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In the Midst of Change, a Few Truths Remain—A Review of Trazenfeld and Jarvis's Florida Legal Malpractice Law

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BOOK REVIEW

Jan L. Jacobowitz

In the Midst of Change, a Few Truths Remain—
A Review of Trazenfeld and Jarvis's
Florida Legal Malpractice Law

Florida Legal Malpractice Law: Commentary and Forms
by Warren R. Trazenfeld & Robert M. Jarvis
Full Court Press, Washington, DC, 253 pages
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Jan has presented at hundreds of ethics CLE seminars and symposiums throughout the country. She teaches and writes about legal ethics and technology issues, and is often quoted in the national media.

Jan is the president of the Association of Professional Responsibility Lawyers (APRL) and the co-chair of APRL's Future of Lawyering Committee. She also serves as a Commissioner on the Miami-Dade County Commission on Ethics & the Public Trust.

Prior to devoting herself to legal education, Jan practiced law for over twenty years. She began her career as a Legal Aid attorney in the District of Columbia; prosecuted Nazi war criminals at the Office of Special Investigations of the U.S. Department of Justice; was in private practice in Washington, D.C. and Miami; and served as in-house counsel for a large Miami based corporation.

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*Plans are of little importance, but planning is essential.*¹

I. INTRODUCTION

Warren R. Trazenfeld and Robert M. Jarvis have written a much-needed legal malpractice handbook for practitioners.² Published in October 2019, it arrives in the midst of significant turmoil and change in the legal profession. Issues of technological competence, multi-jurisdictional practice, access to legal services, and alternative business models abound. These issues not only evoke debate about the sustainability of current practice models and the legal ethics rules that govern but engender discussion about new malpractice concerns.

When does a lawyer’s failure to understand and engage technology, social media, and artificial intelligence evince incompetence that rises to the level of malpractice? While the legal ethics rules stand apart from professional liability, the rules may contribute evidence to prove the standard of care in

1. *Winston Churchill Quotes*, GOODREADS, <https://www.goodreads.com/quotes/543727-plans-are-of-little-importance-but-planning-is-essential> [<https://perma.cc/VUD8-C6ZW>].

2. WARREN R. TRAZENFELD & ROBERT M. JARVIS, *FLORIDA LEGAL MALPRACTICE LAW: COMMENTARY AND FORMS* (2019).

a malpractice action. A lawyer who lacks a fundamental understanding of the rules and malpractice law may not only trip upon traditional professional liability landmines, but also risks falling into a double bind if he fails to keep pace with the evolving definition of professional competence and the current challenge to the legal profession's status quo.

A central theme in the legal profession's evolution debate involves the rule requiring that a lawyer maintain professional independence. Professional independence inevitably connects to the reasonable duty standard in the malpractice context. While the concept of professional independence remains essential, the definition of independence has become a cog in the wheel of progress. The definition of professional independence in the American Bar Association's ("ABA") Model Rule 5.4³ (and most state versions) imagines a lawyer that does not collaborate in a business or share legal fees with nonlawyers. The history, justification, and underlying policy concerns of the rule are murky at best.⁴ The contemporary impact of the rule is to inhibit innovation and increased access to legal services.

In fact, several states have established task forces to begin to experiment with traditional terrain. Utah's Supreme Court recently adopted its task force's recommendations that include establishing an independent regulator to operate in a regulatory "sandbox" to experiment with novel business models.⁵ Arizona's task force has recommended the elimination of its Rule 5.4,⁶ and California commissioned a report from William Henderson and then held hearings last summer to consider the need for relaxing the

3. MODEL RULES OF PROF'L CONDUCT r. 5.4 (AM. BAR ASS'N 2020).

4. Arthur Lachman, *Lawyer Professional Independence & Rule 5.4: An Overview Compiled by Art Lachman*, ASS'N PROF. RESP. LAW. (May 2019), <https://aprl.net/wp-content/uploads/2019/07/prof-ind-5-19.pdf> [<https://perma.cc/BYP3-32SW>].

5. *Utah Supreme Court Adopts Groundbreaking Changes to Legal Service Regulation*, UTAH CTS. (Aug. 29, 2019), <https://www.utcourts.gov/utc/news/2019/08/29/utah-supreme-court-adopts-groundbreaking-changes-to-legal-service-regulation/> [<https://perma.cc/89MB-GXKH>]; *Narrowing the Access-to-Justice Gap by Reimagining Regulation*, UTAH ST. B. (Aug. 2019), <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf> [<https://perma.cc/D83X-45W8>].

6. Robert Ambrogi, *Arizona Task Force Calls for Wide-Ranging Practice Reforms, Including Eliminating Ban on Nonlawyer Ownership*, LAWSITES (Oct. 15, 2019), <https://www.lawsitesblog.com/2019/10/arizona-task-force-calls-for-wide-ranging-practice-reforms-including-eliminating-ban-on-nonlawyer-ownership.html> [<https://perma.cc/M6R2-JB7U>]; *Task Force on the Delivery of Legal Services*, SUP. CT. ARIZ. (Oct. 4, 2019), <https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf?ver=2019-10-07-084849-750> [<https://perma.cc/EB38-UPPW>].

professional conduct rules that prohibit meaningful collaboration between lawyers and other business entities.⁷

On a national level, both the Institute for the Advancement of the American Legal System (“IAALS”)⁸ and the Association of Professional Responsibility Lawyers (“APRL”)⁹ have joined the discussion.⁹ In 2018, APRL convened a Future of Lawyering Committee that includes an impressive array of interested attorneys from both the United States and abroad. The Committee includes liaisons from other organizations, such as the National Organization of Bar Counsel, IAALS, the Federal Trade Commission, the American Bar Association, the Legal Marketing Association, and the Chief Counsel of Judges. APRL’s goal is to study and recommend changes to the legal profession’s regulatory rules to allow for greater access to legal services and collaboration among lawyers and nonlawyers.¹⁰ As Anthony Davis recently wrote, “[t]hese rules are no longer rational or workable, are contrary to the best interests of clients, and are unnecessary to protect the public from harm. Whatever the justifications of such a system at the end of the Eighteenth Century, they are no longer persuasive”¹¹

II. THE BOOK

Amid the current chaos, Trazenfeld and Jarvis provide a gem of a handbook. Although focused primarily on Florida, the book provides a wonderful, general malpractice road map for both the inexperienced and the veteran lawyer. Regardless of how or when the rules and associated standard of care may change, there is no doubt that lawyers will continue to have to

7. Jayne Reardon, *Re-regulating Lawyers for the 21st Century*, 2CIVILITY (July 18, 2019), <https://www.2civility.org/lawyer-regulation-re-regulating-lawyers-for-the-21st-century/> [https://perma.cc/N6UM-VVYP]; *State Bar Task Force on Access Through Innovation of Legal Services Report: Request to Circulate Tentative Recommendations for Public Comment*, ST. B. CAL. (July 11, 2019), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024450.pdf> [https://perma.cc/PHR4-XD62].

8. Zachariah DeMeola, *Legal Regulation in the Age of Disruption*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (Sept. 18, 2019), <https://iaals.du.edu/blog/legal-regulation-age-disruption> [https://perma.cc/NXX7-L4Z6].

9. *Id.*

10. *The Future of Lawyering*, ASS’N PROF. RESP. LAW., <https://aprl.net/aprl-future-of-the-legal-profession-special-committee/> [https://perma.cc/MV8U-82BZ]. Disclaimer: the author is a co-chair of APRL’s committee and APRL’s current president.

11. Anthony E. Davis, *Lawyer Admission and Mobility: Regulation Fit for the 18th Century*, N.Y. L.J. (Nov. 1, 2019, 2:03 PM), <https://www.law.com/newyorklawjournal/2019/11/01/lawyer-admission-and-mobility-regulation-fit-for-the-18th-century/> [https://perma.cc/W4F8-K3L5].

engage in thoughtful planning to avoid or to adequately defend a malpractice lawsuit. Moreover, for lawyers representing clients who have not received adequate representation, those clients require a competent, well-informed lawyer.

Trazenfeld and Jarvis offer both the basic underpinning of malpractice law and the specific issues that may arise on the journey of a claim that travels from jurisdictional issues to a jury trial. The first chapter details the three main predicates that must be established in a malpractice complaint: the attorney's employment, the neglect of a reasonable duty, and the attorney's negligence as a proximate cause of a client's loss.

The complexities of the three essential components of a claim become apparent as Trazenfeld and Jarvis devote the first fifty pages of the book to explore and clearly explain the nuances inherent in properly pleading a malpractice claim. For example, how does one prove both employment and the scope of employment when an engagement letter does not exist? What are the unique challenges in the criminal law context? What constitutes a reasonable duty in the evolving state of the legal profession? When reasonable duties to a client are redefined in the context of collaboration with nonlawyers, the attorney who understands traditional malpractice standards will be able to adapt appropriately.

The first chapter concludes with sample pleadings for lawyers representing either the plaintiff or the defendant. The forms include a complaint and answer, discovery documents, and a settlement agreement. While there is much more to come, the first chapter alone is reason enough to own the book. Moreover, although not necessarily designed to be a textbook, the book could easily be used to engage law students in this vital area of law. Trazenfeld and Jarvis's exploration is replete with valuable citations for the Florida lawyer that will also launch other lawyers towards locating similar case law in their respective states. In fact, not only are the chapters heavily footnoted, but there is also a forty-five-page table of cases at the back of the book.

After the reader has mastered the basics, the following chapters provide a soup to nuts malpractice menu that begins with Chapters two and three on jurisdiction and venue. Although jurisdiction and venue may sound like law school 101 subject matter, in our constantly evolving global high-tech world of practice, understanding the application of a long-arm statute takes on new meaning, the mantra: understand the traditional standards so that one may think about those standards in today's digital world.

The book then delves into potential defenses, immunities, and the applicability of the attorney-client privilege. Each of these chapters clearly delineate their sub-topics by both section number and page number, so that a practitioner, who may have a question about a statute of limitations defense, can easily find the explanation without having to wade through information inapplicable to his or her case. In fact, the layout of the entire book is extremely user friendly, another reason to have the book in your office as a ready reference.

Before offering insight on jury instructions in Chapter eight, Chapter seven focuses on the issue of expert testimony. Do you need an expert? Maybe not. If the case, however, does require expert testimony, then you want to avoid the professional liability exposure that may result if you fail to consult an expert. Trazenfeld and Jarvis offer excellent advice about retaining and working with an expert. Once again, they provide a useful example of an expert retainer agreement.

After the reader explores Chapters one through eight and the various issues that may arise in the case, then a visit to Chapter nine: Damages is essential. What type of damages are available in a particular case? Are attorneys' fees available? The authors provide insight and case law on available damages. The book then moves on to Chapters ten through twelve that feature information on assignments, arbitration, and insurance. While these chapters may be less central to a particular case, the information renders the book a thorough treatise on Florida malpractice law.

The book concludes with Chapter thirteen: Prevention. I read this chapter early in my review of the book. Prevention begins with the ominous message: "[e]very Florida lawyer—regardless of his or her education, level of experience, or practice type—runs the risk of being sued for legal malpractice." The authors explain that this truism extends to lawyers in other states. However, valid statistics do not exist because of the lack of both accurate reporting and the absence of mandatory malpractice insurance in most states.

After this proverbial splash of cold water, Trazenfeld and Jarvis insert a ray of (Florida) sunlight by providing best practices designed to minimize the odds of being sued for malpractice. Sample engagement and disengagement letters are included to address the first predicate of a malpractice claim; that is, attorney employment. Prevention also involves screening prospective clients and adhering to fundamental legal ethics rules such as competence, diligence, communication, reasonable fees, and avoiding conflicts of interest. The authors identify some of these

fundamentals as best practices rather than citing to the associated legal ethics rule. Of course, the fundamentals reflect both the minimum standard of conduct established by the legal ethics rules and the foundation of a best practices approach to practicing law.

Regardless of semantics, the book's message is that a failure to abide by the fundamentals increases a lawyer's exposure to professional liability. The authors note that the competence standard in today's digital world creates additional exposure in a category that they identify as "inexplicable errors," which includes the failure to use or the improper use of technology in a case.

The final chapter, Prevention, brings the discussion full circle. The standards for competence and reasonable judgment will no doubt continue to evolve. Trazenfeld and Jarvis's book is not only a valuable contribution to the traditional area of malpractice law but also will assist lawyers as the future of lawyering remains in flux.

III. CONCLUSION

Warren Trazenfeld and Robert Jarvis have penned an invaluable contribution to the malpractice library of both lawyers who prosecute malpractice and those that defend malpractice claims. The authors' clear writing and masterful organization of both basic and complex tenants of professional liability will no doubt assist the new lawyer as well as the seasoned veteran. Beyond those who practice in the malpractice area, the book is one that all lawyers should read to grasp the basics of an area of law that is relevant to the entire legal profession. After all, understanding the pitfalls of professional liability and learning how to avoid them is the essence of thoughtful planning.

"Planning is bringing the future into the present so that you can do something about it now."¹²

12. *Alan Lakein Quotes*, BRAINY QUOTES, https://www.brainyquote.com/quotes/alan_lakein_154655 [<https://perma.cc/KXC6-GKTZ>].