminished public trust in doctors and lawyers may help enable heightened regulation of both professions.

13. See *infra* note 192 and accompanying text for a sampling of scholarship that indicates decreased respect and approval ratings for many professions.

14. Alex Williams, *The Falling-Down Professions*, N.Y. TIMES, Jan. 6, 2008, § 9, at 1.

“professions”¹⁵ generally in order to protect the economic and social status they worked so hard to achieve.¹⁶ Also, whether they like it or not, in a world of managed healthcare, doctors increasingly will be dependent on lawyers for help in safeguarding their livelihoods.¹⁷ Moreover, research shows that harboring anger and hostility enhances health risks and decreases personal happiness.¹⁸ In light of research showing high levels of stress and job dissatisfaction among doctors and lawyers,¹⁹ health and happiness are states of being that neither doctors nor lawyers can afford to further imperil.

But the Article goes beyond asserting that doctors and lawyers should recognize it is in their interests to tone down their feuding. Proposals without potential solutions accomplish little. The Article outlines several steps for facilitating improved communication and understanding between doctors and lawyers,²⁰ including the threshold need for both sides to acknowledge certain fundamental truths about the medical liability system, some of which will be uncomfortable to accept.²¹

No illusion is entertained that the utopian day will come when doctors and lawyers dance, sing, and bathe together in the Woodstock tradition. So long as lawyers continue to sue doctors, reconciliation is too much to ask for. But enhanced civility and communication would be an important step toward some much-needed toleration. Legitimate policy disagreements important to all Americans exist between the medical and legal professions. Resolving them will require more dialogue and less squabbling.

Part II sheds light on the doctor-lawyer fight generally, including the bases for their mutual dislike. Part III discusses examples of the conflict from the tort reform debate, the most visible platform for doctor-lawyer animosity. Part IV examines the

15. Traditionally, only three “professions” existed: medicine, law, and divinity. Today, several other occupations have laid claim to the title of professionals, including accountants, architects, college professors, dentists, engineers, pharmacists, psychologists, and veterinarians. A concrete definition of what qualifies as a “profession” is elusive, but the following is a list of criteria commonly associated with professional status: (1) the occupation is one that has achieved a particularly high level of status and prestige in society; (2) advanced education and training, usually of an intellectual nature, is required to participate in it; (3) the services its members provide are generally of a non-manual nature; (4) members are expected to serve the community rather than operate solely out of self-interest; (5) members operate under the umbrella of a self-regulating organization (such as the American Medical Association and the American Bar Association); (6) due to the advanced education and licensure requirements of the regulating bodies, the avocation operates as a closed club in the nature of a monopoly; and (7) related to number six, the type of services the occupation provides are essential to the community and cannot be obtained from other sources. See generally RICHARD MALMSHEIMER, “DOCTORS ONLY”: THE EVOLVING IMAGE OF THE AMERICAN PHYSICIAN 7–11 (1988) (collecting and commenting on various definitions of profession).

16. The shared values identified by Jacobson apply equally to all of the professions. See Jacobson & Bloche, *supra* note 2, at 2084 (discussing shared values of professional autonomy, duties to patients or clients, duties to society, and ethical codes).

17. See *infra* notes 196–99 and accompanying text for a discussion of how doctors must rely on lawyers to protect their rights.

18. See *infra* notes 233–35 and accompanying text for a discussion of studies linking anger and hostility to heart attacks, strokes, and depression.

19. See *infra* notes 212–23 and accompanying text for a discussion of this research.

20. See *infra* Part V for a discussion of how relations between lawyers and doctors can be improved.

21. See *infra* Part V.A for a discussion of the need for doctors and lawyers to recognize core truths about both medical negligence and malpractice litigation.

potential negative effects of the doctor-lawyer conflict on the medical and legal professions and individual doctors and lawyers. Part V sets forth several suggestions for improving communication and understanding between doctors and lawyers. Part VI, the conclusion, offers final comments about self-interest as a motivator and summarizes key points.

II. THE ANTAGONISM BETWEEN DOCTORS AND LAWYERS

The nation's more than one million lawyers and nearly one million doctors²² have much more in common than they realize or may want to admit. Indeed, social psychology "liking research" suggests they should get along well, since persons of similar intellectual, social, and economic status tend to gravitate toward one another.²³ Aristotle observed twenty-four centuries ago that "[w]e like those who resemble us We like those who desire the same things as we."²⁴ Doctors and lawyers are both highly intelligent.²⁵ Both labor through similarly lengthy, expensive, and grueling

22. One reason lawyers and doctors get disproportionate attention among the professions is because of their sheer numbers. The 2009 *Statistical Abstract of the United States* shows that in 2007 the U.S. had 1,001,000 lawyers. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES tbl.596 (2009) [hereinafter STATISTICAL ABSTRACT OF THE U.S.], available at <http://www.census.gov/compendia/statab/2009/tables/09s0596.pdf>. With ranks numbering more than 920,000, doctors aren't far behind. According to the American Medical Association's most recent data, as of December 31, 2006, the United States had 921,904 physicians. DEREK R. SMART & JAYME SELLERS, AM. MED. ASS'N, PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE U.S. 8 tbl.1.1 (2008).

To help put these numbers in perspective, the United States (as of 2007) had 240,000 architects, 422,000 clergy, 184,000 dentists, 247,000 pharmacists, and 185,000 psychologists. STATISTICAL ABSTRACT OF THE U.S., *supra*, at tbl.596. Among the professions, only engineers (nearly 1.4 million of all types) clearly outnumbered doctors and lawyers. *Id.* (showing in 2007, that the United States had 1,388,000 engineers of all types, including 123,000 aerospace engineers, 382,000 civil engineers, 79,000 computer hardware engineers, 347,000 electrical and electronics engineers, 161,000 industrial engineers, and 296,000 mechanical engineers).

The *Statistical Abstract* lists 1.8 million accountants and auditors, *id.*, but only about one-fifth (nearly 370,000) are certified public accountants. AICPA *Strategic Plan 2009–2011*, AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, <http://www.aicpa.org/About/MissionandHistory/StrategicPlan/Pages/AICPAStrategicPlan.asp> (last visited Mar. 10, 2011). Similarly, while America has approximately 1.5 million college instructors, only twenty-seven percent are full-time tenured or tenure-track professors. AM. FED'N OF TEACHERS, AMERICAN ACADEMIC: THE STATE OF THE HIGHER EDUCATION WORKFORCE 1997–2007, at 10 tbl.1 (2009), available at http://www.aftface.org/storage/face/documents/ameracad_report_97-07for_web.pdf (including ten-year analysis of college instructors showing severe reductions in tenure-track positions in favor of contract or other part-time positions).

23. See, e.g., Donn Byrne et al., *Effect of Economic Similarity-Dissimilarity on Interpersonal Attraction*, 4 J. PERSONALITY & SOC. PSYCHOL. 220, 221 (1966) (stating that friendship choices tend to be members of same socio-economic status); Fang Fang Chen & Douglas T. Kenrick, *Repulsion or Attraction? Group Membership and Assumed Attitude Similarity*, 83 J. PERSONALITY & SOC. PSYCHOL. 111, 111 (2002) (stating "[t]here is strong support for the general statement that we like those who are like us"); Alvin Zander & Arnold Havelin, *Social Comparison and Interpersonal Attraction*, 13 HUM. REL. 21, 22 (1960) (stating that persons of high competency are attracted to persons of similarly high competency).

24. DONN BYRNE, THE ATTRACTION PARADIGM 24 (1971) (quoting translated writings of Aristotle).

25. Even with all their animosity, doctors and lawyers are willing to acknowledge each other's intelligence. See Paul E. Fitzgerald, Jr., *Doctors, Lawyers Evaluate Each Other in New Study: Building Trust, Opening Communication Lines Could Improve Doctor/Lawyer Relationships*, PHYSICIAN EXECUTIVE, Mar.-Apr. 2002, at 20, 22 (reporting survey of doctors and lawyers in which each group acknowledged that intelligence was most positive aspect of working with members of other group).

educational experiences.²⁶ As a result, both start their careers in debt, often deeply so.²⁷ They both work long hours and suffer low job satisfaction and high suicide and substance abuse rates.²⁸ Members of both professions achieve higher-than-average economic status.²⁹ Justly so, both perceive themselves as helpers and healers. They

26. A constant thread in the doctor-lawyer dispute is that both sides assert their educational journey is harder than the other's. For an example, see *infra* text accompanying notes 84 and 85. As with most disagreements between the two professions, both sides have valid arguments. Medical education requires more years: four years of medical school plus three to seven years of supervised residency compared to three years of law school. On the other hand, residents earn salaries roughly equivalent to those of most starting lawyers. The average salary of a medical resident is around \$53,000. JAY YOUNGCLAUS, ASS'N OF AM. MED. COLL., M.D. ECONOMICS 10 (2009). Although the average starting salary of lawyers is higher, around \$85,000, the largest percentage of salaries for new graduates falls between \$40,000–\$60,000. *Salary Distribution Curve for the Class of 2009 Shows Relatively Few Salaries Were Close to the Mean*, NAT'L ASS'N FOR LAW PLACEMENT (July 2010), <http://www.nalp.org/startingsalarydistributionclassof2009>; see also *Starting Salary Distribution for Class of 2008 More Dramatic than Previous Years*, NAT'L ASS'N FOR LAW PLACEMENT (June 2009), <http://www.nalp.org/08saldistribution> (“The new reality is that very few law school graduates actually make either the median or mean starting salaries, and so it is neither helpful nor accurate to describe starting lawyer salaries using those modalities.”).

Both educational pursuits are arduous, but quite different. Medical school involves extremely difficult material, but the nonclinical early years of medical education focus mostly on memorization. Law is quite different. Memorization plays a much smaller role in legal education, perhaps thirty percent of the total package if one had to put a number on it. Most legal education involves training students in the skills of critical thinking and effective written and oral communication. See STANDARDS FOR APPROVAL OF LAW SCHS. § 302(a)(2)–(3) (2010–2011) (requiring all approved law schools to provide students with “substantial instruction in: . . . (2) legal analysis and reasoning, legal research, problem solving, and oral communication; [and] (3) writing in a legal context”). Anecdotally, the author has taught several physicians as law students. Most of them performed quite well, even as they continued to practice medicine while in law school.

27. Although both medical students and law students graduate with considerable debt, medical students on average face more debt than law students. Graduates of public medical schools have a median debt totaling more than \$120,000, while the median debt of private medical school graduates is above \$160,000. AM. ASS'N OF MED. COLL., MEDICAL SCHOOL TUITION AND YOUNG PHYSICIAN INDEBTEDNESS: AN UPDATE TO THE 2004 REPORT 5 (2007). Based on the typical ten-year payback schedule for Federal Direct Loans, public school graduates face monthly loan payments of more than \$1,700 while private school graduates face monthly loan payments of nearly \$2,500. *Id.* Law school debt is smaller, but still hefty. The average amount borrowed for law school for 2007–08 was \$59,324 for public schools and \$91,506 for private schools. *Legal Education Statistics*, AM. BAR ASS'N, <http://www.abanet.org/legaled/statistics/stats.html> (follow “Average Amount Borrowed” hyperlink) (last visited Mar. 10, 2011). A 2009 *U.S. News & World Report* survey showed that average law school debt ranged from a high of \$131,800 for graduates of the Thomas Jefferson School of Law in San Diego to a low of \$20,429 for Texas Southern University in Houston. *Whose Graduates Have the Most Debt?*, U.S. NEWS & WORLD REP., http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad_debt (last visited Mar. 10, 2011).

28. See *infra* notes 212–32 and accompanying text for a discussion of job satisfaction, happiness, suicide, and substance abuse rates among doctors and lawyers.

29. While a small cadre of lawyers—including some personal injury lawyers—become excessively rich, in the aggregate, doctors generally earn more than lawyers. The mean annual salary for all lawyers in 2008, according to the U.S. Bureau of Labor Statistics, was \$125,000. *Occupational Employment Statistics: Lawyers*, U.S. BUREAU OF LABOR STATISTICS (May 2008), <http://www.bls.gov/oes/2008/may/oes231011.htm>. Ten percent of lawyers earned more than \$166,000 per year. *Id.*

Of nine physician specialties listed by the Bureau of Labor, the lowest mean annual salary was \$153,000, for pediatricians. *Occupational Employment Statistics: Pediatricians, General*, U.S. BUREAU OF LABOR STATISTICS (May 2008), <http://www.bls.gov/oes/2008/may/oes291065.htm>; see also *Occupational Employment Statistics: Healthcare Practitioner and Technical Occupations (Major Group)*, U.S. BUREAU OF

share the general hallmarks, values, and benefits of all the professions. And both of their professions are under attack and losing public trust.³⁰

Despite these commonalities, doctors and lawyers seem forever destined to be at odds. While doctors and lawyers usually function well together in individual relationships as patients or clients of the other, the professions do not hold each other in high regard. The limited available research bears this out. A study found that most lawyers have a high degree of trust for their personal physicians, with 78.8% rating that trust level from eight to ten on a ten-point scale.³¹ That trust level declined substantially with regard to professional relationships, however. Only 40.6% of lawyers gave a high (eight to ten) trust rating to the doctors with whom they deal professionally.³² For doctors, both percentages were lower, with 71.2% giving their personal lawyers a high trust-level rating, and only 29% giving a high trust-level rating to the lawyers they deal with on a professional basis.³³ While only a small percentage (3.6%) of lawyers found nothing at all positive about working professionally with physicians, nearly a quarter of doctors felt that way about lawyers.³⁴

Relations between doctors and lawyers got off to a rocky start in the first reported U.S. medical malpractice case, *Cross v. Guthery*,³⁵ decided by a Connecticut court in 1794. The defendant operated on the plaintiff's wife to remove a breast. She died three hours after the surgery because, according to the court, the defendant "performed said operation in the most unskillful, ignorant and cruel manner."³⁶ Actions for wrongful death did not yet exist,³⁷ so the plaintiff sued for his own loss of consortium—i.e., for the loss of his wife's services and companionship, which includes conjugal relations. He sought damages of £1,000.³⁸ The jury awarded the plaintiff £40.³⁹ Predating the development of modern negligence law, which bases liability for professionals on whether they exercised the reasonable skill and care customary to their particular

LABOR STATISTICS (May 2008), <http://www.bls.gov/oes/2008/may/oes290000.htm> (providing links to statistics for the other eight physician specialties (oral and maxillofacial surgeons, anesthesiologists, family/general practitioners, internists, obstetricians/gynecologists, psychiatrists, surgeons, physicians/surgeons), all of which have a higher mean salary than pediatricians). A 2009 private national compensation survey of physicians in sixty-nine specialty areas showed that all had median salaries above \$166,000. *Physician Compensation Data*, CEJKA SEARCH, http://www.cejkasearch.com/compensation/amga_physician_compensation_survey.htm (last visited Mar. 12, 2011).

30. See *infra* notes 162–80 and accompanying text for a discussion of declining trust in the medical and legal professions.

31. Fitzgerald, *supra* note 25, at 20.

32. *Id.*

33. *Id.* at 22.

34. *Id.*

35. 2 Root 90 (Conn. 1794).

36. *Cross*, 2 Root at 91.

37. See Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 18–21 (2005) (discussing history of wrongful death actions in United States, noting they did not exist at common law and came into being in mid-nineteenth century).

38. *Cross*, 2 Root at 91.

39. *Id.*

profession, the court upheld the defendant's liability for breaching a promise to perform the operation "with skill and safety."⁴⁰

One would imagine things got a bit frosty in the litigation when the defendant doctor asserted that the plaintiff wasn't entitled to damages because he allegedly had agreed to settle the case for £15—which the doctor claimed the plaintiff owed him "for doctoring his wife."⁴¹ The court rejected the defense and ruled for the plaintiff.⁴²

Medical malpractice lawsuits actually were quite rare when *Cross v. Guthery* was decided. Incredible as it may sound today, some physicians initially embraced malpractice litigation as a way to cleanse their ranks of quacks and charlatans.⁴³ At the time of the American Revolution, only five percent of the nation's 3,500 medical practitioners, serving a colonial population of two million, had any type of medical degree.⁴⁴ Relations soured, however, with a surge of lawsuits filed in the mid-nineteenth century, a period denoted as the nation's first "medical malpractice crisis."⁴⁵ By 1860, a book review of an early treatise about medico-legal jurisprudence opined that "law and medicine had evolved into mutually incompatible professions."⁴⁶ Less restrained assessments of the relationship were abundant. As James Mohr noted, "[i]t would be easy to fill several hundred pages full of vituperative, anti-legal rhetoric from medical journals after mid-century."⁴⁷

The first reported unflattering comparison by doctors of lawyers to a certain ocean predator appeared around this time. In 1878 physician Eugene Sanger wrote that medical malpractice lawyers "follow us as the shark does the emigrant ship."⁴⁸ The epithet has enjoyed impressive staying power. A hundred years later, the president of the Association of American Medical Colleges told a graduating medical school class, "[w]e're swimming in shark-infested waters where the sharks are lawyers."⁴⁹ In 2009, the *Wall Street Journal* published an op-ed piece by a doctor calling for legal industry reform in which the writer characterized lawyers as "sharks," adding for good measure that they are "[s]lick" and "sleazy sneaks" and that their billing practices are "shady."⁵⁰

40. *Id.*

41. *Id.*

42. *Id.* at 92.

43. JAMES C. MOHR, *DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH-CENTURY AMERICA* 113 (1993).

44. MALMSHEIMER, *supra* note 15, at 20.

45. MOHR, *supra* note 43, at 111–19; *see also* Allen D. Spiegel & Florence Kavalier, *America's First Medical Malpractice Crisis, 1835–1865*, 22 *J. COMMUNITY HEALTH* 283 (1997) (discussing mid-nineteenth century medical malpractice crisis).

46. Spiegel & Kavalier, *supra* note 45, at 287 (quoting a *New York Medical Press* book review of John J. Elwell's *A Medico-Legal Treatise on Malpractice, Medical Evidence and Insanity, Comprising the Elements of Medical Jurisprudence*) (internal quotation marks omitted).

47. MOHR, *supra* note 43, at 116.

48. *Id.* (quoting physician Eugene Sanger) (internal quotation marks omitted).

49. Daniel M. Fox, *Physicians Versus Lawyers: A Conflict of Cultures*, in *AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC* 367, 368 (Scott Burris et al. eds., 1993) (quoting Robert G. Petersdorf speech from 1986) (internal quotation marks omitted); *see also* *New York Medical College: 196 New Doctors Are Told of Problems Awaiting Solutions*, *N.Y. TIMES*, June 3, 1986, at B4.

50. Richard B. Rafal, Op-Ed., *A Doctor's Plan for Legal Industry Reform*, *WALL ST. J.*, Sept. 4, 2009, at A17.

The web has provided doctors a ready and oft-used outlet to vent anger toward lawyers viscerally and at times viciously. On a “student doctor” internet forum, for example, someone struggling with his career choice posted the question of what it’s like to be a doctor versus a lawyer. While a number of posters offered reasoned comments, several of the responses were, shall we say, less than completely objective.

Three examples:

Physicians

1. Help people.
2. Selfless sacrifice.
3. Feel good about what they’re doing.
4. Make good money.
5. Intellectually satisfying career.

Lawyers

1. Use people.
2. On the lookout for the big paycheck, who cares who it hurts (physicians).
3. Have no soul therefore feel no regret at the end of the day.
4. The more evil you are, the more money you make.
5. A monkey could do this job.⁵¹

And

99% of lawyers give the rest a bad name.⁵²

And

Lawyers are cowards and spineless punks. If they had any REAL balls they’d just mug you for your money and kick you when you’re down.⁵³

While not common, some doctors have gone so far as to refuse to treat trial lawyers and even their families. In 2004, Dr. J. Chris Hawk, Charleston, S.C., proposed at an American Medical Association (AMA) meeting that the AMA adopt a policy endorsing the ethicalness of refusing to treat plaintiffs’ medical malpractice attorneys and their families.⁵⁴ Although the proposal was summarily rejected on a voice vote,⁵⁵ it highlights the depth of anger some doctors harbor toward their legal brothers and sisters.

51. Jpro, Posting to *Pre-Medical Allopathic [MD]: Premedical Student Discussion Forum*, STUDENT DOCTOR NETWORK (July 12, 2004, 5:42 AM), <http://forums.studentdoctor.net/showthread.php?t=134931> (minor punctuation and grammar errors corrected). Anecdotal comments don’t prove anything, of course, and are not offered for that purpose. Being professionals, doctors and lawyers rarely voice strong animosity toward one another in public. Anonymous comments, such as Internet postings, may provide the clearest window into their true feelings.

52. SpiderBill, Posting to *Pre-Medical Allopathic [MD]: Premedical Student Discussion Forum*, STUDENT DOCTOR NETWORK (July 12, 2004, 7:51 AM), <http://forums.studentdoctor.net/showthread.php?t=134931> (minor punctuation error corrected).

53. TTSD, Posting to *Pre-Medical Allopathic [MD]: Premedical Student Discussion Forum*, STUDENT DOCTOR NETWORK (July 12, 2004, 7:54 AM), <http://forums.studentdoctor.net/showthread.php?t=134931> (spelling error corrected).

54. Don Babwin, *Malpractice Debate Takes Ugly Turn: Doctors Angrily Shout Down Proposal to Deny Lawyers Health Care*, ASSOCIATED PRESS, June 15, 2004.

55. *Id.*

Why so much animosity? A natural competition has long existed between what have historically been seen as the two most learned and prestigious professions. This competitive spirit, which does not exist between other professions, rears its head in interesting places. Researching how doctors and lawyers are depicted in popular culture, for example, turned up a medical journal article by a doctor encouraging more doctors to write medical fiction. One reason he offered was “to compete with the impressive number of lawyers whose novels make the bestseller list.”⁵⁶ Even with regard to airport reading fodder, doctors and lawyers compete.

Beyond the “we’re-number-one!” complex seemingly suffered by both professions, commentators have offered a variety of reasons why doctors and lawyers don’t see eye to eye, including: different approaches to determining “truth” (objective scientific truth for doctors versus “whatever a judge or lay jury can be made to believe” for lawyers);⁵⁷ conflict between the right of self-determination (highly valued by lawyers and Anglo-American law) and the primacy given by doctors to the patient’s best physical health interests,⁵⁸ which does not always coincide with self-determination; and language barriers attributable to the specialized vocabularies of each profession,⁵⁹ including different meanings ascribed to relevant terms such as “causation” and “injury.”⁶⁰ To these differences can be added Daniel Fox’s oft-quoted list of five issues of “fundamental disagreement” that cause doctors to not like lawyers: their differing views on “the nature of authority; how conflict should be resolved; the relative importance of procedure and substance; the nature and significance of risk; and the legitimacy of politics as a method of solving problems.”⁶¹

But, of course, the primary bone of contention between doctors and lawyers, and the root of the abstract differences listed above, is that some lawyers sue doctors. Medical malpractice suits matter deeply to doctors. Being sued for medical malpractice can damage a doctor’s reputation,⁶² threaten personal assets, and drive up insurance premiums. Medical liability insurance premiums can exceed a ridiculous \$200,000 per

56. Marshall Goldberg, *On Writing and Publishing Medical Fiction*, 127 ANNALS INTERNAL MED. 413, 413 (1997).

57. Robert D. Gillette, *Malpractice: Why Physicians and Lawyers Differ*, J. LEGAL MED., Oct. 1976, at 9.

58. Jacobson & Bloche, *supra* note 2, at 2084.

59. Richard T. Shepherd, *Doctors and Lawyers: Separated by a Common Language or a Lack of Time?*, 58 MEDICO-LEGAL J. 61, 61 (1990).

60. Joan M. Gibson & Robert L. Schwartz, *Physicians and Lawyers: Science, Art, and Conflict*, 6 AM. J. L. & MED. 173, 175–76 (1980). “Whereas a physician might describe the cause of a death as cardiac arrest, a lawyer might describe the cause of the same death as a gunshot fired by a named assailant—a gunshot that triggered the particular sequence of physiological events that resulted in the victim’s cardiac arrest and death.” *Id.* at 179.

61. Fox, *supra* note 49, at 369. *But see* Jacobson, *supra* note 1, at 504–05 (questioning modern validity of some of the differences listed by Fox, including suggestion that only lawyers believe in the legitimacy of politics in solving problems, and noting physicians have become “masters of the political game”).

62. *See* John Gibeaut, *The Med-Mal Divide: As the AMA Talks Up Damage Caps and Specialty Courts, Solving the Medical Malpractice Clash May Require Bridging the Lawyer-Doctor Culture Gap*, A.B.A. J., Mar. 2005, at 39 (quoting doctor who was unsuccessfully sued for failing to detect patient’s colon cancer as stating that publicity from lawsuit caused his patient referrals to decline).

year for some risky specialties in some parts of the country.⁶³ (Not surprisingly, as a rhetorical device when attacking the tort system, doctors and their supporters frequently cite these high-end figures, which do not paint an accurate picture of the premiums most doctors pay.)⁶⁴

Being named as a party in a lawsuit also imposes emotional harm and gobbles up time, a commodity most doctors can't spare.⁶⁵ Doctors see lawsuits as an attack on their integrity. While malpractice lawsuits may be business as usual for plaintiffs' lawyers, they are intensely personal to physician-defendants. A medical writer explained it this way:

Lawyers, I find, appear to look upon a lawsuit much as the medical profession does a case of chicken pox—unpleasant perhaps, but no cause for shame and certainly not the end of the world. To the lawyer, a malpractice action means another client to be listened to and another set of papers to be filed at the courthouse.

To the physician, at the very least, a malpractice suit is a personal affront and an attack on perhaps the most vulnerable part of his personality—his sense of personal integrity and professional competence.⁶⁶

Thus, it is not surprising that doctors harbor anger and resentment toward a profession that holds such power to disrupt and harm their lives and livelihoods. Law professor Ellen Wertheimer put it bluntly: "It is at this point axiomatic that doctors hate

63. See, e.g., Richard A. Oppel Jr., *Bush Enters Fray Over Malpractice*, N.Y. TIMES, Jan. 17, 2003, at A24 (citing increased premiums in many states and specialties, such as obstetricians in Miami who pay more than \$200,000 per year for liability insurance).

64. Medical malpractice insurance premiums vary significantly depending on specialty and locale. RICHARD J. HILLMAN & KATHRYN G. ALLEN, U.S. GEN. ACCOUNTING OFFICE, GAO-04-128T, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO RATE INCREASES 4 (2003). Thus, in New York County, a New York neurosurgeon pays \$237,084 per year for malpractice insurance, while an allergist in the same county pays only \$7,978 per year. *Physician—What's My Premium?*, MED. LIABILITY MUT. INS. CO., <http://www.mlmic.com/portal/servlet/WhatsMyRate?hidden=physician&group1=occ&specialty=Neurosurgery&county=New+York> (last visited Mar. 10, 2011); *Physician—What's My Premium?*, MED. LIABILITY MUT. INS. CO., <http://www.mlmic.com/portal/servlet/WhatsMyRate?hidden=physician&group1=occ&specialty=Allergy%2C+including+pediatric+allergy&county=New+York> (last visited Mar. 10, 2011). In Arizona, premiums for neurosurgeons average \$87,416 per year, while premiums in Sacramento, California for neurosurgeons average only \$39,165. A general family practitioner, on the other hand, pays an average of only \$12,752 in Arizona and only \$7,245 in Sacramento. TEXAS DEP'T OF INS., MEDICAL MALPRACTICE INSURANCE: OVERVIEW AND DISCUSSION 31 (2003). Obstetrics and gynecology is another high-risk, high-premium specialty. As with neurosurgeons, however, the liability premiums paid by OB/GYNs vary widely across the United States. For example, rates in Tennessee average less than \$40,000 per year, *id.* at 34, while rates in Florida can average more than \$180,000 per year. *Id.* at 31. Comparing two populous states, Florida and California, obstetricians pay 200% more and general surgeons 300% more in Florida than in California. H.E. Frech III et al., *An Economic Assessment of Damage Caps in Medical Malpractice Litigation Imposed by State Laws and the Implications for Federal Policy and Law*, 16 HEALTH MATRIX 693, 709 (2006). One study found that the mean malpractice premium for physicians nationwide was \$18,400 in 2000, lower in adjusted dollars than in 1986. Marc A. Rodwin et al., *Malpractice Premiums and Physicians' Income: Perceptions of a Crisis Conflict with Empirical Evidence*, 25 HEALTH AFFAIRS 750, 751–53 (2006).

65. See PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 126 (1993) (discussing finding of physician survey that doctors sued for malpractice spend, on average, six work days on each case).

66. Gillette, *supra* note 57, at 9–10.

lawyers.”⁶⁷ They don’t appear to discriminate between plaintiffs’ medical malpractice lawyers and other lawyers,⁶⁸ which is unfortunate, since only a small percentage of lawyers devote a significant amount of their practice to representing plaintiffs in personal injury cases.⁶⁹

Doctors dislike lawyers more than lawyers dislike doctors. We saw, for example, somewhat higher trust ratings by lawyers of doctors than vice versa in the survey discussed above,⁷⁰ and a search of web content and other literature suggests that lawyers unleash public attacks on doctors at a far lower rate than doctors do against lawyers.

The main reason for the hostility imbalance is that doctors generally cannot sue lawyers. The legal profession gets to judge doctors, but doctors don’t get to judge lawyers.⁷¹ This “I-can-sue-you, but-you-can’t-sue-me” power asymmetry is no doubt particularly grating to the many doctors who consider themselves to be in the superior profession. Asked to name the primary reason doctors and lawyers don’t get along, law and medical school Professor Sheldon Kurtz said, “Doctors don’t like lawyers intruding on their professional judgment, second-guessing and judging them.”⁷²

Lawyers enjoy the luxury of judging themselves. While lawyers no doubt make at least as many mistakes as doctors, because the harm is not physical and not always immediately apparent, more of their errors escape scrutiny. It’s true that, unlike in medicine, a formalized error-correction procedure—an appeal—is part of the foundation of the legal system, but the focus of most appeals is on trial court errors, not attorney errors.

Some doctors have attempted to turn the tables on their lawyer tormentors through lawsuits. In the 1970s, medical malpractice defendants filed a series of actions attempting to get back at lawyers they believed had filed unfounded suits against them.⁷³ The legal theories available to the doctors, such as malicious prosecution, abuse of process, and defamation, proved not up to the challenge and the movement

67. Ellen Wertheimer, *Calling It a Leg Doesn't Make It a Leg: Doctors, Lawyers, and Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 154, 154 (2008).

68. See Gibeaut, *supra* note 62, at 40 (quoting former Florida State Senator Steven A. Geller stating: “I’m a zoning and land-use lawyer, and I get that all the time. . . . They just hate lawyers.” (internal quotation marks omitted)).

69. See WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 113 (2004) (“In 1995, 8 percent of practicing Chicago attorneys spent a quarter or more of their time representing plaintiffs in personal injury cases, while only 6 percent spent more than half their time on such representation.”).

70. See *supra* notes 31–34 and accompanying text for a discussion of attorneys’ trust ratings of doctors, and vice versa.

71. Wertheimer, *supra* note 67, at 156 (making this observation).

72. Telephone Interview with Sheldon F. Kurtz, Percy Bordwell Professor of Law, University of Iowa College of Law, Professor of Surgery, University of Iowa College of Medicine (Jan. 26, 2010). For seventeen years, Professor Kurtz has taught an innovative law and medicine seminar involving law students shadowing medical professionals on the job. See *infra* notes 330–34 for a discussion of this course.

73. See generally Sheila L. Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003 (1977) (discussing physician claims against plaintiffs’ attorneys).

dissipated.⁷⁴ More recently, physicians have set up websites listing medical malpractice plaintiffs and their lawyers, ostensibly for the purpose of encouraging doctors to blacklist them as patients.⁷⁵ One of the sites, litipages.com, encouraged medical malpractice plaintiffs who lost their cases to turn around and sue their lawyers for malpractice.⁷⁶ In 2002, Jeffrey Segal, a Florida neurosurgeon, established an insurance policy designed to provide doctors with the resources to sue plaintiffs' medical malpractice lawyers whom were believed to have filed frivolous suits against them.⁷⁷ The Florida Medical Association voted to endorse the insurance program.⁷⁸

Nevertheless, while lawyers don't hate doctors with the same intensity of feeling that doctors direct at them,⁷⁹ neither are they great fans, especially personal injury lawyers. One explanation is simply that people tend not to like those who don't like them. Liking research shows that we like people who like us and dislike those who don't.⁸⁰ Indeed, "the single most powerful determinant of whether one person will like another is whether the other likes that person."⁸¹ With doctors constantly bad-mouthing lawyers, it's no wonder lawyers react negatively to them. Moreover, just as doctors harbor negative feelings toward lawyers because lawyers' actions jeopardize physicians' livelihood, the tort reform movement, which is spearheaded in large part by medical interests, is delivering a financial blow to plaintiffs' personal injury lawyers.⁸²

Lawyers also get prickly when doctors assert claims of intellectual and professional superiority. "Ego, arrogance and an elite attitude" were the primary

74. See *id.* at 1020–74 (discussing substantial obstacles to physicians successfully suing lawyers under theories of malicious prosecution, abuse of process, defamation, intentional infliction of mental distress, prima facie tort, and professional negligence).

75. See Julie Hilden, *The Legality of Web "Blacklists": Should It Be Against the Law to List Malpracticing Doctors and Litigation-Happy Patients on the Internet?*, FINDLAW (Aug. 1, 2006), http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/hilden/20060801.html (explaining problems with websites like LitiPages.com, which list previously unsuccessful medical malpractice plaintiffs and plaintiffs' attorneys).

76. Rebecca Riddick, *Web Site Encourages Blacklist of Med-Mal Plaintiffs*, LAW.COM (July 25, 2006), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005550379>.

77. Tanya Albert, *Frivolous Suits Feel Wrath of Medical Justice: One Physician Hopes Legal Insurance Could Be One Way to Halt the Medical Malpractice Crisis*, AM. MED. NEWS, Feb. 11, 2002, at 1. The insurance policy was also designed to allow doctors to sue expert witnesses as well. *Id.*

78. *Id.*

79. Of course, every generalization has exceptions. When the author posted a status update on his Facebook page that he was researching relationships between doctors and lawyers, one former student, now a personal injury lawyer, took the opportunity to lash out rather vituperatively at doctors:

Since you didn't ask, my gripe is doctors who tell my clients they are on the verge of death due to the car that hit them, treat them for three years and bill their insurance to death, yet get on the stand or in deposition and claim that they weren't really hurt in the first place. Great, now my client is addicted to Vicodin and being called a liar by her own doctor in open court, who just managed to collect \$15,000 from Blue Cross Blue Shield. Sorry. This is a touchy subject for me.

Posting of Jesse Gibson to Andrew McClurg's Facebook page, <http://www.facebook.com> (July, 16, 2009, 12:00 PM) (on file with author) (minor punctuation and other errors corrected).

80. ELLIOT ARONSON ET AL., *SOCIAL PSYCHOLOGY* 324–25 (5th ed. 2005).

81. ELLIOT ARONSON, *THE SOCIAL ANIMAL* 389 (8th ed., Worth Publishers 1999).

82. See *infra* notes 106–13 and accompanying text for a discussion of tort reform's impact on personal injury lawyers.

physician traits identified by lawyers as the greatest challenge to working with doctors.⁸³ Dr. Kevin Pho posted a link on his blog, KevinMD, to an article in the *American Bar Association Journal* analyzing the question of whether it is appropriate for lawyers, who receive juris doctor degrees, to use the title “Doctor.” The ensuing comments by both doctors and lawyers include this huffy exchange between “Shadow Merchant” and “Anonymous”:

Shadow Merchant: . . . The guy who equated the JD with the PhD? You’re insane. Academically, you couldn’t hold my MD jockstrap, much less a hard-science PhD who may have been working at the bleeding edge of research for five or six years to get his degree.⁸⁴

. . . .

Anonymous: . . . Typical reasoning by a pedantic MD. Your critical thinking skills are on par with a 16 year old. My wife’s brother-in-law has a PhD in Chemical Engineering, so I am fully aware of what he went through and what it takes. I can assure you the level of time he put in certainly does not outweigh what I did—not even close.

. . . .

If we were to follow your logic to its inevitable conclusion (of which I know you’re genetically incapable), we would have to allow the use of the title only to those who have demonstrated that their education met the “Jockstrap Standard” of condescending MDs like you.⁸⁵

It’s unclear whether both sides really feel superior, or if one or both of them suffer from inferiority complexes with regard to the other which they hide behind an air of superiority. In any event, we again see no love lost between the two professions.

After an early history of relative peace, lawyers and doctors have been feuding for roughly 160 years, their invective becoming shriller over time. For most of this period, the doctor-lawyer fracas was largely a backroom brawl of interest only to the combatants. The national tort reform movement took the fight public.

III. THE TORT REFORM SMEAR

A telling statement of the extreme polarizing effect of the doctor-lawyer fight occurred during President Barack Obama’s September 2009 address to a joint session of Congress in which he pushed for his overhaul of the nation’s healthcare system, which ultimately passed. At roughly the thirty-five minute mark of the forty-seven minute speech, the President, a lawyer, said: “Now, finally, many in this chamber—particularly on the Republican side of the aisle—have long insisted that reforming our

83. Fitzgerald, *supra* note 25, at 22–23 (noting that 23.5% of surveyed lawyers identified doctors’ “ego, arrogance and . . . elite attitude” as greatest challenge to working with them; doctors’ lack of business knowledge placed second, with 22.5% of lawyers listing it as greatest challenge).

84. Shadow Merchant, *Should Lawyers Be Called “Doctor”?*, KEVINMD (Aug. 9, 2009, 7:09 PM), <http://www.kevinmd.com/blog/2007/02/should-lawyers-be-called-doctor.html>.

85. Anonymous, *Should Lawyers Be Called “Doctor”?*, KEVINMD (Aug. 26, 2009, 11:54 AM), <http://www.kevinmd.com/blog/2007/02/should-lawyers-be-called-doctor.html> (spelling and minor grammatical errors corrected).

medical malpractice laws can help bring down the cost of health care.”⁸⁶ This puny tort reform reference ignited a rousing standing ovation by Republicans lasting twenty-six seconds⁸⁷—tied for the second longest ovation of the speech.⁸⁸

The ovation outlasted those that greeted the President’s promise to not rest until he created jobs for 700,000 unemployed Americans (twenty-three seconds)⁸⁹ and his proclamation that the economy had been brought back from the brink of disaster (eighteen seconds).⁹⁰ It was longer than the applause in response to virtually every other important healthcare issue, including the need to rein in the crushing costs of Medicare and Medicaid (ten seconds),⁹¹ assure coverage for preexisting conditions (twenty seconds),⁹² and impose maximum out-of-pocket payment limits because “no one should go broke because they get sick” (fourteen seconds).⁹³

Surprisingly, the issue of medical malpractice tort reform never reached prominence in the national healthcare debate,⁹⁴ overshadowed by issues both larger (whether the plan should incorporate a public option⁹⁵) and smaller (the bogus “death panel” controversy⁹⁶). But the Republican response to the President’s mere mention of

86. Barack Obama, U.S. President, Address to Congress on Health Insurance Reform (Sept. 9, 2009), <http://www.whitehouse.gov/video/President-Obama-Address-to-Congress-on-Health-Insurance>. Obama also raised the malpractice issue in June 2009, when addressing the American Medical Association’s House of Delegates at their annual meeting. Discussing the need for healthcare reform, he took time to assure the doctors’ group that he “recognize[d] that it will be hard to make some of these changes if doctors feel like they are constantly looking over their shoulder for fear of lawsuits That’s a real issue.” Barack Obama, U.S. President, Address to Physicians at AMA Meeting (June 15, 2009), <http://www.ama-assn.org/ama/pub/about-ama/our-people/house-delegates/2009-annual-meeting/speeches/president-obama-speech.shtml>. He promised to look at a wide range of fixes, although he voiced opposition to caps on damages, a popular pillar of the tort reform movement. *Id.*

87. Obama, Address to Congress on Health Insurance Reform, *supra* note 86 (35:19–35:45).

88. The longest ovation during the speech clocked in at twenty-eight seconds. It came in response to a statement debunking the inflammatory rhetoric that the proposed healthcare plan would create bureaucratic “death panels” to terminate senior citizens. *Id.* (20:38–21:35).

89. *Id.* (0:52–1:20).

90. *Id.* (1:38–1:59).

91. *Id.* (8:03–8:21).

92. *Id.* (13:27–13:53).

93. *Id.* (14:27–14:49).

94. See Tom Hamburger & James Oliphant, *The Nation: No Overhaul for Medical Malpractice*, L.A. TIMES, Jan. 19, 2010, at A10 (asserting that massive lobbying by nation’s trial lawyers kept major tort reform out of national healthcare legislation).

95. See, e.g., David Ignatius, *Paging Dr. Reform*, WASH. POST, Aug. 20, 2009, at A17 (arguing that healthcare reform should be modeled after six existing public options in U.S.); Noam N. Levey & Janet Hook, *Public Option Privately Pushed: White House Discreetly Labors to Weave Coalition on Health Care*, CHI. TRIB., Oct. 4, 2009, at C34 (detailing Obama administration’s behind-the-scenes campaign in support of a public option whereby citizens could purchase insurance coverage from government); Richard H. Thaler, *A Public Option Isn’t a Curse, or a Cure*, N.Y. TIMES, Aug. 16, 2009, at BU4 (evaluating whether public option could compete successfully with privately owned companies).

96. See, e.g., “Death Panel” Claims, *Distortions: Don’t Let False Claims Dominate the Health Care Debate*, STAR TRIB. (Minneapolis, Minn.), Sept. 1, 2009, at 8A (discussing provisions for end-of-life counseling in proposed healthcare plan, prompting “death panel” debate); Ben Evans, *GOP Backers Flee Idea of “End-of-Life” Counsel*, NEWSDAY (New York), Aug. 15, 2009, at A8 (describing conservative backlash to end-of-life counseling, likening practice as a step toward euthanasia); Charles Krauthammer, *Let’s Be Honest About the Health-Care Bill’s Death Counseling*, PITTSBURGH POST-GAZETTE, Aug. 22, 2009, at B6 (arguing

malpractice lawsuits demonstrated the issue is highly charged and that the divide between doctors and lawyers is wide. Tort reform is a classic example of a wedge issue in politics, with Democrats opposing it and Republicans supporting it.⁹⁷ To a large extent, the politicians serve as mercenaries fighting on behalf of their legal or medical interest group constituencies. With financial support from well-funded organizations such as the Association of Trial Lawyers of America (ATLA)⁹⁸ and the American Medical Association (AMA), the trial lawyers back Democrats⁹⁹ while medical and other pro-tort reform groups back Republicans.¹⁰⁰ The battle has turned the medical-malpractice liability reform debate into “[a]n arms race of political spending . . . , with physicians and attorneys vying for the top position.”¹⁰¹

The tort reform debate provides a highly visible national stage for the doctor-lawyer battle. We never hear about architects and engineers, dentists and accountants, or other professionals duking it out, but doctors and lawyers regularly grapple in public

that end-of-life provisions in healthcare plan merely incentivize doctors to encourage patients to write living wills).

97. See, e.g., Tony Fong, *Partisan Foils Pose Challenge to Malpractice Reform Measure*, 33 MOD. HEALTHCARE 8, 8–9 (2003) (discussing lack of bipartisan support for malpractice reform and stating that Republicans push tort reform by focusing on damage caps while Democrats advocate healthcare reform by focusing on insurance issues); Darshak Sanghavi, *Do We Have a Winner? How to Reform the Broken Medical Malpractice System*, SLATE, Nov. 9, 2009, <http://www.slate.com/id/2235027/> (stating that Republican position is to make it harder for patients to sue, while Democratic position is that doctors are getting away with committing medical errors, leaving lawsuits as the only way for patients to fight back).

98. ATLA renamed itself as the American Association for Justice in 2006. *About AAJ: Mission & History*, AM. ASS’N FOR JUST., <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/418.htm> (last visited Mar 10, 2011). While no explanation is offered on the organization’s website for the name change, substituting “Justice” for “Trial Lawyers” was no doubt a public relations move. The doctors and other pro-tort reformers have done such an effective job bashing trial lawyers that one would not be surprised to see “greedytriallawyers” emerge as one word in the next edition of the Oxford dictionary.

99. Between 1994 and 2007, trial lawyers invested nearly a half-billion dollars in Democratic candidates. Kimberley A. Strassel, *Tort Tribute*, WALL ST. J., Apr. 27, 2007, at A16. ATLA supports primarily Democratic political candidates. From 1997 to 2009, ATLA financially supported fifty-three current Democratic Senators and only seventeen Republican Senators, as well as two Independents. *Committees and Candidates Supported/Opposed: American Association for Justice Political Action Committee*, FED. ELECTION COMM’N, http://query.nictusa.com/cgi-bin/com_supopp/C00024521/ (last visited Nov. 18, 2010).

100. The American Medical Association (AMA), the nation’s largest physicians’ organization, has traditionally supported the Republican Party, contributing more to Republican candidates than Democratic candidates in the four election cycles prior to 2008. Robert Pear, *Doctors’ Group Opposes Public Health Insurance Plan*, N.Y. TIMES, June 11, 2009, at A19. In 2008, an aberration occurred, when contributions to Democrats edged out Republicans with fifty-six percent of the total amount spent. *Id.*; see also *Health Professionals: Long-Term Contribution Trends*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/totals.php?cycle=2010&ind=H01> (last visited Mar. 10, 2011) (showing that health professionals gave more to Republican candidates in every election cycle from 1990 to 2006, giving \$285,949,328 to Republicans both individually and through interest groups). *But see* Erica Frank et al., *Political Self-characterization of U.S. Medical Students*, 22 J. GEN. INTERNAL MED. 514, 516 (2007) (reporting that forty percent of U.S. medical students characterize themselves as liberals, while only twenty-six percent label themselves as conservatives); Erica Frank, *Political Self-characterization of US Women Physicians*, 48 SOC. SCI. & MED. 1475, 1475 (1999) (commenting on lack of significant research on political affiliations of physicians and asserting that while most female physicians in the U.S. describe themselves as moderates, they tend to be more liberal than conservative).

101. William M. Sage, *The Lawyerization of Medicine*, 26 J. HEALTH POL. POL’Y & L. 1179, 1183 (2001).

with their “political, legal and cultural war over who to blame”¹⁰² for malpractice lawsuits and high healthcare and malpractice insurance costs.

Substantively, medical malpractice tort reform has proved to be a powerful weapon wielded, at least indirectly, against lawyers. Hundreds of medical malpractice reform bills have been passed by state legislatures in the past three decades,¹⁰³ although some have been struck down by courts.¹⁰⁴ Congress has considered at least twenty bills proposing medical malpractice lawsuit reforms, although no broad-based bills have yet passed.¹⁰⁵

Some tort reform measures, such as statutory maximum caps on noneconomic damages and restrictions on contingency fees, directly impinge the law practices and revenues of plaintiffs’ lawyers. Roughly half of the states impose caps on noneconomic damages¹⁰⁶ and limitations on attorneys’ fees in medical malpractice cases.¹⁰⁷ While fee limitations are portrayed by tort reformers as an effort to allow injured plaintiffs to retain more of their damages, lawyers are convinced they are the real target. In 2004, for example, Florida voters passed a constitutional amendment limiting contingency fees in medical malpractice cases.¹⁰⁸ The amendment made it on the ballot through the efforts of medical interests using Florida’s citizen initiative process.¹⁰⁹ The amendment was presented in advertisements and by signature gatherers¹¹⁰ as a measure to allow

102. Gibeaut, *supra* note 62, at 39.

103. Joanna M. Shepherd, *Tort Reforms’ Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 906 (2008).

104. *Id.* at 906–07.

105. *Id.* at 907.

106. See HENRY COHEN, CONG. RESEARCH SERV., MEDICAL MALPRACTICE LIABILITY REFORM: LEGAL ISSUES AND FIFTY-STATE SURVEY OF CAPS ON PUNITIVE DAMAGES AND NONECONOMIC DAMAGES 12–19 (2005), available at <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL3169202082005.pdf> (citing twenty-three states with caps on noneconomic damages in medical actions); F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 498 n.293 (2006) (listing statutes from twenty-two states imposing limitations on noneconomic damages in medical actions).

107. See AM. ACAD. OF FAMILY PHYSICIANS, LIABILITY: LIMITS ON ATTORNEY FEES 1 (2005), available at http://www.aafp.org/online/etc/medialib/aafp_org/documents/policy/state/liability-fees.Par.0001.File.tmp/stateadvocacy_Liability_Attorney%20Fees.pdf (listing twenty-three states that have passed legislation limiting contingency fees in medical cases); Casey L. Dwyer, *An Empirical Examination of the Equal Protection Challenge to Contingency Fee Restrictions in Medical Malpractice Reform Statutes*, 56 DUKE L.J. 611, 615–16 (2006) (discussing twenty-four state statutes that limit contingency fees in medical malpractice cases, either through sliding-scale limitations, fixed maximum percentages, or through judicial review of the reasonableness of fee arrangements).

108. Eric S. Matthew, *A New Prescription: How a Thorough Diagnosis of the “Medical Malpractice” Amendments Reveals Potential Cures for Florida’s Ailing Citizen Initiative Process*, 14 U. MIAMI BUS. L. REV. 331, 333 (2006). The amendment limits contingency fees to thirty percent of the first \$250,000 awarded and to ten percent of any additional amounts. FLA. CONST. art. I, § 26.

109. See generally Matthew, *supra* note 108 (describing Florida’s citizen initiative process for amending their constitution through lens of malpractice attorneys’ fee amendment and two other medical malpractice constitutional amendments).

110. This author was a professor at the Florida International University (FIU) College of Law at the time and remembers being approached on the FIU campus several times by persons paid to gather the signatures necessary to get the measure on the ballot. Each time, the pitch of the signature gatherers was that the amendment would prevent lawyers from getting rich off the damage awards of injured medical malpractice victims.

malpractice claimants to keep more of their awards, but plaintiffs' attorneys argued that the real purpose was to prevent lawyers from taking on medical malpractice cases. One prominent Florida plaintiffs' lawyer said of the amendment: "It's going to put us out of business."¹¹¹

The indirect costs of tort reform on plaintiffs' lawyers may be higher than the direct costs inflicted by specific tort reform measures. Plaintiffs' attorneys believe the rhetorical assault on tort litigation has seriously hampered their practices by making jurors predisposed to be skeptical of plaintiffs and their claims.¹¹² In a survey of plaintiffs' lawyers, ninety-one percent said they believed tort reform had either a negative or strongly negative impact on their practices.¹¹³

Rhetorically, fallacious and inflammatory attacks are regularly used to poison public opinion toward lawyers, and to a lesser extent doctors. Pro-tort reform rhetoric continually tells the American people that lawyers are greedy, responsible for higher healthcare costs (not only because of lawsuits, but also due to the defensive medicine doctors must practice to avoid them¹¹⁴), and are forcing doctors to leave the state or quit practicing altogether. Many of the broadsides are blatant ad hominem attacks and fallacious appeals to emotions such as hatred and fear.¹¹⁵

An organization called Doctors for Medical Liability Reform provides examples of these attacks and appeals, including print and broadcast ads, posters, DVDs, and even a set of animated cartoons.¹¹⁶ One of the latter, titled "Restoring Balance to Our Healthcare System," depicts a set of scales filled with three smirking lawyers sitting in one bucket of the scales and a larger group of bewildered-looking patients, along with a doctor, in the other. The lawyers are awash in greenbacks. One of them is drinking a cocktail.¹¹⁷ The text accompanying the animation says in part:

111. Jane Musgrave, *Doctors Ask Court to Uphold Limits on Lawyer's Fees*, PALM BEACH POST, July 24, 2005, at 1C (quoting lawyer Robert Montgomery) (internal quotation marks omitted). Another plaintiffs' lawyer said: "It's a way to get rid of medical negligence cases entirely because we simply couldn't afford to take them. And that's what they really want to accomplish." *Id.* (quoting lawyer Sean Domnick) (internal quotation marks omitted) (minor punctuation error omitted). Montgomery cited the high costs of medical malpractice cases as a deterrent to accepting cases under the fee limits, stating: "It's not anything to spend three hundred, four, five, six, even seven hundred thousand dollars to prepare [a medical malpractice case for trial]." *Id.* (quoting lawyer Robert Montgomery) (internal quotation marks omitted). In a controversial move ultimately upheld by the Florida Supreme Court, Florida trial lawyers developed a procedure whereby potential clients can waive their "constitutional right" to the fee limits as a way around the amendment. See Brian Bandell, *Court Permits Contingency Fee Waiver*, S. FLA. BUS. J., (Dec. 30, 2005, 1:01 PM), <http://southflorida.bizjournals.com/southflorida/stories/2005/12/26/daily18.html>.

112. HALTOM & MCCANN, *supra* note 69, at 299.

113. *Id.* at 300.

114. See *infra* note 185 and accompanying text for a discussion of defensive medicine.

115. See *infra* Part V.B for a discussion of common logical fallacies in the tort reform debate.

116. See PROTECT PATIENTS NOW!, <http://www.protectpatientsnow.org/> (last visited Mar. 12, 2011) (created by Doctors for Medical Liability Reform but now project of Health Coalition on Liability and Access).

117. The animation has apparently been removed from the Protect Patients Now website. An image from the animation, however, can be found at *Doctors Group's Cartoon Blames the Greedy Lawyers, THIS MAKES ME SICK* (Dec. 29, 2005, 12:36 AM), http://thismakesmesick.typepad.com/this_makes_me_sick/2005/12/doctors_for_med.html. This is how the American Academy of Orthopaedic Surgeons described it:

For generations doctors have worked in balance with other professions to deliver the world's best health care.

But in recent years greedy personal injury lawyers have launched get-rich predatory practices.

Aimed at doctors leaving you without care.

Who's thrown our health care system out of balance? [Doctor falls out of the bucket while the scales tilt toward the lawyers; patients try to save him.]

Why are health care costs rising?

Who's getting rich off rising costs?

You guessed it. [Animation zooms in on grinning lawyers to the sound of a cash register ringing.]

Personal injury lawyers are responsible for:

—Driving insurance premiums for doctors sky-high.

—Forcing good doctors out of business.

—Leaving you without care when you need it.

America pays. Patients pay. You pay.¹¹⁸

As discussed in Part V.B., arguments of this type succeed not on their merits, but because they persuade people to hate and fear lawyers.¹¹⁹ As such, they only exacerbate the conflict and encourage the legal profession to respond in kind.

In addition to rhetorical defects, as often as not, tort reform attacks are substantively flawed. A 2005 television spot called “Shark Bait” released by America’s Health Insurance Plans, an insurance industry group, showed trial lawyers as sharks in a feeding frenzy.¹²⁰ The voiceover said:

They're circling. America's trial lawyers are on the prowl. And your health care is still their favorite bait. Their lawsuit feeding frenzy costs every American household up to \$1,200 a year in higher medical bills. That's money that could have gone in your pocket. Now it's just fish food. It's time for Congress to stop lawsuit abuse. Because until they do, it won't be safe for anyone to go back in the water.¹²¹

[The animation] asks the question: “Who's thrown our health care system out of balance?” On the scales of justice are patients and physicians on one side and “greedy personal injury lawyers” on the other. As money amasses around the personal injury lawyers, the scales are thrown off-balance, and physicians are left hanging. The animation can be easily forwarded to others to help build an active, grassroots network.

DMLR Launches Advocacy Campaign with Media Roundtable, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, <http://www2.aaos.org/aaos/archives/bulletin/oct05/fline1.asp> (last visited Mar. 12, 2011).

118. *Animations*, PROTECT PATIENTS NOW!, <http://www.kintera.org/site/c.8oIDJLNnHIE/b.1154905/k.282E/Animations.htm> (last visited Feb. 19, 2010) (animation and attached commentary have since been removed from website).

119. See *infra* notes 307–17 and accompanying text.

120. Annenburg Pub. Policy Ctr., *Insurance Industry Ad Makes Fishy Claim About Lawyers*, FACTCHECK.ORG (Apr. 26, 2005), http://www.factcheck.org/politics/insurance_industry_ad_makes_fishy_claim_about.html.

121. *Id.*

In exposing the ad as “fishy,” FactCheck.org, a non-profit project of the Annenberg Public Policy Center of the University of Pennsylvania, pointed out that if the ad’s claim was true, “it would mean that almost [three] percent of the typical American household’s income was being lost to ‘lawsuit abuse’ in the medical arena alone.”¹²²

Of course, neither side has clean hands in the medical malpractice tort reform debate. FactCheck.org also exposed the misleading nature of an ad from ATLA attacking Senator Rick Santorum (R-Pa.) for supporting a medical malpractice reform bill that the ad said would protect negligent doctors at the expense of women injured by malpractice, “even when they lose their ability to have children.”¹²³ The bill, which was not enacted into law, would have restricted the rights of *all* medical malpractice claimants—not simply women—by capping damages for noneconomic losses at \$250,000.¹²⁴ Moreover, the ad failed to mention the bill also would have capped the contingency fees of plaintiffs’ lawyers in medical malpractice cases.¹²⁵

Lawyers have been more restrained than doctors in their public advocacy against tort reform and, specifically, their assaults on doctors. William Haltom and Michael McCann have argued that lawyers “virtually conceded the public domain of popular discourse” regarding tort litigation to the pro-tort reformers, opting instead to pursue a “stealth” policy of insider legislative and judicial [maneuvering].¹²⁶ Comparing the relative volume and intensity of doctor-lawyer tort reform rhetoric seems to bear out their assertion. Most lawyer rhetoric about the malpractice debate offered to the public is limited to debunking doctors’ claims about why tort reform is needed, what it will accomplish, and who it will affect.¹²⁷ But lawyers do regularly attack doctors on a couple of fronts. Some anti-tort reform rhetoric would have people believe that: (1) doctors are killing off patients with reckless abandon; and (2) don’t even care about it.

122. *Id.*

123. Annenburg Pub. Policy Ctr., *Objection! In re Santorum, Trial Lawyers Withhold Evidence*, FACTCHECK.ORG (May 12, 2006), http://www.factcheck.org/elections-2006/objection_in_re_santorum_trial_lawyers_withhold.html.

124. *Id.*

125. *Id.*

126. HALTOM & MCCANN, *supra* note 69, at 112 (emphasis omitted).

127. See, e.g., Ryan Bradley, *Illinois Supreme Court Rules Against Tort Reform*, MISSOURI ACCIDENT LAWYER BLOG (Feb. 5, 2010), http://www.missouriaccidentlawyerblog.com/2010/02/illinois_supreme_court_rules_a.html (“What supporters don’t realize is that tort reform isn’t about protecting patients at all. It’s about taking money directly out of the pocket of seriously injured people at the most challenging moment in their lives and protecting hospitals and insurance companies.”); Adam Cohen, Op-Ed., *They Say We Have Too Many Lawsuits? Tell It to Jack Cline*, N.Y. TIMES, Jan. 14, 2007, <http://www.nytimes.com/2007/01/14/opinion/14sun2.html> (presenting journalist/lawyer’s perspective that real victims of tort reform measures are severely injured patients); Peter J. Flowers, *Voice of the People*, CHI. TRIB., Sept. 17, 2009, http://articles.chicagotribune.com/2009-09-17/news/0909160558_1_medical-errors-medical-malpractice-medical-malpractice (noting opinion of Illinois Trial Lawyers Association’s President that limiting patients’ access to “the legal system ignores the larger issue: patient safety”); Patrick J. Kenneally, Letter to the Editor, N.Y. TIMES, Sept. 28, 2009, <http://query.nytimes.com/gst/fullpage.html?res=9C0CEED9113AF93BA1575AC0A96F9C8B63> (quoting personal injury lawyer who opined that “[tort] reform is unfair to patients” (internal quotation marks omitted)); James C. McKinley Jr., *Trial Lawyers Begin Effort Against Cutting Jury Awards*, N.Y. TIMES, Mar. 18, 2003, at B2 (noting that New York State Trial Lawyers Association’s public campaign against tort reform focused on “important role civil suits have played in making products, workplaces and medical procedures safer”).

On the first point, frequently cited is a 1999 report by The Institute of Medicine (IOM).¹²⁸ Extrapolating from two studies of adverse patient incidents, the IOM report estimated that between 44,000 and 98,000 people die in hospitals each year as a result of medical errors.¹²⁹ Lawyers and other anti-tort reformers commonly cite the higher figure, while ignoring the lower figure, and fail to provide explanation regarding how the figures were arrived at or to place them in context.¹³⁰ For example, the IOM statistics frequently are cited without mentioning that the authors of the original reports cautioned they could not be certain that all of the deaths would have been prevented with optimal care.¹³¹ Reporting of the figures by lawyers seldom advances beyond dramatized sound-bites. For example, the website, 98000reasons.org, run by the American Association for Justice (formerly the Association of Trial Lawyers of America, or ATLA),¹³² features these streaming headlines: “98,000 patients are killed annually by medical errors . . . [two animated jetliners move across screen] . . . That’s like TWO 737s crashing every day for a whole year.”¹³³ Lawyers use the same data to claim that “[m]edical malpractice is the third leading cause of death in the U.S.”¹³⁴ Googling “98,000 doctors” offers a good snapshot of the scope of this widely disseminated partial-truth.

On the second point, some anti-tort reform dialogue attempts to paint doctors as not caring enough about patients to weed the unqualified from their ranks. For example, the consumer group Public Citizen released a report in 2004 called “Dangerous Maryland Doctors” purporting to show that just three percent of Maryland’s doctors are responsible for fifty percent of all medical malpractice

128. COMM. ON QUALITY OF HEALTH CARE IN AM., INST. OF MED., *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM I* (Linda T. Kohn et al. eds., 2000). The IOM is a nonprofit organization that provides health policy advice under a congressional charter to the National Academy of Sciences. Institute of Medicine, *About the IOM*, IOM.EDU, <http://www.iom.edu/About-IOM.aspx> (last visited Jan. 15, 2011).

129. COMM. ON QUALITY OF HEALTH CARE IN AM., *supra* note 128, at 1.

130. The figures were derived from two large studies of hospital patients, one in Colorado and Utah and one in New York, which “found that adverse events occurred in 2.9 and 3.7 percent of hospitalizations, respectively.” *Id.* In the Colorado/Utah study, 6.6% of the adverse events resulted in death. *Id.* In the New York study, 13.6% of the adverse events resulted in death. *Id.* Both studies found that more than half of the adverse events resulting in death were attributable to preventable medical errors. *Id.* Extrapolated to the 33.6 million hospitalizations nationwide in 1997, the Colorado/Utah study yielded a national estimate of 44,000 annual deaths due to medical negligence in hospitals, while the New York study yielded a national estimate of 98,000 annual deaths due to negligence. *Id.* The New York study relied on by the IOM was the Harvard Medical Practice Study. See *infra* notes 242–44 for discussion of this ground-breaking study.

131. See Rodney A. Hayward & Timothy P. Hofer, *Estimating Hospital Deaths Due to Medical Errors: Preventability Is in the Eye of the Reviewer*, 286 JAMA 415, 415 (2001) (discussing view of some that IOM figures are overestimates and that accounts of the study often fail to note IOM authors’ caution regarding possible imperfections).

132. ATLA renamed itself as the American Association for Justice in 2006. See *supra* note 98.

133. AM. ASS’N FOR JUSTICE, <http://www.98000reasons.org/> (last visited Jan. 16, 2011).

134. Rosenbaum & Assocs., *Medical Malpractice is Third Leading Cause of Death in U.S.*, PHILADELPHIA TOP INJURY LAW. BLOG (Nov. 23, 2009, 9:50 AM), <http://www.philadelphiatopinjurylawyerblog.com/2009/11/medical-malpractice-is-third-l.html> (asserting that, with 98,000 estimated deaths attributable to medical errors each year, medical malpractice is third leading cause of death in United States behind cancer and heart disease).

payouts.¹³⁵ The report accused the Maryland medical community of “failing to rein in doctors who repeatedly commit medical errors and medical negligence.”¹³⁶ One anti-lawyer group has stated the “Public Citizen Foundation’s board looks like a Trial Lawyers, Inc. leadership meeting.”¹³⁷

As the above paragraphs suggest, although it comes down much harder on lawyers than doctors, the tort reform movement regularly hammers home to the American public that neither group can be trusted. The fact that much of the rhetoric, on both sides, is so blatantly fallacious, as expanded on in Part IV, adds more distrust by reinforcing what the public already believes: that neither side tells the truth, at least not the whole truth.

IV. PUMMELED PROFESSIONS, TATTERED TRUST, UNHAPPY LIVES

Does it matter that doctors and lawyers don’t get along? Who really cares if a bunch of rich, pampered professionals insist on squabbling like children in their interactions?¹³⁸ This part argues that doctors and lawyers should care because their bickering and name-calling reinforces negative, distorted public perceptions of them, erodes trust between the combatants and their clients and patients (with potentially serious side-effects), and injects further stress and unhappiness into their already difficult daily lives.

A. *Tarnished Images*

People “of mystery and magic, members of a sacerdotal class in close communion with the gods.”¹³⁹ Reading descriptions of their professions such as this must invoke dreams of the good old days in doctors and lawyers, when both groups were looked up to and viewed with something approaching awe. The images of both professions have taken severe public relations hits in recent decades. While doctors regularly fare better than lawyers in “most-respected-profession” type surveys (with doctors generally ranking in the top quartile and lawyers in the middle of the pack or lower),¹⁴⁰ both professions are in dire need of public relations makeovers. Googling the

135. PUB. CITIZEN, DANGEROUS MARYLAND DOCTORS 1 (2004), available at http://www.citizen.org/documents/MD_Dangerous_Doctors.pdf.

136. *Id.* at 2.

137. *Ready Money: Trial Lawyers, Inc. Finds Politics a Lucrative Investment*, CTR. FOR LEGAL POLICY, MANHATTAN INST., <http://www.triallawyersinc.com/healthcare/hc07.html> (last visited Mar. 12, 2011).

138. This characterization is written partly tongue-in-cheek. Part of the problem with the demonization of doctors and lawyers, including by each other, is the creation and perpetuation of distorted public images of their lifestyles. See *infra* notes 212–32 and accompanying text for a discussion of low job satisfaction and high suicide and substance abuse rates among doctors and lawyers.

139. MANFRED S. GUTTMACHER & HENRY WEIHOFEN, *PSYCHIATRY AND THE LAW* 3 (1952) (describing ancient view of doctors and lawyers).

140. In a 2009 Harris poll of the “most prestigious occupations” doctors placed third (behind firefighters and scientists) among twenty-two professions, while lawyers ranked thirteenth. THE HARRIS POLL, *FIREFIGHTERS, SCIENTISTS AND DOCTORS SEEN AS MOST PRESTIGIOUS OCCUPATIONS* 1, 3 (2009), available at http://new.abanet.org/marketresearch/PublicDocuments/harris_poll.pdf. In a 2008 Gallup poll of integrity rankings, participants were asked to rate the honesty and ethical standards of twenty-one professions. Medical

terms “I hate doctors” and “I hate lawyers” (in quotation marks) brings up 779,000 hits for doctors and 254,000 hits for lawyers.¹⁴¹ Both professions have “I Hate . . .” books dedicated to them.¹⁴²

Empirically, as in years past, both the medical and legal professions received negative net ratings in a 2010 Gallup poll.¹⁴³ Each year, Gallup conducts a survey of public attitudes toward twenty-five industries and businesses, including the legal profession and healthcare industry.¹⁴⁴ Respondents are asked whether they have a positive or negative opinion of each field. Gallup then assigns “net positive” scores by deducting the percentage of respondents with negative views of the industry from the percentage with positive views. In 2010 the legal field had a negative “net positive” rating of -14 percentage points, while the healthcare industry had a negative net positive rating of -25 percentage points.¹⁴⁵

Increasingly, contrary to the ethos of their professions, both doctors and lawyers are seen as being driven more by self-interest than by a desire to serve their patients and clients. An American Bar Association (ABA) study of lawyer perceptions found that “lawyers have a reputation for winning at all costs, and for being driven by profit and self-interest, rather than client interest.”¹⁴⁶ Lawyers are perceived as “greedy,” “manipulative,” and “corrupt.”¹⁴⁷ Doctors see themselves as being portrayed as “greedy—motivated by a desire to maintain their incomes and stave off malpractice suits.”¹⁴⁸ This perception may have some grounding in reality, as many doctors are concerned about what they see as dishonest and unethical conduct in the medical profession.¹⁴⁹ Public confidence in “leaders of medicine” has declined substantially in

doctors placed fourth (behind nurses, pharmacists, and high school teachers) and lawyers placed twelfth. Lydia Saad, *Nurses Shine, Bankers Slump in Ethics Ratings*, GALLUP (Nov. 24, 2008), <http://www.gallup.com/poll/112264/nurses-shine-while-bankers-slump-ethics-ratings.aspx>. Sixty-four percent of respondents ranked doctors as having “very high” honesty and ethical standards compared to only eighteen percent for lawyers. *Id.*

141. Based on Google search conducted on May 10, 2011.

142. See SUSAN MURPHY, *I HATE DOCTORS: 303 REASONS WHY YOU SHOULD, TOO* (1997); SUSAN MURPHY, *I HATE LAWYERS: 225 REASONS WHY YOU SHOULD, TOO* (1997).

143. *Business and Industry Sector Ratings*, GALLUP, Aug. 5–8, 2010, <http://www.gallup.com/poll/12748/business-industry-sector-ratings.aspx>.

144. *Id.*

145. *Id.*

146. LEO J. SHAPIRO & ASSOCIATES, AM. BAR ASS’N, *PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 7* (2002) [hereinafter *PUBLIC PERCEPTIONS OF LAWYERS*].

147. *Id.*

148. Ken Terry, *Physicians and the Press: Do Doctors Get a Fair Shake?*, *MED. ECON.*, July 11, 2003, at 78; see also Matthew K. Wynia et al., *Medical Professionalism in Society*, 341 *NEW ENG. J. MED.* 1612, 1613 (1999) (“Dramatic rises in physicians’ incomes over the past four decades have fostered the trust-destroying belief, whether true or not, that physicians as a group are greedy and take advantage of patients.”).

149. See Michael Romano, *Perception Is Everything; An ACPE Survey Reveals the Details of Physicians’ Public Fall From Grace*, *MOD. HEALTHCARE*, Mar. 7, 2005, at 6 (stating that nine out of ten respondents surveyed by American College of Physician Executives said they “were either ‘very concerned’ or ‘moderately concerned’ about what they perceive to be rampant instances of dishonesty, financial conflicts and unethical behavior in the U.S. healthcare system”).

recent decades.¹⁵⁰ Both professions are seen as doing a poor job of policing themselves.¹⁵¹

Both professions also are the target of demeaning jokes.¹⁵² Lawyer jokes are so plentiful that there are lawyer jokes about lawyer jokes.¹⁵³ While not as prevalent as lawyer jokes, doctors also serve as the butt of jokes, taking it on the chin for qualities such as their arrogance and large egos.¹⁵⁴

150. Robert J. Blendon et al., *Americans' Views of Health Care Costs, Access, and Quality*, 84 MILBANK Q. 623, 627 (2006) (presenting Harris polling data showing that percentage of persons stating they have a "great deal" or "quite a lot" of confidence in the leaders in medicine declined from seventy-three percent in 1966 to thirty-one percent in 2006). Higher percentages of Americans are satisfied with their individual healthcare professionals. In 2006, forty-five percent of persons who had received medical care in the previous year rated that care as "excellent" while an additional thirty-nine percent rated it as "good." *Id.* at 630.

151. See PUBLIC PERCEPTIONS OF LAWYERS, *supra* note 146, at 7 (stating that only twenty-six percent of ABA poll respondents believe the legal profession does a good job of policing itself); Sylvia R. Cruess & Richard L. Cruess, *The Medical Profession and Self-Regulation: A Current Challenge*, VIRTUAL MENTOR, Apr. 2005, <http://virtualmentor.ama-assn.org/2005/04/oped1-0504.html> (describing public and scholarly perceptions of the self-regulation of medical profession as "weak, variable, and inconsistently applied").

152. One of the first books devoted exclusively to lawyer and doctor jokes (as well as clergy jokes) was published in 1912. GEORGE H. BRUCE, *LAWYERS, DOCTORS AND PREACHERS* (1912). Even at this early date, lawyers were being portrayed as hired guns who talk out of both sides of their mouths and doctors as greedy moneymakers, as in this joke about lawyers:

"I want you to show that this law is constitutional. Do you think that you can manage it?" asked a man of his lawyer.

"Easily."

"Well, go ahead with the case, get familiar with it."

"I am already at home in it. I know my ground perfectly. It's the same law you had me prove was unconstitutional two years ago."

Id. at 14–15. And in this joke about doctors:

[A]n eminent surgeon performed an operation, and a medical student at the college asked him:

"What did you operate on that man for?"

Eminent Surgeon: "\$500."

Student: "I mean what did he have?"

Surgeon: "\$500."

Id. at 49.

153. "Question: How many lawyer jokes are there? Answer: Only three. The balance are documented case histories." MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* 3 (2005). Galanter estimates that between 500 and 1,000 lawyer jokes were circulating at the turn of the twenty-first century. *Id.* at 15. His excellent book analyzes lawyer jokes in nine categories. Five of the categories involve substantive complaints about lawyers as "corrupters of discourse," "economic predators," "fomenters of strife," "betrayers of trust," and "enemies of justice." *Id.* at 16. Four other categories focus on the general character and standing of lawyers and society's response to them, including portrayals of lawyers as "allies of the devil," "morally deficient," "objects of scorn," and "candidates for elimination." *Id.*

154. A couple of examples: "What does MD stand for? Answer: Minor deity." "Why can't a nun be a good nurse? Answer: Because she has been taught to serve only one God." Paul Levy, *Minor Deities?*, NOT RUNNING A HOSP. (June 28, 2007, 2:22 PM), <http://runningahospital.blogspot.com/2007/06/minor-deities.html>.

Jokes involving both lawyers and doctors usually end up being jokes about lawyers, as in this example:

In a recent FDA study, the United States government doctors who were conducting studies on test drugs administered weekly doses of VIAGRA to an equal number of doctors and lawyers.

While the majority of the doctors achieved enhanced sexual prowess, the lawyers simply grew taller.

The US government researchers are at a loss to explain.

Of course, a number of factors beyond doctor-lawyer infighting contribute to the bruised public images of the medical and legal professions. But while it cannot be empirically shown, it is reasonable to infer that the continuous tearing down of one another's profession is a contributing factor. People believe what they hear. A substantial body of research, for example, shows that information disseminated in the media about the civil litigation system, including advertising by pro-tort reform groups, has a powerful influence on public perceptions.¹⁵⁵ One study of mock jurors found "that even a single exposure to . . . [a pro-tort reform ad] can dramatically lower the amount of award a juror is willing to give" in a personal injury case.¹⁵⁶

A few statistics perhaps lend support to the inference that doctor/lawyer attacks on one another influence public views of the medical and legal professions: In 2004, roughly one-third of people believed unwarranted lawsuits were the primary reason for rising malpractice insurance premiums, while eleven percent believed the main cause was doctors making too many mistakes.¹⁵⁷ At the same time, forty-eight percent of Americans surveyed in 2004 expressed concern over medical errors and the safety of medical care.¹⁵⁸ Moreover, while experts attribute medical errors primarily to system failures,¹⁵⁹ opinion data shows the public blames individual healthcare providers, believing they "should be sued, fined, and subject to suspension of their licenses."¹⁶⁰ With hundreds of millions of dollars being spent by each side on advertising and contributions to politicians who champion their respective causes,¹⁶¹ surely the public hears loudly and clearly the negative messages doctors send out about lawyers and vice versa.

Lawyer Jokes, THE HUMOR VAULT http://humorvault.tripod.com/lawyer/lawyer_2.html (last visited Jan. 17, 2011).

155. See generally Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 LAW & HUM. BEHAV. 5 (2003) (collecting information from a variety of such studies); see also Valerie P. Hans & Juliet L. Dee, *Media Coverage of Law: Its Impact on Juries and the Public*, 35 AM. BEHAV. SCIENTIST 136, 140 (1991) ("The content and style of media coverage of . . . legal issues have considerable impact on people's views of law and justice."); Valerie P. Hans, *Law and the Media: An Overview and Introduction*, 14 LAW & HUM. BEHAV. 399, 399 (1990) (stating that "public knowledge and views of law and the legal system are largely dependent on media representations").

156. Elizabeth Loftus, *Insurance Advertising and Jury Awards*, A.B.A. J., Jan. 1979, at 69. Advertisements suggesting that viewers will be personally affected by an issue, such as by paying higher insurance rates or healthcare costs, cause viewers both to pay more attention to the message and to remember it longer. See Edith Greene, *Media Effects on Jurors*, 14 LAW & HUM. BEHAV. 439, 446 (1990) (noting that pro-tort reform advertisements may affect jurors' attitudes and impact their award decisions).

157. Blendon et al., *supra* note 150, at 637 (citing polling data solicited by Kaiser Family Foundation and Harvard School of Public Health).

158. *Id.* at 648.

159. See James T. Reason, *Foreword to HUMAN ERROR IN MEDICINE*, at vii–xv (Marilyn Sue Bogner ed. 1994) (opining that most accidents are rooted in organizational or system failures).

160. Blendon et al., *supra* note 150, at 649.

161. See *supra* notes 99–100 and accompanying text for a discussion of doctors' and lawyers' political contributions.

B. Trust Busters

A byproduct of lower public perceptions of our medical and legal systems is diminished trust.¹⁶² Trust¹⁶³ has been called “[t]he most vital component”¹⁶⁴ and “the core, defining characteristic” of doctor-patient relationships.¹⁶⁵ Similarly, trust has been called the “cornerstone,”¹⁶⁶ “foundation,”¹⁶⁷ and “essence”¹⁶⁸ of the attorney-client relationship. Nobel-prize winning economist Kenneth Arrow identified two pillars of trust: “competence (faith in another person’s expertise) and conscience (faith in that person’s integrity, values, and honesty).”¹⁶⁹ As reflected in the tort reform examples above,¹⁷⁰ the doctor-lawyer battle focuses heavily on chipping away at doctors’ competence-trust pillar and lawyers’ conscience-trust pillar, as in “doctors are going to kill you” and “lawyers are going to cheat you.”

162. See, e.g., Cathryn Delude, *Crisis of Confidence*, HARV. PUB. HEALTH REV., Fall 2004, http://www.hsph.harvard.edu/review/review_fall_04/rvw_trust.html (“Across the United States, trust in institutions that guard the public’s health and provide care has fallen to an all-time low.”); DAVID KRANE, HARRIS INTERACTIVE, DOCTORS AND TEACHERS MOST TRUSTED AMONG 22 OCCUPATIONS AND PROFESSIONS: FEWER ADULTS TRUST THE PRESIDENT TO TELL THE TRUTH (2006) (reporting results of Harris poll in which only twenty-seven percent of respondents said they trust lawyers to tell the truth). In the same Harris poll, doctors finished first, with 85 percent of respondents saying they trust doctors to tell the truth. *Id.* While the Harris poll results might seem to contradict Delude’s assertion above, that is not necessarily the case. Delude was referring to lack of trust in healthcare institutions, not individual doctors. Delude, *supra*. The public has more faith in their individual doctors than in healthcare systems. See *supra* note 150 for a discussion of public satisfaction with individual healthcare providers. And, of course, even if patients trust doctors to tell the truth, they may not trust them to render proper treatment.

163. “Trust” is subject to varying definitions, but Frank B. Cross’s characterization is an apt one to use in the context of doctor-patient and attorney-client relationships. Cross defined trust as “the voluntary ceding of control over something valuable to another person or entity, based upon one’s faith in the ability and willingness of that person or entity to care for the valuable thing.” Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1461 (2005). Medical patients and legal clients are required to cede control over their very lives, literally and figuratively, to doctors and lawyers. See *infra* notes 173–77 and accompanying text for a discussion of the public’s reliance on lawyers and doctors.

164. MALMSHEIMER, *supra* note 15, at 16.

165. Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 470 (2002) (stating that trust is also the “glue” that makes doctor-patient relationships possible) (internal quotation marks omitted); see also LLOYD PAUL STRYKER, *COURTS AND DOCTORS* 9 (1932) (“The relationship of patient and physician is to the highest possible degree a fiduciary one, involving every element of trust and confidence.”).

166. 2 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 19:1, at 1271 (2010 ed.) (describing trust as “cornerstone of the attorney-client relationship”).

167. Philip F. Downey, *Attorneys’ Trust Accounts: The Bar’s Role in the Preservation of Client Property*, 49 OHIO ST. L.J. 275, 275 (1988) (“Trust is the foundation of the attorney-client relationship.”).

168. H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 KY. L.J. 1191, 1263 (1999) (describing trust as “the essence of the attorney-client relationship”).

169. See Delude, *supra* note 162 (referencing Marc Roberts, a professor at the Harvard School of Public Health, who described these two items as Arrow’s two pillars of trust). Roberts’s characterization was derived from Arrow’s seminal 1963 article, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963).

170. See *supra* notes 114–37 and accompanying text for a discussion of the rhetoric and arguments commonly used in the tort reform debate.

1. Dependency Conflict: “I Don’t Want You, but I Need You.”¹⁷¹

To appreciate the impact of diminished trust on doctor-patient and attorney-client relationships requires insight into the uniquely delicate and largely one-sided nature of those relationships. Psychologists use the term “dependency conflict” to describe relationship situations in which one party is necessarily dependent on the other but doesn’t trust that he or she *can* depend on the other.¹⁷² The parties in the unempowered role experience conflicted feelings about trusting and being dependent because they aren’t confident the others will act with their best interests in mind. The dominant party might not have the capacity or inclination to nurture, might exploit the other out of self-interest, allow dependency to flourish and then abandon the person, or may intentionally/unintentionally humiliate the dependent party for being needful.

The concept applies to our relationships with medical and legal professionals. The following observation by Malmshiemer of the doctor-patient relationship applies equally to lawyers and clients: “At the same time that patients and their physicians rely on the cohesive power of trust, that very trust is continually threatened by the most fundamental component of the doctor-patient relationship, the inescapable fact that the patient *needs* medical care.”¹⁷³

We’re dependent on doctors and lawyers to survive. It’s not a matter of take it or leave it. We have to take it. We’re at their mercy because our lives—literally and figuratively—may be in their hands. An estimated 20,000 disease diagnoses exist, including more than 200 different kinds of cancer. Cancer strikes roughly one of every two men and one of every three women.¹⁷⁴ More than eighty-one million people seek medical treatment for accidental injuries each year.¹⁷⁵ In all, according to the Centers for Disease Control and Prevention, Americans make more than 1.1 billion visits to physician offices and hospital outpatient and emergency departments annually, an average of four visits per person.¹⁷⁶ Doctors literally bring us into the world, keep us in it as long as they can, and help ease the pain of our exit from it.

Lawyers also have people’s lives in their hands. For most lawyers, lifesaving is less literally true than for doctors, although lawyers are involved in prosecuting and defending persons charged with capital crimes, establishing administrative safety

171. SMOKEY ROBINSON, *YOU REALLY GOT A HOLD ON ME* (Tamla 1962).

172. “Dependency conflict” is not a diagnosis, but simply a term used by psychologists to characterize relationships of the kind described in the text. *See generally* Albert Bandura & Richard H. Walters, *Dependency Conflicts in Aggressive Delinquents*, 14 *J. SOC. ISSUES* 52 (1958); Robert F. Bornstein, *The Dependent Personality: Developmental, Social, and Clinical Perspectives*, 112 *PSYCHOL. BULL.* 3 (1992); Robin D. Post, *Dependency Conflicts in High-Achieving Women: Toward an Integration*, 19 *PSYCHOTHERAPY: THEORY, RES. & PRAC.* 82 (1982).

173. MALMSHEIMER, *supra* note 15, at 16; *see also* JONATHAN B. IMBER, *TRUSTING DOCTORS: THE DECLINE OF MORAL AUTHORITY IN AMERICAN MEDICINE* xi (2008) (stating that “trusting doctors [is] one of life’s necessities”).

174. JEROME GROOPMAN, *HOW DOCTORS THINK* 10 (First Mariner Books ed. 2008).

175. *FastStats, All Injuries*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/fa_stats/injury.htm (last visited Mar. 12, 2011).

176. *NCHS Press Room, Americans Make Nearly Four Medical Visits a Year on Average*, CTRS FOR DISEASE CONTROL & PREVENTION (Aug. 6, 2008), http://www.cdc.gov/nchs/pressroom/08newsreleases/visits_todocor.htm (citing figures from 2006).

regulations that will either save or lose statistical lives, and representing persons in proceedings regarding the continuation or withholding of life-sustaining medical treatment. But day in and day out, lawyers represent people in a myriad of contexts in which, in a popular sense, their clients' lives depend on the result. For every person facing an emergency appendectomy, dozens are being evicted, domestically abused, fired from jobs, denied benefits, involved in child custody disputes, threatened with deportation, or facing other life-consuming issues that only lawyers have the knowledge and power to manage. Even in the absence of crisis, in a regulatory society where laws and regulations pervade most aspects of daily life, many individuals, as well as all businesses big and small, depend on lawyers to navigate the legal morass. The public doesn't need lawyers as frequently as they need doctors, but a 2002 ABA survey found that approximately seven in ten households experienced a situation in the previous year that might have led them to seek a lawyer, although not all of them did.¹⁷⁷

To the patient or client, professional relationships with doctors and lawyers qualify as intimate relationships, in which trust is an essential component. For doctors, we readily shed our clothes and wait in sterile rooms wearing gowns seemingly intentionally designed to leave us feeling exposed and vulnerable. We tell them embarrassing things about our physical conditions and lifestyles. We let them touch and probe us. For lawyers, the intimacy isn't physical, but clients often are required to entrust their innermost secrets to lawyers, things they might hide even from their closest friends. As a young lawyer handling a pro bono divorce case, this author asked his client, a petite blonde woman who hardly looked old enough to be married, if there was anything her husband could use against her in the divorce and child custody dispute. Her face burned crimson as she began explaining and apologizing for how, to support her child, she had worked as an exotic dancer for a short period. It would have been a tough contest to pick who felt more uncomfortable.

Heightening the unease, patients and clients know, contrary to their hopes, that need, intimacy and dependency travel only one way in the relationship. As Jerome Groopman wrote in his book, *How Doctors Think*, "We all want to feel that our physician really likes us, sees us as special, and is emotionally moved by our plight, attracted not so much by the fascinating biology of our disease but by who we are as people."¹⁷⁸ The same observation has been made by legal scholars about the attorney-client relationship: "Clients want their lawyers to like them."¹⁷⁹ But the reality is that we're just not as important to our doctors and lawyers as they are to us.

On top of all this, or because of it, a caste system exists in our relationships with doctors and lawyers. We look up to and defer to them even if we don't like them. We are in their care and control. We rarely question anything they say or do or tell us to do, even when we want to and should. Our lack of knowledge, power, and resources to

177. See PUBLIC PERCEPTIONS OF LAWYERS, *supra* note 146, at 24.

178. GROOPMAN, *supra* note 174, at 46.

179. Lynne Stewart, *Defending the Right to Defend*, 2 SEATTLE J. SOC. JUST. 85, 94 (2003).

solve our own medical and legal problems converts us into the equivalent of school children in their presence. We need them. They know it. We know it.¹⁸⁰

2. The Implications of Declining Trust for Doctors and Lawyers.

When patients and clients lose trust in their doctors and lawyers, all parties suffer. Without trust, there really is no relationship. What Mark Hall said about trust in the doctor-patient context applies to the attorney-client relationship as well: “[W]ithout trust medical relationships never form or are entirely dysfunctional.”¹⁸¹

Declining trust of doctors and lawyers may cause people who have a choice to avoid seeking their services and take matters into their own hands.¹⁸² Clients and

180. Dependency is also enhanced by the fact that doctors and lawyers can be scarce, particularly for low-income people. Contrary to the perception that we are a nation awash with too many lawyers, many citizens in need of legal help, particularly low-income people, never receive it. The Legal Services Corporation, the publicly funded organization that provides free legal services to the poor, turns away roughly one million cases each year because of inadequate resources—and that’s just counting the people who actually come to their offices for help. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 8 (2007). Only one in five low-income people with legal problems actually seek out legal counsel. *Id.* at 9.

The difficulties of obtaining a doctor are more widely known. Depending on the location and type of specialty, it may take months for an initial appointment, and, of course, time is often of the essence in medical situations. The shortage of doctors, particularly primary care physicians, received attention during President Obama’s push to expand healthcare coverage for the nation’s uninsured. *See* Robert Pear, *Doctor Shortage Proves Obstacle to Obama Goals*, N.Y. TIMES, Apr. 27, 2009, at A1 (stating doctor shortage is discussed at most Congressional hearings and White House forums regarding healthcare). To meet demand, the Association of American Medical Colleges said the country would need a thirty percent increase in medical school enrollment, which would create 5,000 new doctors a year. *Id.* In Massachusetts, often held up as a model of healthcare reform because of the state’s universal coverage provisions, the average wait for a new patient seeking a primary care physician is between thirty-six and sixty days. More than half of Massachusetts internists refuse to accept new patients. Kevin Pho, *Commentary: Why the Doctor Won’t See You Now*, CNNHEALTH.COM (Aug. 20, 2009), <http://www.cnn.com/2009/HEALTH/08/20/pho.doctor.shortage/index.html>.

Also, professional relationships are ongoing—not single transactions. The investment of time, emotional energy, information-sharing, and money are built-in deterrents to changing a doctor or lawyer in the middle of a treatment or case, as are the difficulties of finding a suitable replacement. Both doctors and lawyers may be reluctant to take on patients/clients who have issues with their existing problem-solver. Difficult patients and clients do exist; some people are never satisfied. Once a professional takes on a client, she can’t just snap her fingers and make the person go away. Unlike most occupations, professional relationships have legal and ethical duties attached to them. Moreover, changing doctors or lawyers can be expensive because the new person has to get up to speed. Legal files in complex cases can fill several boxes. Doctors may insist on performing additional or repeat tests for new patients, both for the patient’s protection and the doctor’s. The impracticality of changing doctors/lawyers midstream forces patients/clients to stay tied to them even after trust has been lost.

181. Hall, *supra* note 165, at 470.

182. *See, e.g.*, PUBLIC PERCEPTIONS OF LAWYERS, *supra* note 146, at 23–24 (suggesting that lack of trust in lawyers can cause people in need of legal services not to seek their services); Hall, *supra* note 165, at 478 (“Without some minimal level of trust, patients would not seek . . . treatment . . .”); Delude, *supra* note 162 (stating that lack of trust in healthcare systems may cause people to postpone doctor visits or seek unproven alternative healing remedies).

It is fortunate for the livelihoods of doctors and lawyers that most of the services they render are essential, rather than optional. Doctors often keep patients waiting beyond scheduled appointment times and spend little time with them once they do see them. *See* Am. Med. Ass’n, *Public, Physicians Voice Positive*

patients may withhold embarrassing information, the disclosure of which would make them more vulnerable.¹⁸³ They may question advice they receive or, worse, decline to follow it.¹⁸⁴ For example, the more frequently the public hears doctors insisting they have to practice defensive medicine because of lawyers,¹⁸⁵ the more people will distrust not only lawyers for causing the problem, but doctors when they order tests. Patients may begin reacting to every test with the internal question: “Do I really need this expensive, time-consuming, painful, invasive or side effect-fraught test or is my doctor just doing this to me cover his ***?” Lack of trust also may make patients and clients more likely to resort to legal action when results come out differently from what they had expected or hoped for.¹⁸⁶

On a broader policy level, lack of trust may cause the public to be more willing to support government regulations that hurt both professions (e.g., contingency fee limits for lawyers, payment cuts to doctors). Already, the public is quick to lay blame on both professions for the high costs of medical care. If the public can’t trust the medical and legal professions to do the right thing on their own, they may endorse substituting legal regulation as “a functional alternative to trust.”¹⁸⁷

Views of Profession, AM. MED. NEWS, Aug. 19, 1996, at 62 (reporting on survey in which seventy-two percent of 1,500 respondents said doctors keep patients waiting too long). Lawyers frequently fail to keep clients informed about the progress of their cases or even to return their phone calls. See Stephen E. Schemenauer, *What We’ve Got Here . . . Is a Failure . . . to Communicate: A Statistical Analysis of the Nation’s Most Common Ethical Complaint*, 30 HAMLIN L. REV. 629 (2007) (asserting and documenting that most common ethical complaint against lawyers is a failure to communicate with clients). If doctors and lawyers were non-professional service providers or product sellers, customers would say “the hell with you” and go to a competitor. But they can’t. Instead, they just get irritated. They may not grin, but they bear it.

183. See Hall, *supra* note 165, at 478 (stating that without trust, patients will withhold information); Delude, *supra* note 162 (same).

184. See Hall, *supra* note 165, at 478 (stating that without trust, patients will not follow treatment recommendations); Delude, *supra* note 162 (same).

185. See, e.g., Gillette, *supra* note 57, at 10 (“It is getting to the point where the first question a physician asks himself when he sees a new patient is not ‘What can I do to help this person?’ but rather ‘What can I do to keep him from suing me?’”); David M. Studdert et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 JAMA 2609, 2609 (2005) (discussing results of survey of Pennsylvania physicians in which ninety-three percent reported practicing defensive medicine and ninety-two percent reported ordering unneeded tests and diagnostic procedures and making unnecessary referrals); Jennifer Silverman, *Medical Malpractice Crisis Breeds Fear, Distrust of Lawsuit Culture: 83% of Physicians Don’t Trust System*, SKIN & ALLERGY NEWS, Apr. 2003, at 56 (stating that seventy-nine percent of doctors surveyed said they were ordering more tests on patients and fifty-one percent were recommending invasive procedures such as biopsies due to fears of lawsuits); Sanghavi, *supra* note 97 (discussing survey in which internists reported that fifteen percent of tests and hospital admissions they ordered were for defensive reasons).

186. See Joe Daubert & Phil Clay, *Medical Malpractice—Current Trends and Issues—2007*, GEN RE VIEWPOINT (Gen Re, Stamford, Conn.), Oct. 2007, at 2–3 (noting that, while malpractice claims have been declining in recent years, new liability exposures are likely due to a variety of reasons, including “a general mistrust of healthcare providers”).

187. See Hall, *supra* note 165, at 514 (suggesting that legal regulation can serve as “functional alternative to trust”).

Like all professionals, doctors and lawyers cherish autonomy, and prefer to function with as little regulatory intrusion into their lives as possible.¹⁸⁸ In the era of managed care, doctors already have lost a substantial portion of the autonomy they previously enjoyed. “Though attorneys do not currently face similar constraints on their professional autonomy, an attack on one profession’s autonomy may lead to similar attacks on the other’s.”¹⁸⁹ Doctors and lawyers have an interest in working together to protect the autonomy and stature of both of their professions. The medical and legal professions are in precarious positions when compared to the glory days of their past. They used to be perched atop the professional world,¹⁹⁰ but observers have noted that both professions have “lost their allure, their status.”¹⁹¹

Indeed, with indicators that public confidence is declining for virtually all professions and institutions,¹⁹² doctors and lawyers have a broader joint stake in working together to build and sustain public trust and respect in the professions as a whole. If the public loses faith in professions generally, there is no reason to believe any single profession will be spared. Professions share certain qualities that many find objectionable. They are self-licensing, self-regulating, and operate in the nature of monopolies.¹⁹³ They are, in fact, elitist clubs of a sort. These objectionable characteristics are tolerated and offset only to the extent the public believes the profession is staying true to its primary mission: serving the public and not simply its own interests.¹⁹⁴ Repeated attacks by doctors and lawyers portraying each other as greedy or unconcerned for the welfare of their constituents may foster overall discontent with and lack of confidence in the validity of all self-regulated professions.

188. See JACOBSON, *supra* note 6, at 210 (identifying professional autonomy among strongest shared values of medical and legal professions).

189. *Id.*

190. See Williams, *supra* note 14 (stating that law and medicine were at one time the most elite of traditional professions based on pay, long-term security, schooling, and subject matter).

191. *Id.*

192. See Todd R. La Porte & Daniel S. Metlay, *Hazards and Institutional Trustworthiness: Facing a Deficit of Trust*, 56 PUB. ADMIN. REV. 341, 341 (1996) (explaining that the public has a deep suspicion and general distrust of all kinds of institutions); Ragnar Lofstedt, *The Post-Trust World*, 26 PHARMACEUTICAL EXECUTIVE 114, 114 (2006) (stating that people no longer have faith in any type of industry or its regulators); Murray Weidenbaum, *Restoring Public Confidence in American Business*, 26 WASH. Q. 53, 53 (2002–2003) (citing widespread reports of unethical and illegal behavior as decreasing public’s confidence in all American businesses and business people); Adam Snyder, *Revolt Against the Professionals: Many Consumers Harbor the Same Feelings for Lawyers and Doctors They Once Reserved for Politicians, A Sea Change in American Attitudes*, ADWEEK’S MARKETING WEEK, Feb. 25, 1991, at 24–25 (focusing on doctors and lawyers, but describing declining public respect for and confidence in professions generally); Williams, *supra* note 14 (same); see also Cross, *supra* note 163, at 1458–59 (discussing perception that public trust in institutions is declining). The 2010 Gallup poll of public opinion regarding twenty-five business and industry sectors, including several professions, showed that only four industries (Internet industry, sports industry, telephone industry, and radio industry) have higher positive public approval ratings in 2010 than in 2001. The legal field showed a slight increase in approval from a negative “net positive” rating of –16 to –14 percentage points. The federal government’s negative “net positive” rating also increased slightly from –36 to –32 percentage points. See *supra* notes 143–45 and accompanying text for a discussion of the Gallup poll.

193. See *supra* note 15 for a comprehensive definition of “profession” including these common attributes.

194. See MALMSHEIMER, *supra* note 15, at 9 (noting that the community will withdraw esteem from profession, unless profession is adequately serving community’s interest).

Trust is also lacking, of course, between doctors and lawyers.¹⁹⁵ In this regard, both groups should take notice of the fact that the farther the U.S. moves from pay-for-service to managed care, the more they will be forced to work together. Doctors will have no choice but to rely on—and trust—lawyers to steer the course and fight to protect their rights.¹⁹⁶ This is already happening. In the early 2000s, physicians' groups turned to lawyers in filing a series of actions against managed healthcare organizations alleging that the defendants failed to disclose that they deliberately delayed physician payments and developed various systems directed at avoiding full and prompt payment for services.¹⁹⁷ The lawsuits resulted in financial settlements with several major health maintenance corporations.¹⁹⁸ One of the lawsuits produced a quotation from a doctor that surely must contend for the "Things I Never Thought I Would Hear" Hall of Fame: "We doctors suddenly found ourselves in trouble, and the only place we could turn was to the trial lawyers for help."¹⁹⁹ The future will necessitate more such alliances.

And then there are the insurance companies. Continuing the battle royal imagery of this Article, if doctors and lawyers are the main combatants, insurance companies are the guys who sneak into the ring when the referee has his back turned and whack the fighters from behind with a chair. Insurance companies may be the common enemy of doctors and lawyers.

Some studies suggest that the principal cause of high medical malpractice premiums is not tort lawsuits, but insurance company investment practices and strategies. A 2009 analysis by Americans for Insurance Reform, an anti-tort reform group, argues that lawsuits have nothing to do with malpractice liability premium levels and that high premiums are attributable to cyclical market conditions.²⁰⁰ Insurance companies earn most of their profits from investment income. This study

195. See *supra* notes 31–34 and accompanying text for a discussion of the distrust between doctors and lawyers.

196. See JACOBSON, *supra* note 6, at 216 ("The growing physician demand for independent external review of insurance benefit coverage denials . . . is likely to erode the medical profession's resistance to legal process, thinking, and values.").

197. In addition, the doctors argued that the defendants threatened to blacklist them or withhold their fees if they did not accept the health maintenance organizations' allegedly manipulative payment system. The lawsuits raised a variety of causes of action, including breach of contract, unjust enrichment, and RICO-based claims. The cases were consolidated in *In re Managed Care Litigation*, 209 F.R.D. 678 (S.D. Fla. 2002). The district court dismissed the case as to all patient plaintiffs, holding that the patients were not a proper class for class action certification. The court allowed class action certification for both state claims and federal RICO-based claims alleged by the physicians. *Id.* at 697. In *Klay v. Humana, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part, finding that class certification was proper for the RICO claims, but dismissing all other claims. 382 F.3d 1241, 1276 (11th Cir. 2004).

198. Several of the defendant insurance companies entered into settlement agreements with the physicians. Relief under these settlements totaled nearly \$2 billion and included both cash payments to physicians and physician funds, as well as prospective relief in the form of reformed business practices. *Multi District Litigation Settlements*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/advocacy/current-topics-advocacy/private-sector-advocacy/health-insurer-settlements/multi-district.shtml> (last visited Mar. 12, 2011) (click each insurance-provider link for settlement figures).

199. JACOBSON, *supra* note 6, at 216 (quoting doctor's statement regarding state medical association's litigation against managed care organization).

200. J. ROBERT HUNTER ET AL., AM. FOR INS. REFORM, TRUE RISK: MEDICAL LIABILITY, MALPRACTICE INSURANCE AND HEALTH CARE 2 (2009), available at <http://www.centerjd.org/air/TrueRiskF.pdf>.

asserts, as have others, that when the economy is strong, insurers slash rates to generate capital for investment.²⁰¹ When the economy weakens, premiums jump and coverage is reduced as insurance companies struggle to rebuild reserves, resulting in a “liability insurance crisis.”²⁰² Other analyses of the issue, however, have reached opposite conclusions. For example, a 2006 report by the Center for Legal Policy at the Manhattan Institute, a conservative think tank, purports to establish that malpractice premiums closely track malpractice awards.²⁰³

Because most of the relevant studies on both sides are of questionable neutrality, definitive conclusions are unavailable. Multiple factors no doubt play a role in malpractice insurance premium rates. Nevertheless, the contribution of insurance company practices to malpractice premiums and the overall cost of healthcare is certainly worth investigating. But because the doctors and lawyers have been focused on dueling with each other, the insurance companies have, relatively speaking, escaped scrutiny in the tort reform debate.

C. *Of Yacht Clubs and Suicide Rates*

Doctors and lawyers also lose out in less tangible, but perhaps more important, ways when they lose trust. While, as described above,²⁰⁴ doctors and lawyers are more important to their patients and clients than vice versa, interactions and relationships with patients and clients are one of the most satisfying aspects of being a doctor or lawyer. In a massive nationwide study, physicians rated patient relationships as the most satisfying aspect of their practice.²⁰⁵ Similarly, lawyers frequently cite good relationships with clients and colleagues as their greatest source of happiness.²⁰⁶ Happy professional relationships correlate with happy professionals,²⁰⁷ and “[t]he relationships that provide the biggest happiness boost are ones that are built on trust.”²⁰⁸

Disruption of their most important relationships can further sour the already unhappy, stressful daily lives of doctors and lawyers.²⁰⁹ The public perception of doctors and lawyers living happily in the lap of relaxed luxury, spending their

201. *Id.* at 5–6.

202. *Id.* at 5 (internal quotation marks omitted).

203. ALEXANDER TABARROK & AMANDA AGAN, MANHATTAN INST., CIV. JUST. REP. NO. 10, MEDICAL MALPRACTICE AWARDS, INSURANCE, AND NEGLIGENCE: WHICH ARE RELATED? (2006), available at http://www.manhattan-institute.org/pdf/cjr_10-bw.pdf.

204. See *supra* notes 173–77 and accompanying text for a discussion of the public’s need for doctors and lawyers.

205. THE PHYSICIANS’ FOUND., THE PHYSICIANS’ PERSPECTIVE: MEDICAL PRACTICE IN 2008, SURVEY SUMMARY & ANALYSIS 3 (2008). Nearly 12,000 physicians responded to the survey, providing more than 800,000 data points. *Id.* at 2.

206. NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW 213 (2010) (“A number of lawyers surveyed identify good relationships as their greatest source of happiness.”).

207. See *id.* at 90–93 (stating that deep relationships correlate with higher levels of happiness); *id.* at 93 (“Those lawyers who develop personal bonds with clients . . . tend to be happier lawyers than those who do not.”).

208. *Id.* at 40.

209. David A. Shore, an expert on healthcare marketing, said he knew he struck a nerve when he told a healthcare audience, “I invite you to think of something you’d rather be known as than a trusted provider of health care.” Delude, *supra* note 162 (internal quotation marks omitted).

weekdays at yacht and country clubs knocking back margaritas, is a distortion (one, unfortunately, that their attacks on each other serve to bolster). Although they earn salaries above the median, most doctors and lawyers are not extremely rich.²¹⁰ The vast majority of doctors and lawyers work long hours under stressful conditions.²¹¹

Large percentages of both groups suffer from low morale or are unhappy. A Johns Hopkins University study found that lawyers ranked fifth in the overall prevalence of depression out of 105 occupations.²¹² When the data were adjusted to focus on the association between depression and the particular occupation (by taking into account non-occupational factors contributing to depression), lawyers moved into first place.²¹³ The *Wall Street Journal Law Blog* has written so much about disaffected lawyers that “[u]nhappiness in the law has . . . become a distinct sub-genre of [Law Blog] coverage. To such an extent, in fact, that the storyline of lawyer wretchedness has become somewhat of a cliché: Wayward liberal-arts student, law school, indebtedness, dashed career hopes, inertia, misery.”²¹⁴ Only forty-three percent of lawyers reported they are very happy in a national survey of job satisfaction.²¹⁵

As for doctors, a 2006 survey found that only twenty-five percent of 1,201 responding physicians rated their morale as “very high” (eight to ten on a ten-point scale).²¹⁶ They estimated that only nine percent of their colleagues had morale in that same range.²¹⁷ (Interestingly, when asked to name the single biggest factor contributing

210. See *supra* note 29 for a discussion of salary data for doctors and lawyers. Tangentially, happiness research shows that “[w]ealth is the most overrated of all factors in people’s guesses as to what will improve their happiness.” LEVIT & LINDER, *supra* note 206, at 38. “[A] majority of Americans answer ‘more money’” when asked to name the single thing that would bring them more happiness, but research shows that beyond lower middle-income levels, increases in wealth add only minutely to happiness. *Id.* at 38–39.

211. The stress starts early during their professional education. For a seminal analysis of medical students’ psyches, see Kenneth Keniston, *The Medical Student*, 39 *YALE J. BIOLOGY & MED.* 346 (1967); Blake P. Boyle & Robert H. Coombs, *Personality Profiles Related to Emotional Stress in the Initial Year of Medical Training*, 46 *J. MED. EDUC.* 882 (1971) (assessing psychological inventory scores of first-year medical students); Elizabeth Cooney, *White Coat Notes*, *BOS. GLOBE*, Sept. 8, 2008, at A12 (referencing survey of 4,000 medical students in which “[a]bout half said they were suffering from burnout and about one in nine said they had thought about suicide in the past year”). Perhaps surprisingly, the available evidence shows that law student psychological distress exceeds that of medical students. A 1980s study of University of Arizona law and medical students found that law students scored significantly higher than both the general population and medical students in nearly every category of psychological dysfunction measured, including anxiety, depression, feelings of inadequacy and inferiority, hostility, and obsessive-compulsiveness. Stephen B. Shanfield & G. Andrew H. Benjamin, *Psychiatric Distress in Law Students*, 35 *J. LEGAL EDUC.* 65, 66–69, 74 (1985).

212. William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 *J. OCCUPATIONAL MED.* 1079, 1082 tbl.1 (1990).

213. *Id.* at 1085 tbl.3.

214. Dan Slater, *What Holds Unhappy Lawyers Back from Leaving?*, *WALL ST. J. L. BLOG* (June 23, 2008, 2:06 PM), <http://blogs.wsj.com/law/2008/06/23/what-holds-unhappy-lawyers-back-from-leaving/>.

215. TOM W. SMITH, NAT’L OPINION RESEARCH CTR., UNIV. OF CHI., *JOB SATISFACTION IN THE UNITED STATES* 3 (2007), available at <http://www-news.uchicago.edu/releases/07/pdf/070417.jobs.pdf>. The survey polled more than 27,500 randomly selected people. *Id.* at 4. See generally LEVIT & LINDER, *supra* note 206 (analyzing extensive data regarding lawyer happiness and happiness in general).

216. Bill Steiger, *Survey Results: Doctors Say Morale Is Hurting*, *PHYSICIAN EXECUTIVE*, Nov.–Dec. 2006, at 8.

217. *Id.*

to low morale, medical malpractice concerns finished in last place among the listed factors.)²¹⁸ Thirty-two percent of the survey participants reported depression.²¹⁹ In a 2008 nationwide survey involving nearly 12,000 responding physicians, only six percent of doctors characterized the morale of their colleagues as positive.²²⁰ The same survey showed that 63% of doctors work fifty-one or more hours per week, while 38% work sixty-one or more hours per week.²²¹ Tellingly, surveys show that 60% of doctors²²² and 44% of lawyers²²³ would not recommend their professions to young people making career decisions.

Doctors and lawyers both suffer from high suicide and substance abuse rates. In 2006, the AMA called physician suicide an “endemic catastrophe.”²²⁴ While doctors carefully guard their substance abuse,²²⁵ they are believed to abuse alcohol and drugs at

218. *Id.* at 9. The factors identified as the biggest morale killers for doctors were, in descending order: low insurance reimbursement rates (21.9%), loss of autonomy (21.2%), bureaucratic red tape (16.8%), patient overload (12.1%), medical malpractice environment (10.5%), other (5.8%). *Id.*

219. *Id.* at 10.

220. THE PHYSICIANS’ FOUND., *supra* note 205, at 2–3. Written comments provided by physician respondents about the state of modern medical practice were almost unanimously negative, stridently so in many instances, as in these samples:

I’m very disheartened, disappointed over the state of the practice of medicine! . . . If not for a son who I’m working to put through college and a house mortgage I would quit medicine in a heartbeat! I’m beat, tired and under appreciated. Sometimes I cry myself to sleep—wondering why I got into all this.

Id. at 43.

As a young (33 years old) pediatrician, I feel trapped by my choice to become a physician. Declining reimbursement from payers (especially Medicaid) has forced my employer to cut physician salaries, in some cases by \$40,000 annually. This also happened at my prior practice. I have no chance of achieving the income my colleagues were making five to ten years ago. Next year, I will have to see more patients to achieve the same salary I am currently paid. With \$100,000 in student loans, I do not know how I will ever achieve financial security. Morale is low in general among physicians in our state. I would not choose medicine as a career again.

Id. at 54.

We have been looking to recruit one to two physicians for a year now and there has been no interest. I am a busy internist but am paid very poorly (\$84,000 before taxes) because that is all that is left after overhead is paid along with health insurance. I would NEVER do this again and it is killing both my husband and myself. I HATE my job!

Id. at 47.

221. *Id.* at 9.

222. *Id.* at 2.

223. See Williams, *supra* note 14, (reporting results of American Bar Association survey).

224. Jim Ritter, *An Epidemic of Doc Suicides*, CHI. SUN-TIMES, Sept. 5, 2006, at 8 (quoting statement by AMA and referencing Harvard study that found male doctors are 1.4 times more likely and female doctors are 2.3 times more likely to commit suicide than general public); see also Jane Anderson, *Physician Suicide Rates Suggest Lack of Treatment: Greater Awareness of Depression Needed*, CLINICAL PSYCHIATRY NEWS, July 1, 2008, at 1 (“Studies over the past 4 decades have confirmed that physicians—especially women physicians—die by suicide more frequently than people in other professions or those in the general population.” (minor punctuation error omitted)).

225. See Monique Fields, *Doctors Doing Drugs and Drinking: Some Physicians with Substance Abuse Problems Are Protected by Family and Friends*, PHYSICIAN EXECUTIVE, Sept.-Oct. 2004, at 28 (stating that drug experts say physicians are adept at hiding their addictions and that friends and family members help them “keep alcohol and drug abuse out of sight”).

rates greater than the public at large.²²⁶ As for lawyers, a study by the National Institute for Occupational Health and Safety found that lawyers had the fifth highest suicide rate among workers studied.²²⁷ Several studies have documented alcohol abuse problems in the legal profession. A survey of North Carolina lawyers found that nearly 17% reported consuming three to five drinks a day.²²⁸ A study of Washington lawyers concluded from a random sample that 18% of practicing lawyers were “problem drinkers.”²²⁹ One researcher of alcoholism among lawyers estimated that at least 15% of lawyers are alcoholics.²³⁰ This compares to an approximately 10% rate nationwide.²³¹ Alcohol and other forms of substance abuse are involved in from 50-75% of all disciplinary actions against attorneys.²³²

Obviously, fighting with each other is not the main cause of unhappiness and stress for doctors and lawyers, but it can’t help. Harboring anger and hostility increases health risks and contributes to lower overall well-being. A large body of research associates anger and hostility with events such as heart attacks and strokes.²³³ One study specifically found that angry medical students are at increased risk of depression

226. See Thomas M. Johnson, *Physician Impairment: Social Origins of a Medical Concern*, 2 MED. ANTHROPOLOGY Q. 17, 17 (1988) (“Physicians, for at least most of the 20th century, appear to have been especially vulnerable to . . . substance abuse . . .”); S.E.D. Shortt, *Psychiatric Illness in Physicians*, 121 CANADIAN MED. ASS’N J. 283, 283 (Aug. 4, 1979) (asserting that physicians are “inordinately susceptible” to drug abuse and that “[m]any appear to deny their addiction”); Ritter, *supra* note 224 (stating that female doctors suffer higher rates of alcoholism than women in general).

227. See Lynne Marek, *Reports of Suicides Point to Job Stress*, NAT’L L.J., May 11, 2009, available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202430579215&Reports_of_suicides_point_to_job_stress&slreturn=1&hbxlogin=1 (discussing twenty-year-old study mentioned in text, stating that no updated figures exist, but also stating experts believe “factors in the profession that may contribute to suicide have likely grown worse, not better”); see also LEVIT & LINDER, *supra* note 206, at 6 (“Lawyers suffer exceptionally high rates of . . . suicide.”).

228. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 876–77 (1999) (collecting and reporting on studies of lawyer alcohol and drug abuse).

229. *Id.* at 876 (internal quotation marks omitted).

230. *Id.*

231. *Id.*

232. Betty Reddy & Ruth Woodruff, *Helping the Alcoholic Colleague*, PROF. LAW., May 1992, at 1, 4.

233. See, e.g., Benita Jackson et al., *Does Harboring Hostility Hurt? Associations Between Hostility and Pulmonary Function in the Coronary Artery Risk Development in (Young) Adults (CARDIA) Study*, 26 HEALTH PSYCHOL. 333, 334 (2007) (“[S]tudies to date strongly suggest a role for hostility in cardiovascular-related outcomes.”); Marty S. Player et al., *Psychosocial Factors and Progression from Prehypertension to Hypertension or Coronary Heart Disease*, 5 ANNALS FAM. MED. 403, 404 (2007) (stating that anger is associated with coronary events and that a high trait of anger is associated with increased risk of stroke); Jesse C. Stewart et al., *Negative Emotions and 3-Year Progression of Subclinical Atherosclerosis*, 64 ARCHIVES GEN. PSYCHIATRY 225, 225 (2007) (stating that considerable evidence suggests that negative emotions such as depression, anxiety, and hostility/anger are associated with increased risk of coronary artery disease in initially healthy populations).

and heart attacks.²³⁴ Studies also show that harboring anger and “unforgiveness” contributes to negative emotional states generally.²³⁵

Again, none of this is to suggest that if doctors and lawyers let go of their animosity toward one another, they would suddenly lead happy lives. But a greater willingness to approach their relationships and the bigger issues of medical error and medical liability with less anger, to accept unchangeable facts, and to search for common ground could facilitate an altered mindset that would reduce the added stress and negative energy that come from constant conflict. In the words of that prolific lyrical scholar, Don Henley, “[y]ou keep carryin’ that anger, it’ll eat you up inside, baby.”²³⁶

V. PRESCRIPTIONS FOR IMPROVING RELATIONS BETWEEN DOCTORS AND LAWYERS

We’ve seen thus far that doctors and lawyers are in an ugly fight that works against their self-interest—in addition to the interests of their patients and clients—at several levels. But what, if anything, can be done about it? Are doctors and lawyers destined to be locked in eternal conflict or can they learn to get along? It is submitted that the answers to these questions are “yes” and “yes.” So long as lawyers continue to sue doctors, the medical and legal professions are never going to be free from confrontation. But efforts can be made and steps taken to reduce the level—and improve the tenor—of their conflict. Below are several suggestions for improving communication and understanding between doctors and lawyers.

A. *Acknowledge Core Truths About Medical Negligence and Malpractice Lawsuits*

To have any hope of reaching a ceasefire and approaching some middle ground, each side must—as a threshold—acknowledge certain basic truths, some of them uncomfortable, concerning medical negligence and medical malpractice lawsuits. This does not require conceding the merits of either side’s particular proposals to fix the medical or legal systems. That would be nice, of course, but these are intended to be realistic suggestions. The goal here is more modest: to encourage a good faith effort to accept certain facts and appreciate, in the vernacular, where the other side “is coming from.” The examples below are intended to be illustrative, not exhaustive.

234. See Pippa Wysong, *Med Student Anger a Harbinger of Depression, Heart Attack*, MED. POST, May 16, 1995, at 2 (describing long-term study reaching these findings).

235. See Alex H. S. Harris & Carl E. Thoresen, *Forgiveness, Unforgiveness, Health, and Disease in HANDBOOK OF FORGIVENESS* 321, 321–22 (Everett L. Worthington, Jr. ed., 2005) (stating that unforgiveness is a “combination of delayed negative emotions” such as “resentment, bitterness, hostility, hatred, anger, and fear”; that forgiveness not only reduces negative thoughts, motivations, and behaviors toward the offender, but also increases positive emotions such as empathy, hope, or compassion; and that forgiveness should carry health benefits); Thomas M. Begley, *Expressed and Suppressed Anger as Predictors of Health Complaints*, 15 J. ORGANIZATIONAL BEHAV. 503, 503–16 (1994) (discussing study showing suppressed anger is associated with anxiety, depression, and somatic complaints).

236. DON HENLEY, *The Heart of the Matter, on THE END OF THE INNOCENCE* (Geffen Records 1989).

1. Medical Errors Are Common and Frequently Result in Serious Patient Harm.

Doctors must acknowledge that medical errors are far too common, and often result in serious injury or even death to patients.²³⁷ Not surprisingly, because they are human beings, “[e]very doctor makes mistakes in diagnosis and treatment.”²³⁸ Up to fifteen percent of diagnoses may be wrong.²³⁹

Contrary to common belief, most errors made by doctors or other skilled actors do not stem from lack of skill or knowledge. Research about the inevitability of human error in all fields is extensive.²⁴⁰ Counterintuitively, skill and experience can be liabilities rather than assets when it comes to cognitive errors. The more times a person has successfully performed a task, the less conscious thought is required to complete it, and the opportunity for errors is magnified.²⁴¹

Nor do doctors make a larger number of errors than other professionals. Their mistakes simply draw greater attention than errors by, say, lawyers because people can and do die from them. Like pilots and nuclear plant operators, doctors work in a field

237. See *supra* notes 128–29 and accompanying text for a discussion of the Institute of Medicine (IOM) study that estimated that 44,000 to 98,000 hospital deaths occur each year that are attributable to medical error.

238. GROOPMAN, *supra* note 174, at 7.

239. *Id.* at 24.

240. Cognitive failure—“slips”—by humans in performing tasks they have the knowledge and skill to perform are common and predictable. A cognitive failure is a mental error in performing an action sequence that a person normally is capable of completing without error. See Maryanne Martin, *Cognitive Failure: Everyday and Laboratory Performance*, 21 BULL. PSYCHONOMIC SOC. 97, 97 (1983) (defining cognitive failure as “a cognitively based error that occurs during the performance of a task that a person is normally successful in executing”); J. Craig Wallace & Stephen J. Vodanovich, *Can Accidents and Industrial Mishaps Be Predicted? Further Investigation into the Relationship Between Cognitive Failure and Reports of Accidents*, 17 J. BUS. & PSYCHOL. 503, 504 (2003) [hereinafter Wallace & Vodanovich, *Can Accidents and Industrial Mishaps Be Predicted?*] (defining cognitive failure “as a mistake or failure in the performance of an action that the person is normally capable of completing”).

A large body of psychological research shows that all humans suffer slips due to inattention caused by boredom, worry, divided focus, fatigue, external stimuli or other factors in carrying out activities they know full well how to perform properly. See, e.g., Tom Manly et al., *The Absent Mind: Further Investigations of Sustained Attention to Response*, 37 NEUROPSYCHOLOGIA 661, 662 (1999) (stating environmental stimuli may interfere with performance of tasks requiring low level of cognition to complete); Ian H. Robertson et al., *‘Oops!’: Performance Correlates of Everyday Attentional Failures in Traumatic Brain Injured and Normal Subjects*, 35 NEUROPSYCHOLOGIA 747, 747 (1997) (listing several of these factors); Wallace & Vodanovich, *Can Accidents and Industrial Mishaps Be Predicted?*, *supra*, at 504 (stating cognitive failures can occur when a person gets “sidetracked” from a task by external stimulus that interrupts completion of the task); J. Craig Wallace & Stephen J. Vodanovich, *Workplace Safety Performance: Conscientiousness, Cognitive Failure, and Their Interaction*, 8 J. OCCUPATIONAL HEALTH PSYCHOL. 316, 324–25 (2003) (suggesting that fatigue can impact safe behavior, especially when performing monotonous work or jobs that require sustained attention).

241. See DONALD A. NORMAN, *THE PSYCHOLOGY OF EVERYDAY THINGS* 106 (1988) (“Slips show up most frequently in skilled behavior.”); JAMES REASON, *HUMAN ERROR* 97 (1990) (suggesting that the more often cognitive routines achieve successful outcomes, the more likely human error may creep in through a process known as “underspecification”); see also Donald O’Hare, *The ‘Wheel of Misfortune’: A Taxonomic Approach to Human Factors in Accident Investigation and Analysis in Aviation and Other Complex Systems*, 43 ERGONOMICS 2001, 2008 (2000) (suggesting that “overconfidence” in ability to perform tasks may contribute to errors). Not all medical mistakes are the result of cognitive errors by physicians, but “performance” errors are the most common classification of errors leading to adverse medical events. See *infra* note 243 for a discussion of data on this point.

where mistakes are more likely to have disastrous physical consequences for third parties than mishaps that occur in most other occupations.

Not all medical errors are the result of negligence, of course, but the famous Harvard Medical Practice Study²⁴² of more than 30,000 patients hospitalized in New York in 1984 concluded that 3.7% of medical errors resulted in adverse events and that 27.6% of the adverse events were attributable to negligence.²⁴³ This translates to roughly one percent of hospitalized patients suffering a negligent medical injury.²⁴⁴ The results were similar to those reached in a California study conducted a decade earlier.²⁴⁵

To refuse to acknowledge the scope of medical errors or to simply blame lawyers for the consequences of those errors is perhaps a textbook application of what is known as self-concept theory, a sub-theory of the social psychology field of cognitive dissonance. Cognitive dissonance is the tension that arises when one holds two conflicting beliefs or believes one way and then acts another.²⁴⁶ Dissonance theory is “[t]he engine that drives self-justification.”²⁴⁷ The unpleasant feeling created by acting in a way contrary to one’s self-concept drives people to go to great lengths to justify and rationalize their discrepant behavior. Dissonance is strongest when it involves “not just any two cognitions but, rather, a cognition about the self and a piece of our behavior that violates that self-concept.”²⁴⁸

Committing an error that harms a patient cuts deep into the core of a doctor’s self-concept as a helper and healer, the very reasons for his or her existence as a professional. In his candid book, *How Doctors Think*, Jerome Groopman states that he remembers every error he has made in his thirty-year career. He recounts a diagnostic

242. The Harvard Medical Practice Study was an extensive empirical study of medical malpractice undertaken by an interdisciplinary group of researchers from Harvard University. See WEILER ET AL., *supra* note 65, at vii–xiv (explaining origins of study). Commissioned by the state of New York in 1986, the study involved analysis of the medical records of a representative sample of more than 30,000 patients hospitalized in fifty-one New York hospitals in 1984. *Id.* The research led to a series of influential articles in the *New England Journal of Medicine* (denoted Harvard Medical Practice Study I, II, and III) and a book discussing the project and making policy recommendations. *Id.* Interested readers should consult the original sources for detailed information. This article discusses only the most prominent conclusions of the studies.

243. Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practice Study I*, 324 NEW ENG. J. MED. 370, 370 (1991). Analyzing the same data gathered in the *Harvard Medical Practice Study I*, researchers in the Harvard Medical Practice Study II classified the types of error leading to the adverse events as follows: performance (35.2%, of which 28.2% were judged negligent); prevention (21.9%/59.6% judged negligent); diagnosis (13.8%/74.7% judged negligent); drug treatment (8.9%/52.8% judged negligent); system/other (2.4%/66% judged negligent); and unclassified (17.9%/43.4% judged negligent). Lucian L. Leape et al., *The Nature of Adverse Events in Hospitalized Patients: Results of the Harvard Medical Practice Study II*, 324 NEW ENG. J. MED. 377, 381 tbl.6 (1991).

244. WEILER ET AL., *supra* note 65, at 43.

245. *Id.*

246. See generally Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389, 394–95, 414–15, 424–28 (1999) (explaining cognitive dissonance theory).

247. CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME)* 13 (2007).

248. Elliot Aronson, *The Return of the Repressed: Dissonance Theory Makes a Comeback*, 3 PSYCHOL. INQUIRY 303, 305 (1992).

error that led to a patient's death and says he's never forgiven himself for it.²⁴⁹ Given the conflict between their allegiance to the Hippocratic Oath to do no harm²⁵⁰ and the reality that they do make mistakes that cause harm, it is understandable that some doctors, even if only unconsciously, prefer to shift the blame for medical malpractice to the legal system. Nevertheless, while psychological rationalization is understandable in these circumstances, to have any hope of reconciling their anger (and, hence, conflict) with lawyers and the legal profession, doctors must acknowledge the frequency of medical errors and their responsibility under the legal system to make restitution when errors resulting from negligence cause harm to patients.

2. Medical Lawsuits Are Not Personal Attacks.

Hard as it may be, doctors must understand that, while medical liability lawsuits feel like personal assaults, they aren't intended as such. A malpractice lawsuit is not saying, "You are a horrible, evil person." It is alleging only that the doctor made an error.²⁵¹ Assuming they properly investigate potential claims and determine they have reasonable merit, trial lawyers are only doing their jobs when they seek compensation on behalf of injured clients, just as insurance defense lawyers are doing their job in vigorously defending malpractice claims.²⁵² Of course, one of the primary complaints of medical defendants, as discussed below, is that lawyers file too many claims that lack reasonable merit.²⁵³ Properly directed, doctors' primary gripe should not be with lawyers, but with our adversarial legal system, the same system doctors turn to when they need help.²⁵⁴ It should be remembered that doctors and their families are also victims of medical negligence.²⁵⁵

3. Lawyers Cause Harm to Doctors When They File Lawsuits.

As a converse to doctors accepting that lawsuits are not personal, plaintiffs' lawyers need to better understand and be more sensitive to the fact that when they are simply "taking care of business" by filing a medical malpractice lawsuit, they *are* causing severe personal damage to the defendant doctor.

249. GROOPMAN, *supra* note 174, at 24–25.

250. LUDWIG EDELSTEIN, *THE HIPPOCRATIC OATH: TEXT, TRANSLATION AND INTERPRETATION* 3 (1943) ("I will apply dietetic measures for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice.").

251. As one doctor-turned-lawyer attempted to explain to his medical colleagues: "Intent has little to do with getting sued. The issue is whether a deviation in the standard of care resulted in a patient injury—not good or evil." Mark Crane, *Doctors Who Became Lawyers: What They Want You to Know*, *MED. ECON.*, Apr. 4, 2008, at 42, 46 (internal quotation marks omitted).

252. One interesting avenue for research would be to find out what doctors think of malpractice defense lawyers, which are provided by their insurance companies. Do they like them? Do they trust them? Do they value their help?

253. See *infra* notes 271–76 and accompanying text for a discussion of research on the objective merits of medical malpractice claims.

254. See *supra* notes 197–99 and accompanying text for a discussion of lawsuits by doctors against managed care organizations.

255. As noted by Dr. Darshak Sanghavi, "[I]ike almost one-third of all doctors, I have a family member who was injured by medical negligence." Sanghavi, *supra* note 97.

A lawyer's job often necessarily involves hurting one party while seeking to help another. This is, in fact, this author's primary theory as to why lawyers are unpopular and more easily susceptible to personal attack than doctors. In their professional capacity, doctors are always trying to help people. They may not always do a perfect job of it, or carry it out with the most pleasant of demeanors, but their assignment every day when they get to work is to treat the sick and heal the injured.

Lawyers are always trying to help people too, but only *some* of the people involved in a dispute. Their ethical responsibility to "zealously"²⁵⁶ represent their clients often carries a subsidiary de facto duty to work zealously to defeat, some might say hurt, the opposing party or parties. Litigated disputes, by their nature, have winners and losers. Each one leaves someone wounded emotionally and often financially. As one legal commentator put it in comparing lawyers and doctors: "Imagine if it worked like that with doctors. One doctor tries to heal you while the other tries to make you sicker. How popular would doctors be then?"²⁵⁷

Lawyers should pause to think about their own mistakes²⁵⁸ and imagine if the tables were turned. Imagine a world where doctors possessed the power to rain emotional and financial havoc upon them each time they erred. It seems unlikely they would accept that doctors were just doing their jobs.

Improving communication and, hence, understanding between lawyers and doctors, as argued below,²⁵⁹ would enhance the capacity of lawyers to sympathize with the unenviable position of doctors. In all contexts, it is easier to attack an unknown enemy than one who has been humanized to the attacker.²⁶⁰ Having sympathy and understanding for the doctor would not, of course, be a reason to forego a valid claim, but it could alter the manner in which the lawyer handles the claim, such as in the tenor and tone of pleadings and interactions with the defendant physician during the proceedings. Tact, sensitivity, and general humaneness are more professional and easier to receive than seeming callousness and self-righteousness.

Regarding this last point, trial lawyers could enhance their credibility by conceding they're in it for the money and surrendering the dubious stance that they file tort suits motivated only by a desire to champion the rights of the little guy.²⁶¹ Such a

256. See MODEL RULES OF PROF'L CONDUCT Preamble (2009) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

257. *Hate Lawyers?*, ALBANY LAWYER (May 7, 2009, 12:35 AM), <http://albany-lawyer.blogspot.com/2009/05/hate-lawyers.html>.

258. No empirical research exists regarding error rates by lawyers, but it is reasonable to assume they make errors as often as doctors.

259. See *infra* Part V.C for a discussion of ways in which communication between doctors and lawyers could be improved.

260. See Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 293–94 (2008) (discussing study showing that members of social groups "privilege" their own humanity and attribute a lack of humanity to opposing groups, making those others less worthy of consideration and more easy to defeat); Gregory Hooks & Clayton Mosher, *Outrages Against Personal Dignity: Rationalizing Abuse and Torture in the War on Terror*, 83 SOC. FORCES 1627, 1638–39 (2005) (noting that dehumanizing enemies allows one to rationalize using inhumane tactics to defeat them).

261. See HALTOM & MCCANN, *supra* note 69, at 127–28 (discussing this self-held view of plaintiffs' lawyers).

self-righteous opinion may be another example of applied cognitive dissonance theory.²⁶² Personal injury lawyers, under constant attack for being greedy predators, perhaps feel an internal need to nurture the David vs. Goliath self-image as a way to reduce their own dissonance about what they do. One of this author's former students, a surgeon and now also a lawyer, wrote the following comment about a draft of this Article:

In law school, I learned that trial lawyers rationalize their pursuit of large monetary awards by waving the "patient rights" flag. They say it is not personal, just business. But to the doctor, it is very personal. And we all need to come to terms with that fact. Now that legal malpractice is on the upswing, many more lawyers will begin to understand.²⁶³

This author has taught torts for more than twenty years at several law schools in different parts of the country and is acquainted with many plaintiffs' lawyers. While some of them are motivated in part by the noble cause of giving a voice to injured tort victims who otherwise would not have one, this author has never met a plaintiffs' lawyer uninterested in earning large sums of money. Plaintiffs' personal injury lawyers are not public interest lawyers. The most successful ones are among the wealthiest professionals in America.²⁶⁴

4. "Frivolous" Medical Lawsuits Are Uncommon and the Legal System Functions Reasonably Well in Sorting Meritorious from Unmeritorious Claims.

Doctors sincerely believe the legal system is stacked against them,²⁶⁵ a view shared by law professor Ellen Wertheimer. She makes an interesting argument that the legal system treats doctor errors more harshly than lawyer errors because judges, understanding the uncertainties of law better than medicine, are more forgiving of their mistakes.²⁶⁶ She cites the infamous California Supreme Court case involving the attorney who made a mistake in interpreting the Rule Against Perpetuities with the result that an intended inheritance in a will was invalidated.²⁶⁷ The court let the attorney off the hook based on its view that the law on perpetuities was sufficiently

262. See *supra* notes 246–48 and accompanying text for a discussion of cognitive dissonance theory.

263. E-mail from Dr. Robert W. Bailey to author (Feb. 9, 2010, 4:50 PM) (on file with author).

264. As an extreme example, Mississippi lawyer Dickie Scruggs, rumored to have been a model for John Grisham's book, *The King of Torts*, took home nearly \$1 billion in fees as a product of the stunning \$246 billion settlement between forty-six states and the tobacco industry in 1998. Under the settlement, Scruggs' firm is paid \$3 million a month for twenty-three years. Terry Carter, *Long Live the King of Torts?*, A.B.A. J., Apr. 2008, at 45. Scruggs was indicted for attempting to bribe a state judge in 2007. He pled guilty and was sentenced to five years imprisonment. Jennie Jarvie, *For a Legal Legend, a Stiff Dose of Justice; Dickie Scruggs, Once a Powerful Lawyer for the Little Guy, Gets the Maximum 5 Years in a Bribery Case*, L.A. TIMES, June 28, 2008, at A14.

265. See, e.g., Silverman, *supra* note 185, at 56 ("Physicians are running scared from a legal system they no longer trust. A . . . poll of 300 physicians showed that 83% did not trust the current system of justice to achieve a 'reasonable result' . . .").

266. Wertheimer, *supra* note 67, at 156–58.

267. *Id.* at 157–58 (citing *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961)).

confusing that it wasn't negligent for the attorney to screw up.²⁶⁸ Wertheimer posed the question: "Can you imagine a similar result or statement in a medical malpractice case? A judge saying, 'yes, you made a mistake, you were even negligent, but no one really understands how the brain works so don't worry about it?'"²⁶⁹

While it's understandable that doctors are wary of a legal system run by lawyers, the data do not support Wertheimer's assertion of bias against doctors. Doctors win roughly seventy-five percent of malpractice cases that go trial.²⁷⁰ A study by researchers at the Harvard School of Public Health found that the tort system does a good job in separating claims with merit from those without merit.²⁷¹ Physicians reviewed a random sample of 1,452 closed malpractice claims from five insurance companies to compare the merit of the claims with how they were resolved.²⁷² The study found that most claims (seventy-three percent) attributable to medical error resulted in a payout and that most claims (eighty-four percent) that did not involve error did not result in a payout.²⁷³ Moreover, "nonpayment of claims with merit occurred more frequently than did payment of claims that were not associated with errors or injuries."²⁷⁴ One broad conclusion of the study was that "portraits of a malpractice system that is stricken with frivolous litigation are overblown."²⁷⁵ Other studies have reached similar results.²⁷⁶

These empirically based conclusions coincide with the economic reality of being a plaintiffs' lawyer in a contingency fee-based system where the lawyer must fund the litigation and only gets paid if the client receives compensation. The high expense²⁷⁷ and high risk of losing²⁷⁸ medical liability cases makes filing frivolous lawsuits an unlikely and economically irrational scenario. Lawyers pursuing a business strategy of

268. *Lucas*, 364 P.2d at 690 ("[F]ew, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman [A]n error of the type relied on by plaintiffs does not show negligence or breach of contract on the part of the defendant.").

269. Wertheimer, *supra* note 67, at 157–58.

270. THOMAS H. COHEN & KRISTEN A. HUGHES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MEDICAL MALPRACTICE INSURANCE CLAIMS IN SEVEN STATES, 2000–2004, at 3 (2007) (citing to an earlier Bureau of Justice report finding that plaintiffs won about one-quarter of medical malpractice cases that went to trial). While there is variation among states, roughly one-third of medical malpractice claimants receive a payout in some form. *Id.* at 2. Only seven percent of claims filed go to trial. *Id.* at 3. Roughly ten percent of trial awards are for more than one million dollars. *Id.* at 4.

271. David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2031 (2006).

272. *Id.* at 2024.

273. *Id.* at 2027–28.

274. *Id.* at 2028.

275. *Id.* at 2031.

276. David M. Studdert et al., *Medical Malpractice*, 350 NEW ENG. J. MED. 283, 285 (2004) (stating that "[a] number of studies have concluded that the tort system does a reasonably good job of directing compensation to plaintiffs with meritorious claims").

277. See *supra* note 111 for a discussion of the high cost of funding a medical malpractice lawsuit from the plaintiff's side.

278. See *supra* note 270 and accompanying text for a discussion of data showing that payouts occur in only one-third of medical malpractice claims and that plaintiffs who go to trial win only about one-quarter of the time.

filing frivolous medical claims would become insolvent quickly.²⁷⁹ Contrary to popular belief, lawyers reject the vast majority of clients seeking to bring tort claims, including medical claims.²⁸⁰

Thus, one wedge in the conflict could be narrowed if doctors were to accept that the legal system, for all its faults, deters truly frivolous claims and generally reaches fair results. On the other hand, as discussed below, “frivolous” is not coextensive with “lacking ultimate merit.” A substantial percentage of medical malpractice claims, even if not frivolous, lack sufficient evidence by a preponderance of the evidence standard that negligence occurred.²⁸¹ The fact that the system gets the result right in the end may be of small comfort to a doctor who has been subjected to the burden of a lawsuit. As one doctor wrote, “[i]t is the filing of a suit, whether justified or not, that causes the practitioner the most pain.”²⁸²

5. Most Valid Claims for Medical Negligence Are Never Brought, Yet Too Many Unfounded Claims Are Filed.

The medical malpractice system is often attacked by pro-tort reformers, including doctors, for being a lottery system.²⁸³ It does indeed have a significant lottery aspect to it, although a much different one than portrayed by the tort reformers. Medical research shows that the relationship between incidents of medical negligence and claims filing is erratic to the point of being irrational, with doctors benefiting much more from this randomness than they lose since the vast majority of people injured by medical

279. See, e.g., Dan K. Thomasson, *Health Reform Starts with Insurers*, NAPLES NEWS, Aug. 14, 2009, available at <http://www.naplesnews.com/news/2009/aug/14/dan-thomasson-meaningful-health-care-reform-must-s/> (quoting lawyer stating that “only an insane lawyer takes on a malpractice suit against a doctor that isn’t 99 percent provable, and there aren’t many of those” (internal quotation marks omitted)). If anything, smaller claims with merit are currently under-pursued because of the high costs involved. See HALTOM & MCCANN, *supra* note 69, at 299 (stating that higher costs and diminished returns mean that “small [tort] cases get priced out of the market”).

280. See A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Practice Study III*, 325 NEW ENG. J. MED. 245, 249 (1991) (“Trial lawyers usually accept only the relatively few cases that have a high probability of resulting in a judgment of negligence with an award large enough to defray the high costs of litigation.”); Giana Ortiz, Comment, *Medical Malpractice Damage Caps—Constitutional Per Se in Texas, but at What Price? A Look at Alternative Patient Compensation Schemes*, 43 HOUS. L. REV. 1281, 1301 (2006) (explaining that in some states, like California, “seven out of ten attorneys turn down legitimate malpractice claims because they will not recover enough to ‘make it worth their while’”).

281. See *infra* notes 288–90 and accompanying text for a discussion of the distinction between frivolous claims and claims that fail to meet the necessary burden of proof.

282. Gillette, *supra* note 57, at 10 (stating also that the doctor “is injured the moment those papers are served on him” and “[e]ven if he is completely in the right, he will go through the agony of wondering if he should have done something different in his care of the patient”).

283. See, e.g., Jeff Kieffer, Letter to the Editor, *Lawsuits to Blame*, CHI. TRIB., Oct. 22, 2004, at C24 (“Our medical malpractice system has become a lottery and people, greedy and ignorant people, are waiting for their chance to ‘strike it rich’ on the backs of hardworking health-care professionals.”); Jack Torrey, *Bush Slams Malpractice Lawsuits: Speech Is President’s First in Ohio in 3 Weeks*, COLUMBUS DISPATCH, Oct. 23, 2004, at 1A (discussing speech by President George W. Bush in which he accused trial lawyers of turning the American legal system into a lottery, causing unnecessary medical costs for consumers).

negligence never pursue claims. As the Harvard Medical Practice Study researchers concluded, “the real tort crisis may consist in *too few* claims.”²⁸⁴

In the Harvard Medical Practice Study III, researchers, using the same data as in the first two installments²⁸⁵ and linking it to filed malpractice claims, studied the correlation between negligent medical errors and malpractice claims.²⁸⁶ The researchers concluded that, contrary to popular belief, an astonishingly large percentage of patients injured by medical error do *not* file claims. Specifically, the study concluded that only two percent of medical negligence occurrences—one in fifty—led to a claim being filed.²⁸⁷

But, in the words of ESPN sportscaster Lee Corso, “not so fast, my friend.” The study also found that only seventeen percent of the claims that *were* filed—fewer than one in five—involved negligent medical injury,²⁸⁸ a similarly shocking figure. (They did not determine that the other eighty-three percent of the claims were frivolous, as in wholly without substance, but only that the hospital records lacked sufficient proof of negligence to convince the researchers—who sometimes disagreed—that the patients suffered a negligent injury.)²⁸⁹

Like all complex empirical research, the Harvard Medical Practice Study must be consulted for details and limitations,²⁹⁰ but the fact that statistically sound research yielded such bizarre claims-matching results raises serious questions as to whether the medical liability system in its current form efficiently serves the restorative and deterrent functions of tort law. The data should cause both sides to stop and reassess

284. WEILER ET AL., *supra* note 65, at 62.

285. See *supra* note 242 for a discussion of the three-part Harvard Medical Practice Study.

286. Localio et al., *supra* note 280, at 245.

287. *Id.* at 249. The researchers offered several possible explanations for this surprising result, including that patients may have received adequate health and disability benefits, may not want to disrupt their relationships with their physicians, may regard their injuries as minor, may consider the small chance of success to not warrant the cost, may find lawyers repugnant, or may not recognize that they received negligent care. *Id.*

288. This latter conclusion was emphasized in a book (*A Measure of Malpractice*) about the Harvard Medical Practice Study written by several researchers involved in the study. See WEILER ET AL., *supra* note 65, at 71 (“[T]he key finding of our detailed matching procedure [in Harvard Medical Practice Study III] was that in only 8 of the 47 claims filed by our patients as a result of their 1984 hospitalization was there an actual negligent adverse event . . .”). This is where the seventeen percent figure comes from (eight divided by forty-seven equals seventeen percent).

The Harvard Medical Practice Study has been criticized on several grounds, including its failure to prominently feature the finding that only a small percentage of the claims studied appeared to involve medical negligence. See RICHARD ANDERSON, MANHATTAN INST., AN “EPIDEMIC” OF MEDICAL MALPRACTICE?: A COMMENTARY ON THE HARVARD MEDICAL PRACTICE STUDY (1996), available at http://www.manhattan-institute.org/html/cjm_27.htm (leveling several critiques at Harvard Medical Practice Study, including this one).

289. WEILER ET AL., *supra* note 65, at 71. See also *infra* note 290 for further discussion on this point.

290. The researchers specifically cautioned, for example, that their finding that only a small percentage of medical malpractice claims showed evidence of negligence did not necessarily mean that all of those claims were unfounded. WEILER ET AL., *supra* note 65, at 71. Specifically, it was not always clear from the hospital records they examined whether malpractice occurred. *Id.* In several of the cases in which the researchers ultimately determined there was insufficient evidence of medical negligence, one of the reviewing physicians disagreed. *Id.* The authors stated that an undercount of valid claims was “inevitable” using their procedure. *Id.* at 73.

their positions on reforming the medical injury claims process.²⁹¹ In the meantime, the medical community should acknowledge that most negligent errors do not result in claims, while plaintiffs' lawyers should concede that too many unsupported malpractice claims get filed.

6. Malpractice Litigation Increases the Cost of Healthcare.

Finally, with regard to the big picture issue of healthcare costs, lawyers must acknowledge that medical malpractice lawsuits do contribute to higher healthcare costs, both because of litigation-related costs, including insurance premiums, and doctors practicing defensive medicine²⁹² as a way to protect themselves from claims. With regard to insurance premiums, while the relationship of malpractice claims to the cost of medical liability insurance is disputed,²⁹³ it is reasonable to assume that some relationship exists. As to the cost of healthcare generally, lawyers are fond of touting that medical lawsuits are responsible for only one to two percent of overall healthcare costs.²⁹⁴ The actual percentage is contested,²⁹⁵ but even accepting the lawyers' figure as

291. Recommended reading for both doctors and lawyers is the 2004 health policy report by David Studdert and colleagues published in the *New England Journal of Medicine*. Studdert et al., *supra* note 276. The report thoughtfully analyzes the irrational functioning of the medical malpractice system on several levels, including what should be everyone's primary concern: patient safety.

292. See *supra* note 185 for a discussion of the practice of defensive medicine.

293. See *supra* notes 200–03 and accompanying text for a discussion of the opposing studies on the connection between malpractice lawsuits and the cost of malpractice liability insurance; see also *infra* notes 301–06 and accompanying text for a discussion of the disputed causal connection between tort reform measures such as caps on damages and the cost of malpractice liability insurance.

294. See, e.g., TOM BAKER, THE MEDICAL MALPRACTICE MYTH 9 (2005) (arguing that medical malpractice insurance amounts to less than one percent of overall healthcare costs); Donald W. Price, Editorial, *Frivolous Lawsuits Are Already Against the Law*, TIMES-PICAYUNE (New Orleans), July 6, 2004, at M4 (arguing, from perspective of practicing lawyer, that because lawsuits make up less than one percent of the healthcare budget, limiting medical malpractice lawsuits would have little effect on overall healthcare costs); Mark Silva, *Bush Opens Effort to Limit Lawsuits; In Southern Illinois, President Says Congress Must Cap Pain, Suffering Awards at \$250,000*, CHI. TRIB., Jan. 6, 2005, at C9 (stating that opponents of tort reform in U.S. Senate have adopted lawyers' argument that medical malpractice litigation makes up only two percent or less of healthcare costs); *Malpractice a Tiny Percentage of Health Care Costs*, AM. ASS'N FOR JUSTICE, <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/8686.htm> (last visited Nov. 21, 2010) (citing Congressional Budget Office issue brief in asserting that malpractice costs account for less than two percent of overall health costs); Wayne Parsons, *Tort Reform Myth: Myth: Health Care Costs Are Rising and Doctors Are Unable to Practice Due to Litigation*, INJURY BOARD BLOG NETWORK (May 5, 2009, 4:11 AM), <http://honolulu.injuryboard.com/medical-malpractice/tort-reform-myth-myth-health-care-costs-are-rising-and-doctors-are-unable-to-practice-due-to-litigation.aspx?googleid=262346> (arguing that malpractice costs make up less than two percent of overall health costs); see also M. Gregg Bloche, Op-Ed., *Healthcare: Your Aches, Your Pains, Your Bills*, L.A. TIMES, Oct. 10, 2004, at M1 (discussing health reform debate during 2004 presidential election, with presidential candidate John Kerry and other lawyers arguing that ending "frivolous lawsuits" would not substantially affect the total annual cost of healthcare in the United States (internal quotation marks omitted)).

295. See, e.g., Bob Keefe, *Bill Aims at Medical Suits: Chambliss Wants to Reduce Frivolous Malpractice Claims*, ATLANTA J.-CONST., Nov. 4, 2009, at A10 (stating that opponents of tort reform argue that malpractice litigation accounts for less than one percent of the total cost of healthcare in this country, while proponents argue that frivolous malpractice suits increase healthcare costs); Bill Meyer, *Would Tort Reform Make Much Difference in Health Care Costs? Probably Not: Analysis*, CLEVELAND.COM (Sept. 9, 2009, 6:21 PM), http://www.cleveland.com/nation/index.ssf/2009/09/would_tort_reform_make_much_di.html

accurate, one to two percent of our estimated \$2.3 trillion annual healthcare bill,²⁹⁶ is a large amount (specifically, between twenty-three and forty-six billion dollars). Lawyers need to end their state of denial regarding the contribution of medical malpractice litigation to higher healthcare costs.

B. *Fight Fair*

The doctor-lawyer debate is riddled with logical fallacies. A fallacy is a type of incorrect argument.²⁹⁷ A fallacious argument is one that appears on the surface to be correct but proves upon scrutiny to be logically invalid.²⁹⁸ Rhetoric and logic scholars have identified dozens of reasoning fallacies.²⁹⁹ Examples range from the familiar (e.g., circular reasoning, begging the question) to the esoteric (e.g., affirming the consequent, undistributed middle term). Given the woeful state of doctor-lawyer discourse, a thorough examination of their rhetoric would no doubt disclose examples of many types of fallacies, but the discussion below is limited to broad observations regarding a few of the most common and obvious deficiencies.

(arguing that by both lawyers' and nonpartisan government estimates, medical malpractice litigation makes up only two percent of healthcare spending, far lower than doctors' estimates); Hans von Spakovsky, *Congress Must Now Address Civil Justice Reform to Impact Health Care*, THE HERITAGE FOUNDATION (Jan. 20, 2011), <http://blog.heritage.org/2011/01/20/congress-must-now-address-civil-justice-reform-to-impact-health-care> (arguing "that abusive tort litigation is one of the driving forces in the high cost of health care").

296. CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL HEALTH EXPENDITURES 2008 HIGHLIGHTS 1 (2008), available at <http://www.cms.hhs.gov/NationalHealthExpendData/downloads/highlights.pdf> (discussing overall healthcare spending in United States, the total cost of which comprises 16.2% of the nation's Gross Domestic Product).

297. See JEREMY BENTHAM, THE HANDBOOK OF POLITICAL FALLACIES 3 (Harold A. Larrabee ed., rev. ed. 1962) (defining fallacy as argument used for purpose of deceiving); IRVING M. COPI, INTRODUCTION TO LOGIC 52 (2d ed. 1961) (defining effect of fallacy as rendering reasoning incorrect); W. WARD FEARNside & WILLIAM B. HOLThER, FALLACY: THE COUNTERFEIT OF ARGUMENT 3 (1959) ("The word 'fallacy' is sometimes used as a synonym for any kind of position that is false or deceptive, and sometimes it is applied in a more narrow sense to a faulty process of reasoning or to tricky or specious persuasions."); C.L. HAMBLIN, FALLACIES 12 (1970) ("A fallacious argument . . . is one that *seems to be valid* but is not so."); MADSEN PIRIE, THE BOOK OF THE FALLACY vii (1985) (defining fallacy as "[a]ny trick of logic or language which allows a statement or a claim to be passed off as something it is not").

Aristotle, from whose work all subsequent study of fallacies descended, defined fallacies in much the same way: "That some reasonings are genuine, while others seem to be so but are not, is evident. This happens with arguments, as also elsewhere, through a certain likeness between the genuine and the sham. . . . [B]oth reasoning and refutation are sometimes genuine, sometimes not, though inexperience may make them appear so . . ." 1 Aristotle, *De Sophisticis Elenchis*, in THE WORKS OF ARISTOTLE 164a 1.23–164b 1.26 (W.D. Ross ed., W.A. Pickard-Cambridge trans., 1928).

298. See T. EDWARD DAMER, ATTACKING FAULTY REASONING 3–4 (1980) (describing how fallacious arguments are deceptive and sometimes difficult to detect).

299. See, e.g., *id.* (analyzing sixty-four fallacies); DAVID H. FISCHER, HISTORIANS' FALLACIES 337–38 (1970) (offering definitions of more than 100 specific fallacies classified into eleven groups); PIRIE, *supra* note 297, at 183–87 (discussing seventy-six fallacies). Aristotle originally classified thirteen fallacies in *De Sophisticis Elenchis*. Aristotle, *supra* note 297, at 165b 1.23–169a 1.22. For a detailed discussion of logical fallacies in legal and political rhetoric, see generally Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53 (1992) [hereinafter McClurg, *The Rhetoric of Gun Control*]; Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Opinions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 742 (1988) [hereinafter McClurg, *Logical Fallacies and the Supreme Court*].

Fallacies of proof predominate. The consistent failure of both sides to discuss countervailing evidence when arguing about key issues commits the fallacy of one-sided assessment.³⁰⁰ Virtually any argument can be made to sound persuasive if relevant facts are omitted, yet nearly all tort reform information intended for mass consumption, whether from interest groups, lawyers, doctors, or politicians, is one-sided advocacy.

Causal fallacies also make regular appearances. What is the causal nexus, for example, between medical malpractice insurance rates and tort claims or between insurance rates and particular tort reforms, such as caps on noneconomic damages? These are central issues in the debate, yet commentary and studies offer completely opposite conclusions.³⁰¹ Because so much of the discourse is one-sided, it is next to

300. The rhetorical fallacy of offering only one side of an argument travels under a variety of names. See, e.g., DAMER, *supra* note 298, at 60–61 (calling this fallacy “Neglect of Relevant Evidence”); HAMBLIN, *supra* note 297, at 25 (describing the fallacy as “special pleading or half-truth”); PIERRE SCHLAG & DAVID SKOVER, TACTICS OF LEGAL REASONING 19 (1986) (describing the fallacy as “Competing Authority”); Jack L. Landau, *Logic for Lawyers*, 13 PAC. L.J. 59, 93 (1981) (labeling it as fallacy of “Suppressed Evidence”).

301. Analysis of the extensive commentary and studies on these issues is not part of this Article, but one does not have to look hard to find opposite cause and effect conclusions regarding these issues. Compare Bret Hanna, *Tort Reform Myth Debunked—Damages Caps Do Not Lower Malpractice Insurance Premiums*, INJURY BOARD BLOG NETWORK (Nov. 12, 2009, 4:49 PM), <http://saltlakecity.injuryboard.com/medical-malpractice/statistics-prove-claims-of-tort-reformers-are-myth.aspx?googleid=274378> (arguing that damages caps do not lower malpractice insurance rates), *Medical Malpractice & Liability—Just the Facts*, COMM. FOR JUSTICE FOR ALL, <http://www.saynotocaps.org/factsandfigures/justthefacts.htm> (last visited Nov. 22, 2010) (same), and *Medical Malpractice Myths: Tort Reform Will Lower Insurance Rates (Part V)*, PASSEN LAW GRP. (Nov. 20, 2009, 8:51 AM), <http://www.passenlaw.com/blog/personal-injury-law/medical-malpractice-myths-tort-reform-insurance-rates-part> (same), with Randolph W. Pate, Op-Ed., *Pro & Con: Should Liability Damage Caps Be a Part of Healthcare Reform?*, ATLANTA J.-CONST., Sept. 22, 2009, at A15 (arguing that damages caps do lower malpractice insurance rates), and *Healthy Kids, Healthy Families: Medical Malpractice Reform*, JOHN W. POPE CIVITAS INST., <http://www.nccivitas.org/public-policy-series/healthy-kids-healthy-families/medical-malpractice-reform/> (last visited Mar. 13, 2011) (same), and *Insurance Premiums Decline in States Capping Malpractice Payouts, Alabama University Study Finds*, ROBERT WOOD JOHNSON FOUND. (Dec. 2007), <http://www.rwjf.org/reports/grr/050298.htm> (same). See also *supra* notes 200–03 and accompanying text for a discussion of conflicting studies on whether tort lawsuits are the cause of high medical malpractice insurance premiums.

For readers who would like to delve deeper into the conflicting empirical research of these issues, here are some of the relevant studies and reports: PETER P. BUDETTI & TERESA M. WATERS, HENRY J. KAISER FAMILY FOUND., *MEDICAL MALPRACTICE LAW IN THE UNITED STATES* (2005) (asserting average number of medical malpractice claims has not increased over time, but average size of payouts has increased, partially due to healthcare cost inflation); NICOLE V. CRAIN ET AL., *TORT LAW TALLY, HOW STATE TORT REFORMS AFFECT TORT LOSSES AND TORT INSURANCE PREMIUMS* (2009) (discussing effects of tort reforms nationally from 1996 to 2006 and asserting that reforms resulted in sixteen percent reduction in malpractice insurance premiums and forty-seven percent reduction in losses to insurance companies); OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING & EVALUATION, U.S. DEP’T OF HEALTH AND HUMAN SERVS., *CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM* (2002) (arguing that high medical malpractice insurance premiums are forcing more and more doctors out of the profession); CHRIS SCHMITT, PUB. CITIZEN’S CONG. WATCH, *MEDICAL MALPRACTICE PAYOUT TRENDS 1991–2004: EVIDENCE SHOWS LAWSUITS HAVEN’T CAUSED DOCTORS’ INSURANCE WOES* (2005) (stating that number and total value of malpractice payouts were static from 1991 to 2001 and declined from 2001 to 2004 and arguing that such data undermine view that malpractice system is in crisis); U.S. GEN. ACCOUNTING OFFICE, *MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES* (2003) (finding that medical malpractice claims constitute largest portion of

impossible to get a grip on which side has the better of the argument. In the absence of sufficient data and an ability to control for all the variables that affect state-by-state medical liability insurance premium rates, the conclusions offered by each side, even those dressed up as complex statistical analyses, often appear—in the end—to constitute little more than fallacious *post hoc ergo propter hoc* (after this, therefore because of this)³⁰² reasoning, as in: State X imposed caps on noneconomic damages, malpractice insurance rates went down in State X; therefore, caps on noneconomic damages cause insurance rates to go down.³⁰³ The converse proposition, suggesting no relationship between damages caps and insurance rates, would be just as fallacious in the absence of data controlling for relevant variables. As one insurance company report observed, medical malpractice insurance premiums declined across the board during the 2000s, largely as a result of claims reduction.³⁰⁴ Claims have declined both in states with and without tort reform.³⁰⁵ Reasons for the decline, the report said, are speculative.³⁰⁶

insurance companies' costs, making them primary factor in rate increases); MARTIN D. WEISS ET AL., MEDICAL MALPRACTICE CAPS: THE IMPACT OF NON-ECONOMIC DAMAGE CAPS ON PHYSICIAN PREMIUMS, CLAIMS PAYOUT LEVELS, AND AVAILABILITY OF COVERAGE (2003) (finding that, after damage caps were instituted, malpractice payouts were reduced but insurance companies continued to increase insurance premiums for doctors, with median annual premiums increasing more than forty-eight percent in states with damages caps compared to approximately thirty-six percent in states without caps); Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. S183 (2007) (finding that caps on pain and suffering damages and limitations on joint and several liability reduce number of medical malpractice payments, while caps on noneconomic damages decreased total annual payments, but in very limited way); Patricia W. Hatamyar, *The Effect of "Tort Reform" on Tort Case Filings*, 43 VAL. U. L. REV. 559 (2009) (noting that tort reform measures in Oklahoma between 2003 and 2007 decreased number of tort filings by more than seventeen percent while other civil filings increased by four percent in same period); David A. Matsa, *Does Medical Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps*, 36 J. LEGAL STUD. S143 (2007) (suggesting that despite current speculation to the contrary, statutory damage caps have not increased the supply of physicians for average citizen in states that impose such caps); Joanna M. Shepherd, *Tort Reforms' Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905 (2008) (finding that some tort reform measures are associated with increased death rates, especially for women); Kenneth E. Thorpe, *The Medical Malpractice 'Crisis': Recent Trends and the Impact of State Tort Reforms*, HEALTH AFFAIRS, Jan. 21, 2004, at W-20 (finding that medical malpractice insurance premiums are more than seventeen percent lower in states that impose damage caps); Ronen Avraham & Max Schanzenbach, *Impact of Tort Reform on Private Health Insurance Coverage*, 12 AM. L. & ECON. REV. 319 (2010) (finding that some tort reforms, including damage caps and collateral source reform, can reduce healthcare costs by two percent).

302. See DAMER, *supra* note 298, at 68–69 (providing examples of *post hoc* fallacies and explaining that chronological relationship is only one factor in establishment of causal relationship); FEARNSIDE & HOLTHOR, *supra* note 297, at 21–22 (discussing *post hoc* reasoning with examples and comments); FISCHER, *supra* note 299, at 166–67 (explaining *post hoc* fallacies in historical scholarship); HAMBLIN, *supra* note 297, at 37–38 (reviewing philosophers' debate over false cause fallacy).

303. See, e.g., Pate, *supra* note 301 (stating that Georgia enacted noneconomic damages cap of \$350,000 in 2005, that medical liability insurance premiums subsequently declined, ergo "[a]vailable evidence suggests the reforms are working").

304. DAUBERT & CLAY, *supra* note 186, at 2.

305. *Id.*

306. *Id.* (offering "[s]peculation as to the reasons why" malpractice claims have declined in states with and without tort reform, adding that "[w]hatever the factors," insurance claims have declined for all types of liability coverage, including medical malpractice).

One of the most common, and certainly most pernicious, types of fallacy in the doctor-lawyer battle is the fallacy of emotion. This is particularly disappointing because fallacies of emotion are the most brutish and unsophisticated of all reasoning defects. One would expect better from two intelligent groups of professionals. Fallacies of emotion are arguments that persuade by stimulating an affective state of consciousness about the speaker or issue that is designed to preempt cognitive consideration of the issues.³⁰⁷ Because they are so patently transparent and often mean-spirited, they succeed in demeaning not only the target, but the arguer.

Consider as an example the anti-lawyer animation by the Doctors for Medical Liability Reform group discussed in Part III.³⁰⁸ The animation, typical of the group's other multimedia contributions to the dialogue, makes no effort to legitimately address any of the issues in the tort reform debate. It is simply a fact-empty effort to demonize the "greedy personal injury lawyers"³⁰⁹ and their "get-rich predatory practices"³¹⁰ and incite fear among the populace that the goal of lawyers is to drive doctors out of business and leave people without medical care.³¹¹

Ad hominem arguments—which attack the arguer rather than the argument—are one of the most familiar of all reasoning fallacies, in part because they are so effective.³¹² Attacking the arguer is fallacious because it is intended to persuade not by reason, but by prejudicing the speaker.³¹³ Ad hominem attacks are unnecessary in the tort reform debate because both doctors and lawyers *do* have a case. Reasonable arguments exist on both sides of the issues. It is not too much to demand that the discourse rise above base personal abuse. The attempts in the animation to incite generalized dislike and distrust of lawyers (e.g., "[w]ho's getting rich off rising costs?"³¹⁴) and fear (e.g., "[p]ersonal injury lawyers are responsible for . . . [l]eaving you without care when you need it."³¹⁵) constitute emotional fallacies similar to *argumentum ad hominem*. Arguments that prey on hatred (*argumentum ad odium*) or

307. See McClurg, *The Rhetoric of Gun Control*, *supra* note 299, at 65–80 (discussing fallacies of emotion).

308. See *supra* notes 116–18 and accompanying text for an illustration of doctors blaming lawyers for many of the problems that demand tort reform. This Article has aimed for balanced treatment of doctors and lawyers, but, as noted earlier, lawyers have not been as aggressive in the popular rhetoric front of the tort reform debate, choosing instead to work behind the scenes in the legislative and judicial arenas. See *supra* note 126 and accompanying text for a discussion of how lawyers have essentially conceded the public domain approach, opting instead for a legislative and judicial approach.

309. See *supra* text accompanying notes 116–18 for a description of the aforementioned anti-lawyer animation by the Doctors for Medical Liability Reform group.

310. See *supra* text accompanying notes 116–18.

311. See *supra* text accompanying notes 116–18.

312. The fallacy is well-captured in an old legal tale about a British solicitor and a barrister. The barrister had neglected to prepare for trial, counting on the solicitor to investigate and prepare the case. When the barrister arrived on the morning of trial, the solicitor handed him the file. Surprised by its thinness, the barrister looked inside to find written: "No case; abuse the plaintiff's attorney!" COPI, *supra* note 297, at 55.

313. See McClurg, *The Rhetoric of Gun Control*, *supra* note 299, at 74–80 (discussing ad hominem fallacy); McClurg, *Logical Fallacies and the Supreme Court*, *supra* note 299, at 826–27 (same).

314. See *supra* text accompanying notes 116–18.

315. See *supra* text accompanying notes 116–18.

fear (*argumentum ad metum*) are intended only to divert attention from the argument to irrelevant matters.³¹⁶

Provocative attacks and other defective arguments escalate conflict and incite opponents to respond in kind.³¹⁷ Doctors and lawyers owe it to the American public and each other as professionals to use valid argumentation in the medical liability debate. If both sides are convinced that their respective positions are sound, they should not be afraid to discuss the issues honestly and logically on the merits. If they are not convinced, they should modify their stances.

C. *Facilitate More Interaction and Direct Communication*

Doctors and lawyers do not understand each other. That much is clear. A variety of academically oriented explanations, such as different training and approaches to problem solving, have been offered for their lack of understanding and inability to communicate with one another.³¹⁸ But the primary explanation might be something simpler: doctors and lawyers rarely interact except in professional contexts, some of which are contentious. Given the opportunity to get to know each other in non-confrontational settings, doctors and lawyers would realize they have much in common. As noted earlier, given their similar levels of intelligence and demographic and socioeconomic backgrounds, "liking research" suggests that doctors and lawyers should get along well,³¹⁹ and, of course, many doctors and lawyers do enjoy close personal friendships.

The author experienced an epiphany of sorts when he told two treating physicians that he was doing research about doctors and lawyers and their relationships with each other and the public. Both of the doctors are busy specialists who had provided good care, but not a lot of quality bonding time. The mere mention of the research, however, caused an almost startling transformation in their demeanors. One doctor pulled up a chair and began talking animatedly about the high suicide rates among physicians. The other doctor, a surgeon, said, with what sounded like resignation, "We need each other." He then began discussing how the public "doesn't understand us." "Us," as in doctors and lawyers together.

It is axiomatic that effective communication is necessary to the health of relationships of all types: parents-children, employers-employees, teachers-students, intimate partners, co-workers; the list is limited only by the types of relationships.³²⁰ It

316. See McClurg, *The Rhetoric of Gun Control*, *supra* note 299, at 65–70 (discussing fallacies of emotion and their lack of logical relevance).

317. See *International Online Training Program on Intractable Conflict, De-Escalatory Language*, CONFLICT RESEARCH CONSORTIUM, UNIV. OF COLO., <http://www.colorado.edu/conflict/peace/treatment/desclang.htm> (last visited Mar. 13, 2011) (noting that absence of provocation diminishes escalation).

318. See *supra* notes 56–61 and accompanying text for a discussion of various explanations for the conflict and lack of understanding between doctors and lawyers.

319. See *supra* notes 25–30 and accompanying text for a discussion of the commonalities among doctors and lawyers.

320. See, e.g., MALCOLM R. PARKS, COMMUNICATION CORRELATES OF PERCEIVED FRIENDSHIP DEVELOPMENT 19–20 (1977) (finding that increased depth and frequency of communication positively correlated with perceived harmony in personal relationships); Jakki Mohr & Robert Spekman, *Characteristics of Partnership Success: Partnership Attributes, Communication Behavior, and Conflict Resolution*

is hardly surprising that doctors and lawyers don't understand each other when they spend so little time talking to each other. Perhaps the single most important step toward improving doctor-lawyer relationships would be to open more lines of direct communication between them, both professionally and socially. Put doctors and lawyers together in situations that force them to talk *to* each other, not just *at* or *about* each other. The following are some ideas for accomplishing this goal.

1. Establish More Medico-Legal Courses for Medical and Law Students.

The best stage of their careers for doctors and lawyers to begin developing an understanding of each other would be at the beginning: while they are in school. Professional schools are where students become socialized in the values, ethics, responsibilities, relationships, and overall cultures of their new professions. Law and medical school students quickly become aware of the depth of the antagonism and conflict between the medical and legal professions. Better to try to reach them before their views and positions become hardened.

Students are more open minded than fully formed professionals. They haven't had a chance to become as jaded and cynical. One of the greatest joys of teaching first-year law students is that they arrive full of optimism and idealism until law school and the practice of law begin to beat those qualities out of them.³²¹ Medical students presumably begin their professional education with a similar high-mindedness.

An interesting 1998 study compared the views of medical, law, and business students on a variety of issues regarding the healthcare system.³²² The major finding was that their views were remarkably similar. All three groups, for example, agreed at similarly high levels about fundamental healthcare principles, including that society should provide healthcare to all citizens and that all people should have access to a doctor when they need it.³²³ The only areas of notable difference in opinion involved, not surprisingly, issues related to cost containment that might affect the participants' respective professions.³²⁴ But even here the differences were not nearly as dramatic as one might expect. Regarding the key issue in the doctor-lawyer fight—reforming the medical liability system—eighty-five percent of law students, compared to ninety-eight percent of medical students, agreed that such measures would be effective at reducing healthcare costs.³²⁵ While no empirical data

Techniques, 15 STRATEGIC MGMT. J. 135, 144 (1994) (observing that higher levels of communication quality and participation lead to more successful business partnerships).

321. See ANDREW J. MCCLURG, *IL OF A RIDE: A WELL-TRAVELED PROFESSOR'S ROADMAP TO SUCCESS IN THE FIRST YEAR OF LAW SCHOOL* 333–36 (2009) (discussing risk of legal education causing students to become detached from personal values).

322. See generally Michael Wilkes et al., *Medical, Law, and Business Students' Perceptions of the Changing Health Care System*, 47 SOC. SCI. & MED. 1043 (1998).

323. *Id.* at 1048.

324. *Id.*

325. *Id.* at 1047. Ninety-seven percent of business school students agreed with the statement. *Id.* Medical and law students differed to similar degrees, but in reverse, on whether they agreed with proposed cost control measures that could negatively affect doctors. See *id.* (showing that fifty-three percent of law students agreed that requiring doctors to post fees for services would be an effective cost control measures compared to thirty-

exists, it is hard to imagine that practicing lawyers (certainly plaintiffs' lawyers) would agree at such a high percentage rate with the proposition that tort reform is an effective healthcare cost reducer. One of the centerpiece themes of the anti-tort reform movement, after all, is that medical malpractice litigation has little to do with the cost of healthcare.³²⁶

Joint law and medical student courses are not a new idea. Some universities have been offering them for decades.³²⁷ As one commentator opined, the goal of such courses should not be simply to teach law to medical students and/or medicine to law students, but to focus on developing cooperative relationships between the professions.³²⁸ In addition to joint classroom courses, job shadowing has been shown to be an effective technique for learning about particular occupations.³²⁹ Law and medical school Professor Sheldon Kurtz has long taught a law and medicine seminar at the University of Iowa in which law students shadow doctors and residents on the job.³³⁰ He said the course helps “de-demonize” law students and lawyers to medical professionals, while teaching law students to appreciate the complexity of medicine, including its inherent outcome-uncertainty.³³¹ While Kurtz doesn't think the course changes the long-term view of students once they get years into practice, it is at least one contribution toward a better understanding between doctors and lawyers.³³² Many of his students list the seminar as the best experience of their law school careers.³³³ Interestingly, although students are permitted to write their required seminar paper on any topic regarding law and medicine, Kurtz said he could not remember a single student in seventeen years who chose to write about medical malpractice.³³⁴

seven percent of medical students; and that seventy-nine percent of law students agreed with price controls on doctors' fees compared to sixty-seven percent of medical students).

326. See *supra* note 294 for examples of anti-tort reform arguments on this point.

327. See Benjamin J. Naitove, Note, *Medicolegal Education and the Crisis in Interpersonal Relations*, 8 AM. J. L. & MED. 293, 304–19 (1982) (discussing history of medico-legal education, citing several early articles on the subject, and proposing a framework for an effective medico-legal course).

328. *Id.* at 308. The commentator suggested using a problem-solving methodology in such courses based on his opinion that law students would not respond well to passive lecturing as well as the experience of others showing that the traditional law school case method does not work well with medical students. *Id.* at 310–11 (reporting a comment by a professor of medical jurisprudence “that the classical law school approach failed with medical students because the students would not, or could not, properly prepare the materials”).

329. See *Job Shadowing Improves Employees, but Most Companies Don't Take Advantage*, INST. FOR CORP. PRODUCTIVITY (Sept. 14, 2009), <http://www.i4cp.com/news/2009/09/14/job-shadowing-improves-employees-but-most-companies-don-t-take-advantage> (touting benefits of job shadowing but reporting that only about one-third of organizations practice it).

330. See *Law Students to Become Med Students for Class*, U. OF IOWA NEWS SERV. (Dec. 18, 2009), <http://news-releases.uiowa.edu/2009/december/121809lawmedicaltutorial.html> (describing long-running law school course at University of Iowa taught by Professor Kurtz in which law students spend their time at hospitals and clinics “going on rounds with doctors, residents and med students, sitting in on medical team meetings, and talking with clinic and department heads about the legal and ethical issues they contend with”).

331. Telephone Interview with Sheldon F. Kurtz, *supra* note 72.

332. *Id.*

333. *Id.*

334. *Id.*

2. Create Joint Continuing Education Programs for Doctors and Lawyers.

Most states impose continuing education requirements for both doctors and lawyers.³³⁵ State physician and attorney licensing bodies should work together to encourage and develop joint doctor-lawyer continuing education programs approved to satisfy required continuing education credit hours for both professions. Topics could, of course, include substantive medico-legal issues such as professional negligence or any number of health law issues, but even better would be programs requiring doctors and lawyers to engage on the very issues that divide them, such as tort reform. Several continuing legal education programs on tort reform already exist.³³⁶ Imagine how much richer the experience could be if such programs included both legal and medical professionals as presenters and in the audiences.

Another fertile continuing education area for joint programs would be ethics and civility. In recent years, civility training for lawyers has received impetus from courts and bar associations.³³⁷ As a result, several continuing legal education programs in professional civility now exist.³³⁸ Perhaps special programs, preferably including doctors, could be established focusing on the exceptionally contentious area of medical malpractice litigation. Out of professional courtesy, if for no other reason, plaintiffs' lawyers should be taught to be more tactful and sensitive to the implications of suing doctors. As explained in this Article, doctors feel the impact of malpractice claims as direct assaults on their character and integrity.³³⁹ Such programs should be directed not just at plaintiffs' lawyers, but at insurance defense lawyers. They may be in a better position to ameliorate conflict by explaining to doctor clients how the adversarial civil

335. See Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 59 (2005) ("[M]ost American states have adopted continuing education requirements for lawyers."); Corrine P. Parver & Kimberly Alyson Martinez, *Holding Decision Makers Liable: Assessing Liability Under a Managed Health Care System*, 51 ADMIN. L. REV. 199, 201 (1999) (stating that continuing education for doctors proliferated beginning in 1960s).

336. See, e.g., *Tort Reform—Its Impact*, DAYTON BAR ASS'N, <https://dayton.fastcde.com/store/seminar/seminar.php?seminar=1416> (last visited Nov. 17, 2010) (describing continuing legal education program on tort reform sponsored by Dayton Bar Association); *Tort Reform: The Effects of 1603 on Your Practice*, OKLA. BAR ASS'N, <http://www.okbar.org/news/front/2009/07/cle-tort-reform.htm> (last visited Nov. 17, 2010) (describing continuing legal education webcast on tort reform sponsored by Oklahoma Bar Association).

337. See Michael J. Riordan, *U.S. District Court for the Eastern District of Michigan Adopts the "Lawyer's Commitment of Professional Civility"*, 88 MICH. B.J., May 2009, at 42, 42 (discussing court's adoption of civility code and establishment of annual civility award); Donald J. Winder & Jerald V. Hale, *Enforcing Civility in an Uncivilized World*, 22 UTAH B.J., May–June 2009, at 36, 36 (discussing push among state bars to increase civility in legal profession).

338. See, e.g., Seth Chavez, *Civility and Professionalism: Southwestern Law School*, EXAMINER.COM (Oct. 9, 2009, 9:04 AM), <http://www.examiner.com/examiner/x-12920-LA-Law-Schools-Examiner-y2009m10d9-Civility-and-Professionalism-Southwestern-Law-School> (describing continuing legal education program in civility); *Illinois Bar Studies Civility in Fictional and Real Lawyers*, METROPOLITAN CORP. COUNSEL, (Dec. 1, 2009), <http://www.metrocorpocounsel.com/current.php?artType=view&artMonth=December&artYear=2009&EntryNo=10472> (same).

339. See *supra* notes 62–66 and accompanying text for a discussion of the harmful impact that malpractice litigation has on doctors.

litigation system is set up and why it works the way it does, and discussing with them that malpractice suits really are just business, not pleasure for plaintiffs' attorneys.³⁴⁰

Whatever the topic, joint continuing education programs should be structured to require doctor and lawyer interaction, such as by working through hypothetical problems in small groups. They should not consist simply of lecture.

3. Organize Joint Social Events, Perhaps with Friendly Competition.

Bar and medical associations organize many luncheon, dinner, and other social programs. They should reach out to the other side and organize social events that bring doctors and lawyers together. Skip the boring, overly serious speakers, common at such events. Keep it light and focused on social intercourse.

Bar and medical associations also sponsor frequent sporting events for members such as tennis or golf tournaments. These events could present excellent opportunities to reach out to the other side. Make it a charity event and donate the proceeds to charities that both groups can get behind, such as organizations providing free legal and medical services to low-income individuals. Doctor-lawyer competitive matchups should appeal not only to doctors and lawyers, who are by their nature competitive, but to the community. (A true doctor-lawyer "fight club" contest for charity would be likely to bring in some serious money, but it would be better to save that one for a reality television program.) Such events would carry the added benefit of burnishing the public images of both professions within their communities.

4. Establish an AMA-ABA Committee on Improving Doctor-Lawyer Relations.

The American Medical Association³⁴¹ and American Bar Association³⁴² are the largest organizations representing, respectively, doctors and lawyers. With their resources and stature, the two organizations could, working together and leading by example, do much to encourage and facilitate improved doctor-lawyer relationships. Regrettably, the two organizations join forces all too infrequently. Their most

340. Concededly, some plaintiffs' lawyers probably do derive "pleasure" out of suing doctors. A divorce lawyer once told the author about the joy he gets representing "doctors' wives" who are divorcing their husbands. The higher-than-usual financial stake makes such cases attractive to lawyers, which, while not noble, would be at least a rational cause of enjoyment. But this lawyer was adamant that the main reason he liked suing doctors was because of their arrogance.

341. See AM. MED. ASS'N, <http://www.ama-assn.org/> (last visited Mar. 17, 2011) (website of the AMA). The AMA website does not state the number of AMA members. A 2005 news account stated that AMA membership dropped twenty percent after 1993, with 244,530 members as of 2005. Bruce Japsen, *AMA Tries Stronger Medicine for Image*, CHI. TRIB., June 17, 2005, at C7. This figure would put AMA membership at roughly one-third of physicians in the U.S. See *supra* note 22 for figures on the number of physicians in the United States.

342. See AM. BAR ASS'N, <http://www.abanet.org/> (last visited Mar. 17, 2011) (website of the ABA). The ABA has nearly 400,000 members. *About the ABA*, AM. BAR ASS'N, http://www.americanbar.org/utility/about_the_aba.html (last visited Mar. 17, 2011). This figure would place ABA membership at somewhat less than forty percent of the nation's lawyers. See *supra* note 22 for figures on the number of lawyers in the United States.

noteworthy collaboration, a study of narcotics addiction, occurred half a century ago.³⁴³ A joint AMA-ABA committee or task force devoted to studying and improving doctor-lawyer relations would, by itself, open a much-needed portal of communication between the professions, but more importantly, could provide the funding and other resources for many of the proposals contained in this section.³⁴⁴

5. Launch a Balanced Medico-Legal Blog Moderated by Both Doctors and Lawyers.

Doctors and lawyers operate hundreds of blogs. Many of them are simply marketing tools for law firms or medical clinics or forums for hyperbolic one-sided advocacy for or against tort reform, but many medical and legal blogs offer substantive, high-quality content.³⁴⁵ What is missing is a blog aimed at a balanced presentation of, and commentary on, medical and legal news of interest to both professions.

Providing a trusted, respected forum where the nation's roughly one million lawyers and nearly one million doctors³⁴⁶ would feel comfortable expressing their opinions on important medico-legal issues could collect a remarkable amount of information and points of view. The blog should be moderated/edited by both doctors *and* lawyers—not people with an axe to grind, but open-minded scholarly types with solid research and writing capabilities and credentials. Visitors should be encouraged to submit thoughtful comments only. While hearty disagreement on the issues should of course be encouraged, personal attacks, profanity, and the like should be prohibited or relegated to an online trash bin.

D. Encourage and Fund Research of Doctor-Lawyer Views and Relationships

Perhaps the best way to discover how doctors and lawyers might improve their relationships would be to ask them. Almost no empirical surveys have been conducted of doctors and lawyers together. Paul Fitzgerald's survey of doctors' and lawyers'

343. See IND. UNIV. DEP'T OF POLITICAL SCI., Abstract, DRUG ADDICTION - CRIME OR DISEASE - INTERIM AND FINAL REPORTS OF THE JOINT COMMITTEE OF THE AMERICAN BAR ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION ON NARCOTIC DRUGS (1961) (abstract of the Interim and Final Reports of the Joint Committee of the American Bar Association and the American Medical Association on narcotic drugs compiled in 1955-56), available at <http://www.ncjrs.gov/App/publications/Abstract.aspx?id=11138>.

344. Another organization with the prominence, reputation, and orientation to contribute positively to joint doctor-lawyer research and collaboration is the American College of Legal Medicine, the membership of which is geared toward persons with both medical and law degrees. The organization publishes the *Journal of Legal Medicine*, runs writing competitions for law students and medical students, and sponsors the National Health Law Moot Court Competition. See *The History of the American College of Legal Medicine*, AM. COLL. LEGAL MED., <http://www.aclm.org/about/> (last visited Mar. 17, 2011) (detailing organization's history, mission, and activities).

345. Such blogs are too numerous to list, but Kevin Pho's blog, KevinMD, stands out as an example of a quality blog on the medical side. See KEVINMD, <http://www.kevinmd.com/blog/> (last visited Mar. 17, 2011). On the law side, the TortsProf Blog, edited by three law professors, offers solid content, as well as a variety of perspectives, about current issues in tort law, including medical malpractice. See TORTSPROF BLOG, <http://lawprofessors.typepad.com/tortspof/> (last visited Mar. 17, 2011).

346. See *supra* note 22 for data on the number of doctor and lawyers in the United States.

attitudes toward one another stands out as a lonesome exception.³⁴⁷ Even non-empirical academic commentary about the views and relationships of doctors versus lawyers is in short supply. This is surprising given the prominence and power of the two professions generally in society, as well as their deep involvement in arguments over the reformation of our legal and medical systems, issues that affect all U.S. residents.

What do individual doctors and lawyers really think? About each other, the medical system, the legal system, and tort and healthcare reform? We assume we know some of the answers, but we might be wrong. It may be that the views of the pro-tort and anti-tort reform groups, for example, don't accurately reflect those of rank and file doctors and lawyers. A perfect first project for the joint AMA-ABA committee recommended above would be to fund grants for this type of research.

VI. CONCLUSION

This Article has laid out the doctor-lawyer fight and attempted to make the case that doctors and lawyers have strong, shared self-interests in improving their relationships. Specifically, it has been argued that doctor-lawyer fighting is unprofessional, embarrassing, and undignified,³⁴⁸ contributes to damaging the already shaky public images of both the medical and legal professions,³⁴⁹ lowers trust in doctors and lawyers, thereby impinging their most important relationships (with their patients and clients);³⁵⁰ may contribute to a greater public willingness to impose legislative or regulatory restrictions that constrict the professional autonomy of both professions;³⁵¹ ignores the new reality that in a managed healthcare environment doctors will increasingly have to rely on lawyers to protect their livelihoods;³⁵² and compounds the already highly stressful, disaffected lives of doctors and lawyers.³⁵³

That people are motivated to act out of self-interest "is a part of virtually every psychology and moral philosophy in Western thought."³⁵⁴ The theory of psychological egoism holds that all human acts are motivated by a desire or need to advance one's

347. See Fitzgerald, *supra* note 25. A couple of studies compare law and medical students. See *supra* notes 211 and 325 along with accompanying text for a discussion of studies of law and medical students' psychological distress and attitudes toward the healthcare system, respectively.

348. See *supra* notes 1–5 and accompanying text for a discussion of the antagonistic relationship between doctors and lawyers.

349. See *supra* Part IV.A for a discussion of the tarnished public image of doctors and lawyers.

350. See *supra* Part IV.B for a discussion of how doctor-lawyer fighting erodes trust between both doctors and their patients, and lawyers and their clients.

351. See *supra* notes 187–94 and accompanying text for a discussion of how public discontent may lead to an increased willingness to regulate the legal and medical professions.

352. See *supra* notes 196–99 and accompanying text for a discussion of doctors' increasing reliance on lawyers.

353. See *supra* Part IV.C for a discussion of the psychological problems commonly experienced by both doctors and lawyers.

354. David O. Sears & Carolyn L. Funk, *The Role of Self-Interest in Social and Political Attitudes*, 24 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 1, 2 (1991). *But see* Dale T. Miller & Rebecca K. Ratner, *The Disparity Between the Actual and Assumed Power of Self-Interest*, 74 *J. PERSONALITY & SOC. PSYCHOL.* 53, 53 (1998) (stating that "[e]volutionary biology, neoclassical economics, behaviorism, and psychoanalytic theory all assume that people actively and single-mindedly pursue their self-interest," but discussing studies finding that people overestimate the influence of self-interest on attitudes and behaviors).

own interests,³⁵⁵ even acts purportedly taken for the benefit of others.³⁵⁶ Even accepting criticism that psychological egoism is not valid as an absolute principle,³⁵⁷ there is no disputing that self-interest is a powerful motivator. While it would be comforting to believe that doctors and lawyers would seek to improve their relationships for reasons unrelated to their interests—such as, for example, because it is in the public's interest—the evidence belies such a notion. Doctor-lawyer conflict appears to become more intense with each passing year.

This Article has offered several suggestions as to how to approach the difficult task of repairing the severely damaged relationships between the legal and medical professions. They include asking both sides to acknowledge core truths about medical negligence and malpractice lawsuits,³⁵⁸ shunning fallacious rhetoric in favor of sound argument,³⁵⁹ and opening more lines of communication between doctors and lawyers.³⁶⁰ The latter could be accomplished by establishing more joint law and medical school courses, joint continuing legal education programs, joint social events, an AMA-ABA committee on doctor-lawyer relationships, and a reputable medico-legal blog run by doctors and lawyers working together.³⁶¹ More research regarding doctor-lawyer attitudes is also needed.³⁶² Beyond tort reform and blogosphere rhetoric, no one really knows what doctors and lawyers think of each other or what they believe might be effective steps for improving their relationships.

While this Article has concentrated on the mutual interests of doctors and lawyers in improving their relationships, the stronger motivation for both groups should, of course, be patient safety. The patient safety movement is not only stalled by the medico-legal war; it is being severely impaired. The “leitmotif of the patient-safety movement” is transparency.³⁶³ Only through transparency into the occurrence and causes of patient harm can we hope to make substantial medical safety improvements. Real change will not happen unless and until effective surveillance systems are

355. See Michael Anthony Slote, *An Empirical Basis for Psychological Egoism*, 61 J. PHIL. 530, 530–31 (1964) (describing egoism as theory that all human acts are selfish); *id.* at 536 (stating theory of psychological egoism “implies that we never persist in performing any kind of action unless there is in general something in it for us”).

356. See generally Hugh LaFollette, *The Truth in Psychological Egoism*, in REASON AND RESPONSIBILITY 500 (Joel Feinberg ed., 7th ed. 1989) (explaining theory of psychological egoism).

357. See, e.g., *id.*, at 501–04 (discussing flaws in psychological egoism, but nevertheless concluding that “a person will continually engage in an activity only if it has the effect of satisfying what she perceives to be in her self-interest”); Dale T. Miller, *The Norm of Self-Interest*, 54 AM. PSYCHOL. 1053, 1053 (1999) (stating that, beginning with Thomas Hobbes’ publication of *Leviathan* in 1651, self-interest has been “enthroned . . . as the cardinal human motive,” but also discussing criticism of that notion).

358. See *supra* Part V.A. for a discussion of some essential truths about medical negligence and malpractice lawsuits.

359. See *supra* Part V.B. for a discussion of some fallacious arguments commonly employed in the doctor-lawyer fight.

360. See *supra* Part V.C for a discussion of the benefits of increased doctor-lawyer interaction and communication.

361. See *supra* Part V.C for a discussion of ways to facilitate more interaction and direct communication between doctors and lawyers.

362. See *supra* Part V.D for a discussion of the benefits of encouraging such research.

363. Studdert et al., *supra* note 276, at 287.

established to determine the true frequency of medical errors and the precise contexts and conditions in which they occur. But it's probably asking too much of doctors to voluntarily document and self-report errors if such actions amount to sending out an invitation to a lawsuit.³⁶⁴ The antagonism and distrust between doctors and lawyers, much of it generated by the current tort system, blocks the road toward transparency. Developing and implementing creative solutions to advance patient safety through accurate medical error surveillance, while at the same time ensuring reasonable compensation to patients injured by medical negligence, will be impossible absent greater cooperation between doctors and lawyers.

³⁶⁴. *See id.* (stating that reluctance of physicians to engage in greater transparency “stems from the belief that they are being asked to be open about errors with little or no assurance of legal protection”).

