APPENDIX A

2008 – 2010 Rules Cycle Report

of the

New Jersey Supreme Court
Professional Responsibility Rules Committee

December 16, 2009

TABLE OF CONTENTS

C. Establishing an Ad Hoc Committee on Malpractice Insurance

The ABA Model Court Rule on Insurance Disclosure requires lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The stated purpose of the Model Rule is "to provide a potential client with access to relevant information related to a lawyer's representation in order to make an informed decision about whether to retain a particular lawyer." ABA Standing Committee on Client Protection, Report to House of Delegates (2004), *available at* www.abanet.org/cpr/clientpro/malprac_disc_report.pdf. The Model Rule does not mandate that attorneys maintain malpractice insurance.

The Committee briefly addressed the Model Rule in its 2006-2008 report to the Court. As noted, individual New Jersey lawyers are not obligated to maintain professional liability insurance or to inform clients or the Court whether they carry such insurance.[3] As of November 2009, eighteen states require disclosure on annual attorney registration statements; seven states require disclosure directly to clients; four states are considering a reporting requirement; four states have voted not to adopt a disclosure rule; and Oregon remains the only state that requires attorneys to maintain professional liability insurance. *See* ABA Standing Committee on Client Protection, State Implementation of ABA Model Court Rule on Insurance Disclosure (Nov. 16, 2009), *available at* www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf.

As the Committee previously observed, a potential disclosure requirement raises several issues that warrant consideration. Those issues include: whether disclosure should be required only on the annual registration statement or also to clients at the inception of the representation; whether it would be misleading to require disclosure of the fact of insurance to clients without

[3] Law firms organized as professional corporations, limited liability companies, and limited liability partnerships are required to maintain professional liability insurance pursuant to Rule 1:21-1A, Rule 1:21-1B, and Rule 1:21-1C.

also requiring disclosure of the amount of insurance; whether a disclosure rule would encourage more attorneys to obtain insurance; whether a disclosure requirement would unfairly burden small firms and solo practitioners; and whether a disclosure requirement serves any substantial purpose if there is not also a mandate to maintain insurance.

The Committee's resumed discussion of the Model Rule also touched upon the related issue of compulsory professional liability insurance. At first glance, mandatory insurance seems worthwhile because it would close the claims circle by providing coverage for attorney negligence, which is not covered by the Lawyers Fund for Client Protection. *See* R. 1:28-3(a) (allowing Fund to consider claims resulting from attorneys' dishonest conduct). As with an insurance disclosure requirement, however, the prospect of mandatory insurance raises many questions, including: whether there is some great unmet need that would be satisfied by a mandate to carry professional liability insurance; whether such a mandate would unfairly burden small firms and solo practitioners, who may have more difficulty than larger firms finding affordable coverage; and if it were determined that compulsory insurance is justified, what would be the required minimum policy limits and terms of coverage.

The Committee ultimately concluded that it is necessary to have data from various sources to accurately gauge the practical implications – the potential benefits and burdens – that realistically may flow from an insurance disclosure requirement or a mandate to maintain insurance coverage. The Committee recommends that the Court appoint a special commission (perhaps an "Ad Hoc Committee on Lawyers' Professional Liability Insurance"), which may include representatives from the Bar, the lawyers' professional liability insurance industry, and other affected groups, to carefully study the issues.

Respectfully submitted,

PROFESSIONAL RESPONSIBILITY RULES COMMITTEE[4]

Honorable Peter G. Verniero, Former Associate Justice, Chair, PRRC

Honorable Alan B. Handler, Associate Justice (ret.), Chair, Advisory Comm. on Judicial Conduct

Honorable John E. Keefe, Sr., P.J.A.D. (ret.), Chair, IOLTA Fund of the Bar of New Jersey

Kenneth J. Bossong, Esquire, Director and Counsel, Lawyers Fund for Client Protection

Joseph A. Bottitta, Esquire, New Jersey State Bar Association

Cynthia A. Cappell, Esquire, Chair, Committee on Attorney Advertising

Charles M. Lizza, Esquire, Chair, Committee on the Unauthorized Practice of Law

Steven C. Mannion, Esquire, Chair, Advisory Committee on Professional Ethics

Louis Pashman, Esquire, Chair, Disciplinary Review Board

Sherilyn Pastor, Esquire, Appointed Member

Melville D. Lide, Esquire, Appointed Member

(Staff: Holly Barbera Freed, Staff Attorney, Supreme Court Clerk's Office)

[4] This report is the result of deliberations that spanned the 2008-2010 rules cycle. In addition to the members listed here, the Committee is indebted to retired Supreme Court Associate Justice Stewart G. Pollock, who stepped down effective August 31, 2009, after nine years of service as its Chair. Many thanks are also due to Michael S. Stein, Esq., who served as an appointed member from September 2000 through August 2009, and to former *ex officio* members Melville D. Miller, Jr., Esq., ACPE Chair, 1994 through December 2008; Raymond S. Londa, Esq., CUPL Chair, 2001 through December 2008; and Mary Lou Parker, Esq., IOLTA Chair, March 2008 through February 2009.

APPENDIX B

Amended 108

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the *Model Court Rule on Insurance Disclosure*, dated August 2004.

Model Court Rule on Insurance Disclosure
August 2004

RULE ___. INSURANCE DISCLOSURE

A. Each lawyer admitted to the active practice of law shall certify to the [highest court of the jurisdiction] on or before [December 31 of each year]: 1) whether the lawyer is engaged in the private practice of law; 2) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance; 3) **whether the lawyer intends to maintain insurance during the period of time the lawyer is engaged in the private practice of law; and 4)** whether the lawyer is exempt from the provisions of this Rule because the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients outside that capacity. Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall notify [the highest court in the jurisdiction] in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect or terminates for any reason.

B. The foregoing shall be certified by each lawyer admitted to the active practice of law in this jurisdiction in such form as may be prescribed by the [highest court of the jurisdiction]. The information submitted pursuant to this Rule will be made available to the public by such means as may be designated by the [highest court of the jurisdiction].

C. Any lawyer admitted to the active practice of law who fails to comply with this Rule in a timely fashion, as defined by the [highest court in the jurisdiction], may be suspended from the practice of law until such time as the lawyer complies. Supplying false information in response to this Rule shall subject the lawyer to appropriate disciplinary action.

REPORT

Continuity of judicial regulation of the legal profession depends on action taken by the profession itself.
Robert B. McKay, 1990

The ABA Standing Committee on Client Protection ("the Committee") recommends that the American Bar Association adopt the *Model Court Rule on Insurance Disclosure* ("the Model Court Rule").

OVERVIEW

The ABA *Model Court Rule on Insurance Disclosure* requires lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The purpose of the Rule is to provide a potential client with access to relevant information related to a lawyer's representation in order to make an informed decision about whether to retain a particular lawyer. The intended benefit of the Model Court Rule is to facilitate the client's ability to determine whether a lawyer is insured. While the Model Court Rule does not require a lawyer to disclose directly to clients whether insurance is maintained or to maintain professional liability insurance, it does impose a modest annual reporting requirement on the lawyer. The information reported by lawyers will be made available by such means as designated by the highest court in the jurisdiction. While this information could be sought during the initial retention process, many clients are unsophisticated and may be reluctant to raise such issues.

Paragraph A of the Model Court Rule requires a lawyer to disclose on the annual registration statement whether professional liability insurance is maintained. Excluded from the Rule's reporting requirement are those lawyers who are not engaged in the active practice of law and those who are engaged in the practice of law as full-time government lawyers or as counsel employed by an organizational client and do not represent clients outside that capacity. A lawyer who is employed to represent an organization on an ongoing basis generally represents a knowledgeable and sophisticated client. Additionally, organizational or governmental clients may have their own professional liability insurance policies.

Finally, Paragraph A places an affirmative duty upon lawyers to notify the highest court whenever the insurance policy covering the lawyer's conduct lapses or is terminated. This ensures that the information reported to the highest court is accurate during the entire reporting period.

Paragraph B of the Model Court Rule requires lawyers to certify to the accuracy of the information reported. Paragraph B also requires that the information submitted by lawyers will be made available by such means as designated by the highest court. For example, in Nebraska and Virginia, information regarding a lawyer's professional liability insurance is made available to a potential client if the client telephones the bar association and requests it. The information can also be accessed on the bars' websites. (See, www.vsb.org, under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance). It was reported to the Committee that this Virginia Bar website receives 1250 visits per month.

Paragraph C of the Model Court Rule clarifies that failure or refusal to provide the required information would result in a lawyer's administrative suspension from the practice of law until such time as the lawyer complies with the Model Court Rule. The Committee is not recommending that a court amend its current Rules of Professional Conduct. Failure or refusal to make the required disclosure would, therefore, not be considered a disciplinary offense. Nevertheless, providing *false* information in response to the Model Court Rule would subject the lawyer to appropriate disciplinary action, pursuant to ABA *Model Rules of Professional Conduct,* Rule 8.4(c), that prohibits, "conduct involving dishonesty, fraud, deceit or misrepresentation."

INSURANCE REPORTING REQUIREMENTS IN UNITED STATES JURISDICTIONS

To date, ten jurisdictions have addressed the issue of reporting the maintenance of professional liability insurance. The highest courts in five jurisdictions, Delaware, Nebraska, North Carolina, Michigan and Virginia, require lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The Committee's proposed Model Court Rule is patterned after the reporting requirements in these jurisdictions.

The highest courts in four other jurisdictions, Alaska, New Hampshire, Ohio and South Dakota, have amended their Rules of Professional Conduct to require lawyers to disclose directly to their clients whether they maintain professional liability insurance. The Rule in South Dakota, effective January 1, 1999, is the most comprehensive.[1]

In addition, the Oregon Supreme Court, while not having a disclosure rule *per se*, mandates professional liability insurance as a condition precedent to practicing law.

EXISTING ABA POLICIES

On three previous occasions, the American Bar Association has adopted policies requiring lawyers in some circumstances to maintain professional liability insurance. In August 1989, the ABA House of Delegates adopted *Minimum Quality Standards* for lawyer referral services. The minimum standards were adopted as client protection measures. One of the standards is that participating lawyers maintain malpractice insurance coverage.

In August 1992, the ABA House of Delegates adopted *Model Supreme Court Rules Governing Lawyer Referral And Information Services.* Rule 4 of the *Model Rules* requires that in order for a lawyer to participate in the service, the lawyer shall maintain in force a policy of errors and

[1] Rule 1.4 of the South Dakota Rules of Professional Conduct requires South Dakota lawyers to promptly disclose to their clients if they do not maintain professional liability insurance with limits of at least $100,000, or if during the course of the representation, the insurance policy lapses or is terminated, lawyers shall disclose to their clients by including a component of the lawyers' letterhead, using the following specific language, either that: (1) "This lawyer is not covered by professional liability insurance;" or (2) "This firm is not covered by professional liability insurance." The required disclosure is to be included in every written communication with clients. Rule 7.5 (Firm Names and Letterheads) of the South Dakota Rules of Professional Conduct provides that the disclosure ***shall be in black ink with type no smaller than the type used for showing the individual lawyer's names.***

omissions insurance, or provide proof of financial responsibility, in an amount at least equal to the minimum established by the Committee that oversees the service. The Comment to Model Rule 4 states that the intent of the insurance requirement is to ensure that, in the event errors are made by the participating lawyer, the client has redress through the lawyer's policy of insurance. The requirement is contained in the ABA *Minimum Quality Standards* for lawyer referral services (*See* above.). The Comment notes, that only by requiring such insurance, or a showing of financial responsibility, can a client best be protected. In states where lawyer referral services are not immune from lawsuits for negligent referral, this requirement will help protect the lawyer referral service from such suits; in states where such immunity exists, it ensures that a client may find redress against the principal negligent party, the lawyer.

In August 1993, the ABA House of Delegates adopted the ABA *Model Rule for the Licensing of Legal Consultants.* The Model Rule sets forth the requirements for a foreign lawyer to practice law as a foreign legal consultant in the United States on a permanent basis. The Model Rule requires that foreign legal consultants maintain professional liability insurance.

THE PROPOSED *MODEL COURT RULE ON INSURANCE DISCLOSURE*

The Model Court Rule properly places the burden for reporting the maintenance of insurance on the lawyer. Potential clients should not be required to inquire of a lawyer if professional liability insurance is maintained. Many unsophisticated clients either assume that a lawyer is required to provide malpractice insurance or do not even think to inquire if they lawyer is covered.[2] The proposed Model Court Rule would provide potential clients with the ability to independently determine whether a lawyer maintains professional liability insurance. The Model Court Rule is a balanced standard that allows potential clients to obtain relevant information about a lawyer if they initiate an inquiry, while placing a modest annual reporting requirement on lawyers.

Lawyers in the United States, except in Oregon, are not required to maintain professional liability insurance. While clients have the right to hire lawyers who do not maintain professional liability insurance, those who do so will likely have no avenue of financial redress if the lawyer commits an act of negligence. Lawyer disciplinary proceedings primarily offer prospective protection to the public. They either remove lawyers from practice or seek to change the lawyers' future conduct. Protection of clients already harmed is minimal. While lawyer-respondents are sometimes ordered to pay restitution in disciplinary cases, in many jurisdictions the failure of lawyers to make restitution ordered in disciplinary proceedings will not bar subsequent readmission to practice. Clients can also seek restitution from client protection funds when dishonest conduct is involved. Client protection funds are an innovation of the legal profession unmatched by any other profession. Unfortunately, the ability of client protection funds to compensate clients is limited. Restitution is generally available only when a lawyer has misappropriated client funds. Legal malpractice claims are the only manner by which clients can seek redress for acts of negligence. Prospective clients should have the right to decide

[2] A Minnesota lawyer reported to the Committee that based upon his experience in handling legal malpractice actions since 1996, it is a foregone conclusion that every consumer of legal services in the State of Minnesota presumes that the lawyer they hire is insured. He further stated that it is also a given that virtually none of the consumers of legal services ever ask or receive any confirmation as to the insurance status of their lawyer at the time of retention.

whether they want to hire lawyers who do not maintain liability insurance. The Model Court Rule offers the prospective client the ability to make an informed decision.

Lawyers who lack insurance are not immune from malpractice liability. Claims against uninsured lawyers are often abandoned, precisely because there is no available insurance. Plaintiff's counsel know that in evaluating whether to file such a claim, a threshold issue is whether the lawyer is insured. If the claim for damages is modest, many plaintiff's legal malpractice lawyers will elect not to file suit because the risk that any judgment will prove to be uncollectible, in light of how difficult these claims are in other respects, simply makes such claims not worth pursuing. The data on malpractice claims reported by the ABA Standing Committee on Lawyers' Professional Liability is incomplete since potential claims not pursued due to a lack of insurance are not factored.[3]

Malpractice insurance is not a panacea for injuries caused by lawyer negligence. Nevertheless, whether a lawyer maintains professional liability insurance is a material fact that potential clients should have a right to know in retaining counsel. Professional liability insurance does ensure that a client *may* find financial redress against the principal negligent party, their lawyer. The proposed Model Court Rule provides the public with access to relevant information; it does not mandate that lawyers maintain malpractice insurance. The Model Court Rule incorporates a provision requiring an entity designated by the highest court to make the reported information available to the public. The information would presumably be available by telephone, or preferably, by Internet access.

The bar or the lawyer regulatory agency should also inform the public of the limits on the usefulness of this information, e.g., that most policies are "claims made" policies and that policies generally do not cover dishonesty or other intentional acts. Given the nature of claims-made coverage, it is possible that the insurance policy a lawyer has in place at the time when a prospective client is likely to inquire about it, may have lapsed at the time a claim for legal malpractice is made. Most lawyers will probably purchase "tail" coverage to protect themselves from this situation but the public should be made aware of the unique nature of professional liability insurance. The Committee was advised that the experience in Alaska has been that most lawyers who have malpractice insurance today will most likely have it in the future and that, therefore, the value of making the information available to the public outweighed its potential to be misleading by the fact that the policy had lapsed by the time a claim was made.

The Committee recommends that each jurisdiction adopting the Model Court Rule decide if it wants to include, in its version of the Rule, minimum limits of professional liability coverage. Alaska, New Hampshire and Ohio require lawyers to disclose to their clients if the lawyer does not maintain a policy with limits of at least $100,000 per claim and $300,000 annual aggregate.[4]

---

[3] Data has been collected on legal malpractice claims from the National Association of Bar-Related Insurance Companies and commercial insurers for the period January 1, 1996 through December 31, 1999. During that period, there were reported to be 36,844 legal malpractice claims nationally. This data did not cover the entire lawyer population: a significant percentage of practicing lawyers have no malpractice coverage and not all U.S. malpractice insurers provided data. *Profile of Legal Malpractice Claims, 1996-1999,* American Bar Association, Standing Committee on Lawyers' Professional Liability.

[4] Alaska Court Rules, Rule 1.4 (c), Alaska Rules of Professional Conduct; Rule 1.17, New Hampshire Rules of Professional Conduct; and Ohio Rules of Court, Code of Professional Responsibility, DR 1-104.

South Dakota requires its lawyers to disclose to their clients if the lawyer does not maintain a policy with limits of at least $100,000.[5] The Committee was also advised that a professional liability insurance policy with limits of liability of $200,000/600,000 is the smallest policy limit now offered by Minnesota Lawyers Mutual, the largest legal malpractice insurer in Minnesota.[6]

CONCLUSION

The *Model Court Rule on Insurance Disclosure* would reduce potential public harm by giving consumers of legal services an opportunity to decline to hire a lawyer who does not maintain professional liability insurance. Under this Model Court Rule, a lawyer would inform the highest court in the jurisdiction, or designated entity, whether insurance is maintained. The court would make this information available to the public. During the reporting year, if the policy is terminated or modified, the lawyer would be required to inform the court. The ultimate decision whether or not to maintain professional liability insurance remains with lawyers.

Robert D. Welden, Chair
Standing Committee on Client Protection
August 2004

[5] South Dakota Rules of Professional Conduct, Rule 1.4.
[6] Letter dated February 27, 2004, to the Committee from the Minnesota State Bar Association Rules of Professional Conduct Committee.

APPENDIX C

July 30, 2004

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CLIENT PROTECTION
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
SECTION OF FAMILY LAW
NATIONAL ORGANIZATION OF BAR COUNSEL
STATE BAR OF NEW MEXICO
VIRGINIA STATE BAR
WASHINGTON STATE BAR ASSOCIATION
ILLINOIS STATE BAR ASSOCIATION

Proposed ABA *Model Court Rule on Insurance Disclosure*
Report 108

Talking Points

. . Continuity of judicial regulation of the legal profession depends on action taken by the profession itself. *Robert B. McKay, 1990*

CONTENTS

I. SUMMARY OF RECOMMENDATION

A. What is the Committee recommending?

Lawyers disclose on their annual registration statements whether they maintain professional liability insurance.

B. Why is the Committee making this recommendation?

Whether a lawyer maintains professional liability insurance is a material fact that may bear upon a client's decision to hire the lawyer. Lawyers should make this information available to the highest court in their jurisdiction so that prospective clients can make a fully informed decision when deciding whether to hire a lawyer.

C. What if a lawyer fails or refuses to comply with the Model Court Rule?

Failure or refusal to make the required disclosure would not be a disciplinary offense but rather would result in a lawyer's not being authorized to practice law until such time as the lawyer complies with the Model Court Rule.

II. WHAT SIMILAR RULES HAVE BEEN ADOPTED IN U.S. JURISDICTIONS?

12 states have addressed this issue to date.

7 states (DE, IL, KS, NE, NC, MI and VA) require lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. In Illinois, Kansas, Nebraska and Virginia, information regarding a lawyer's professional liability insurance is made available to a potential client if the client telephones the clerk of the court or the bar association and requests it or the information can be accessed on the bar's website.

4 states (AK, NH, OH and SD) have amended their Rules of Professional Conduct to require lawyers to disclose directly to their clients whether they maintain professional liability insurance.

1 state, Oregon, mandates professional liability insurance as a condition of practicing law.

III. WHAT CONCERNS HAVE BEEN EXPRESSED ABOUT THE MODEL COURT RULE?

A. Why can't clients just ask their lawyers if they have malpractice insurance?

Response: Clients should be encouraged to discuss professional liability insurance with their lawyer. However, as a practical matter, the clients who are most likely to have claims against uninsured lawyers are consumer clients, in such areas as family law,

immigration and personal injury. They are very often unsophisticated, and are often using the legal system for the first time. To expect that such clients will take the initiative to inquire about professional liability insurance is not realistic; clients often don't think to ask or are afraid to ask about insurance. The Model Court Rule provides an alternate means to find out whether a lawyer has insurance.

The Model Court Rule properly places the burden for reporting the maintenance of insurance on the lawyer. The attorney-client relationship is founded on fiduciary duties that the lawyer has to the client. These duties arise in the context of what is often a very unequal power balance between the client and the lawyer. This is particularly true when the client is a consumer, often unsophisticated and inexperienced in legal matters.

The Model Court Rule provides potential clients with the ability to independently determine whether a lawyer maintains insurance. The Rule is a balanced standard that allows potential clients to obtain relevant information about a lawyer if clients initiate an inquiry, while placing a modest annual reporting requirement on lawyers.

The Model Court Rule incorporates a provision requiring an entity designated by the highest court to make the reported information available to the public. The information would presumably be available by telephone, or preferably, by Internet access. The Court and the Bar must begin to educate consumers that information about whether a lawyer maintains insurance is available by visiting a website or by making a telephone call.

B. Why not just amend the Rules of Professional Conduct to require disclosure directly to clients?

Response: 4 states have taken that approach. (AK, OH, NH, SD). These states require lawyers to disclose directly to the client if professional liability insurance is not maintained.

The Committee believes that its proposed Model Court Rule is a fair compromise that allows clients an avenue to obtain relevant information about a lawyer, if they initiate such an inquiry, while at the same time placing nothing more than an annual reporting requirement on lawyers. Subsection C of the proposed Model Court Rule requires that the information disclosed by lawyers be made available to the public.

In July 2003, the Committee circulated a proposal to amend Rule 1.4 (Communication) of the ABA Model Rules of Professional Conduct to require lawyers to disclose to their clients if they did not maintain professional liability insurance. The Committee's proposal received little support. Some of the ABA entities concerns were: (1) what must be disclosed regarding the lawyer's policy limits, the existence of exclusions in the lawyer or law firm's policy and what, if any, information regarding the existence of and/or payment of past claims would have to be imparted to the client under such a rule; (2) lack of disclosure of malpractice insurance is a problem that should be dealt with either by statute or by rule of a state supreme court, rather than by the Rules of

Professional Conduct; (3) if you include a disclosure requirement in the Rules of Professional Conduct, you are saying this issue is a matter of legal ethics and lawyers can lose their licenses for non-compliance; and (4) this is a professionalism issue, not an ethics issue.

C. Where is the evidence that uninsured lawyers are currently harming clients?

Response: The entity within the ABA that most logically could conduct such a study, the Standing Committee on Lawyer's Professional Liability, has never conducted such a study. However, a study is not necessary to demonstrate that client harm results from uninsured lawyers. Without question, lawyers who lack insurance commit malpractice, just as do those with insurance. Claims against uninsured lawyers are often abandoned, precisely because there is no available insurance. Plaintiff's legal malpractice lawyers will tell you that in evaluating whether to file such a claim, a threshold issue is whether the lawyer is insured. If the claim is modest (i.e., with potential damages of $100,000 or less), many plaintiff's legal malpractice lawyers will elect not to file suit, because the risk that any judgment will prove to be uncollectible, in light of how difficult these claims are in other respects, simply makes such claims not worth pursuing. It is difficult to count claims never pursued due to lack of insurance.

D. Why can't clients just file claims with the client security fund if their lawyer neglects their case?

Response: Client security funds have a more limited purpose—to reimburse clients when lawyers steal money. The rules of client security funds do not permit reimbursement for acts of negligence by lawyers. Malpractice claims are the only manner by which clients can seek redress for acts of negligence. In 2002, the State Bar of Arizona Client Protection Fund reported that 12% of the claims for reimbursement that were denied were denied because the claims alleged legal malpractice.

E. How does disclosure of malpractice insurance serve to protect the public?

Response: Legal malpractice claims are the only manner by which clients can seek redress for acts of negligence. Professional liability insurance does ensure that a client *may* find financial redress against the principal negligent party, their lawyer.

F. Isn't professional liability insurance just a potential source of indemnification for the lawyer whom the policy covers?

Response: If an insurance policy pays on a claim, the money goes to the client, not the lawyer. If more lawyers were insured, this would unquestionably help protect the public. It would mean that more clients who have negligence claims would have a method of being compensated for their claims.

G. Doesn't disclosure that insurance is maintained give a potential client a false sense of security?

Response: It is true that professional liability policies are written on a "claims made" basis and a client's claim may arise after a policy lapses. If the legal profession educates the public about the strengths and weaknesses of professional liability insurance, the public will understand that insurance will not cover every instance of lawyer negligence; such as when the policy has lapsed or when the practice area of the representation is excluded by the policy. Despite the flaws in the insurance product, the fact that a lawyer maintains insurance is still a relevant piece of information that clients can factor into their decision whether to hire a particular lawyer.

The purchase of professional liability insurance is a sound business practice for lawyers and responsible lawyers will not allow a policy to lapse or they will purchase "tail-coverage".

An imperfect solution to the problem of uninsured lawyers is better for the public than no solution at all. When a client hires a lawyer, the lawyer's lack of professional liability insurance is a material fact that the client is entitled to know.

In the final analysis, this "false expectation" argument involves weighing two competing interests. There may indeed be some number of clients who develop a false expectation of coverage — only to be disappointed by wasting limits policies, coverage issues, or other subtleties of insurance. On the other hand, as the proponents assert, a very large portion of consumer clients assume that their lawyers are insured, and at present significant numbers of lawyers have no such insurance. The fact that having "false expectations" of coverage might harm a very small number of clients is simply not a persuasive rationale to not adopt the Model Court Rule, which logically will benefit large numbers of consumer clients.

Additionally, anytime a client perceives that they have been injured by their lawyer's dishonest or negligent conduct, they will have "failed expectations' and the client-lawyer relationship is already "irreparably damaged".

The purpose of the Model Court Rule is to provide a potential client with easy access to that relevant information related to a lawyer's representation (i.e. does the lawyer have insurance) in order to make an informed decision about whether to hire a particular lawyer. The legal profession needs to be more active in educating the public about the role liability insurance may play in the decision to hire a lawyer.

H. Doesn't a client who inquires of the state bar or state disciplinary authority learn only that the lawyer in question has disclosed that there was coverage in place at the time the lawyer registered?

Response: No. Paragraph A of the Model Court Rule requires that: "Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by

professional liability insurance shall notify [the highest court in the jurisdiction] in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect or terminates for any reason".

IV. WHAT EXISTING ABA POLICIES ARE RELEVANT TO THIS REPORT AND RECOMMENDATION?

In August 1989, the ABA House of Delegates adopted *Minimum Quality Standards* for lawyer referral services. The minimum standards were adopted as *client protection* measures. One of the standards is that participating lawyers maintain malpractice insurance coverage.

In 1992, the McKay Commission, in its report, *Lawyer Regulation for a New Century*, recommended that the ABA continue studies to determine whether a model program and model rules should be created to: (a) make appropriate levels of malpractice insurance coverage available at a reasonable price; and (b) make coverage mandatory for all lawyers who have clients. In the course of examining measures to protect the public, the McKay Commission considered recommending a court rule requiring all lawyers who have clients to carry malpractice liability insurance. The McKay Commission recognized that the issue of mandatory coverage is complex and there are many different forms of coverage and many legal and economic issues to be considered. The Commission, therefore, recommended further study.

In August 1992, the ABA House of Delegates adopted *Model Supreme Court Rules Governing Lawyer Referral And Information Services*. Rule 4 of the Model Rules requires that in order for a lawyer to participate in the service, the lawyer shall maintain in force a policy of errors and omissions insurance, or provide proof of financial responsibility, in an amount at least equal to the minimum established by the Committee that oversees the service. The Comment to Model Rule 4 states that the intent of the insurance requirement is to ensure that, in the event errors are made by the participating lawyer, the client has redress through the lawyer's policy of insurance. The requirement is contained in the ABA's Minimum Quality Standards for lawyer referral services (*See* above.). The Comment notes that only by requiring such insurance, or a showing of financial responsibility, can a client's needs best be satisfied. In states where referral services are not immune from lawsuits for negligent referral, this requirement will help protect the service from such suits; in states where such immunity exists, it ensures that a client may find redress against the principal negligent party, the attorney.

In August 1993, the ABA House of Delegates adopted the ABA *Model Rule for the Licensing of Legal Consultants*. The Model Rule sets forth the requirements for foreign lawyer to practice law as foreign legal consultants in the United States on a permanent basis. The Model Rule requires that foreign legal consultants maintain professional liability insurance.

ABA MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS

§ 6. Disciplinary Provisions

A person licensed to practice as a legal consultant under this Rule shall be subject to professional discipline in the same manner and to the same extent as members of the bar of this State and to this end:

(a) Every person licensed to practice as a legal consultant under these Rules:

(B) an undertaking or appropriate evidence of professional liability insurance, in such amount as the court may prescribe, to assure his or her proper professional conduct and responsibility;

V. WHAT ABA GOALS AND OBJECTIVES DOES THE PROPOSED MODEL COURT RULE SUPPORT?

MISSION: The mission of the American Bar Association is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.

GOAL V: TO ACHIEVE THE HIGHEST STANDARDS OF PROFESSIONALISM, COMPETENCE, AND ETHICAL CONDUCT.

OBJECTIVE 1. Increase the legal profession's awareness about the relationship between professionalism and public respect.

OBJECTIVE 2. Increase the legal profession's awareness about the correlation between competence and ethics.

OBJECTIVE 6. Disseminate information that promotes confidence in the self-regulation of the legal profession.

OBJECTIVE 7. Implement policies and develop programs to increase client protection.

VI. WHICH OF THE FIVE KEY AREAS OF THE ABA STRATEGIC PLAN DOES THE PROPOSED MODEL COURT RULE SUPPORT?

AREA I – SERVING AS THE VOICE OF THE LEGAL PROFESSION

A longstanding primary objective of the ABA has been assuming a leadership role in promoting and maintaining a consistently high standard of excellence for the legal and judicial systems, the legal profession and the justice system as a whole. This goal is widely accepted as valuable if not indispensable to the ABA's mission.

Strategy E: Set Ethical, Professionalism and Regulation Standards

Continue to develop guidelines that promote the high level of ethical conduct and professionalism expected from the legal profession and the judicial system and that strengthen professional regulation.

APPENDIX D

Model Court Rule on Insurance Disclosure—Statement in Opposition

Executive Summary

- **The proposed Rule does not assist the public in making a fully informed decision about hiring a lawyer, because it does not educate the public about the fundamental difference between professional liability insurance (claims-made policies) and the types of insurance policies with which most consumers are familiar (occurrence-based)**
- **Without sufficient context and education, promoting the concept that a lawyer's insurance protects the client (rather than the lawyer) will lead to a false sense of security for the potential client**
- **The proposed Rule creates a substantial risk for increased miscommunication between lawyers and clients, and may foster misunderstandings between the practicing bar and the public**

Key Points

The LPL Committee believes that all lawyers who represent clients, and who do not work in situations that provide for the payment of defense and indemnity costs associated with legal malpractice claims, should protect themselves to the extent practicable by maintaining consistent and sufficient insurance.

"Claims-made" policy forms provide coverage for a loss only if the claim is first reported during the applicable policy period. This is in contrast to broader grants of coverage provided by **"occurrence-based"** policy forms, which cover injury or loss that occurs during the applicable policy period, regardless of when the claim is first made.

Most insurance available to consumers (homeowner's, automobile, and commercial general liability insurance) is written on the occurrence-based form, rather than the claims-made form.

The proposed Rule provides no education about the substantial difference between a lawyer merely purchasing an insurance policy, and having insurance coverage, or sufficient coverage, based upon the number and nature of claims, the size of claims, and type of alleged malfeasance.

In the LPL Committee's experience, no legal malpractice insurer would ever issue a prospective opinion on whether a particular hypothetical situation would be afforded coverage. Lawyers, then, cannot guarantee a potential client that the lawyer has "coverage" for any particular act or omission.

Key Issues

The public will likely misunderstand the information conveyed via the proposed Rule if they expect insurance coverage for lawyers works in the same way as the insurance they buy to cover risks in their lives.

It is reasonable to believe this will be a widespread problem, since many practicing lawyers (especially, new lawyers and those who have never purchased insurance themselves) often make the same presumption.

The proposed Rule creates an environment that may foster false expectations. And the failed expectations of clients often cause irreparable damage to the lawyer-client relationship on a small scale, and serious injury to the overall perception of lawyers and the legal profession on a larger scale.

When clients think that they are "protected" by the proposed rule, they are likely to think they are protected to a greater degree than they really are.

There is clear need for effective means to educate the public about the role liability insurance may play in the decision to hire a lawyer, and that the ABA's efforts in that regard can be focused more intently toward education than bare disclosure.

Publications and public relations/education efforts could encourage those seeking legal help to inquire about insurance coverage, and that such efforts are 1) more likely to raise awareness of the issue of insurance coverage for lawyers, and 2) more effective at initiating and fostering a productive dialogue between lawyer and client about insurance.

A law school curriculum is one example of an effective forum for educating lawyers about the important practice of maintaining sufficient and consistent insurance coverage.

ABA
Defending Liberty
Pursuing Justice

APPENDIX E

NEW JERSEY STATE BAR ASSOCIATION
New Jersey Law Center • One Constitution Square
New Brunswick, New Jersey 08901-1500
Phone (732) 249-5000 • Fax (732) 249-2815

February 26, 2004

John Holtaway
Center for Professional Responsibility
American Bar Association
541 North Fairbanks Court
Chicago, IL 60611-3314

Re: Model Rule on Financial Responsibility

Dear Mr.Holtaway:

The New Jersey State Bar Association Board of Trustees has reviewed the proposed *Model Rule on Financial Responsibility* and has concluded that the rule would impose cumbersome and unnecessary requirements on lawyers. The NJSBA therefore would oppose the adoption of the rule if it reaches the House of Delegates.

The best way a potential client can find out whether a lawyer has professional liability insurance is to ask about it. We would rather have clients make such inquires, rather than require lawyers to report this information on an annual registration statement. Insurance coverage may be the last thing a potential client thinks about. However, a client is more likely to ask a lawyer about it, and is unlikely to either know, or make an effort, to call a central court office to obtain this information. Therefore, we question the central rationale behind the proposed rule.

Further, we question what a state supreme court may be expected to do with this information. We are concerned that the collection of such information will open the door to consideration of a requirement that all lawyers obtain professional liability insurance.

The Model Rule would require a lawyer to report a substantial amount of information, and threatens disciplinary action for failure to comply. A lawyer with insurance would have to certify a range of coverage, and whether there is any unsatisfied judgments against the lawyer, "or any firm or professional corporation in which the lawyer has practiced....arising out of the performance of legal services by the lawyer...." Thus, the rule would impose a significant reporting burden.

The NJSBA is aware of no public outcry for this rule, nor have we any indication that our highest court has any interest in addressing this subject. As you are well aware, the bar is already subject to extensive regulation and disciplinary oversight. It appears to the NJSBA that the Model Rule would be an unnecessary burden to the bar, and would add little in the way of consumer protection.

Very truly yours,

Harold L. Rubenstein
Executive Director

C: Karol Corbin Walker
Edwin J. McCreedy

APPENDIX F

As of February 10, 2016

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CLIENT PROTECTION

STATE IMPLEMENTATION OF ABA *MODEL COURT RULE ON INSURANCE DISCLOSURE*

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	**Considering Adoption** (6) (ME, NJ, NY, SC, UT and VT)	**Information Made Available to Public**	**Other Info** (*See also*, **Oregon:** Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
AL					
AK Adopted effective 7/15/93; Amended effective 4/15/2000.	Alaska Rules of Professional Conduct, Rule 1.4 http://www.courts.alaska.gov/rules/prof.htm#1.4			N/A	
AZ Effective 1/1/07		Supreme Court Rule 32(c)(12), effective January 1, 2007. https://govt.westlaw.com/azrules/Document/N7E080C60A6BD11DE97CFC30D94C59A9E?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)		Yes. State Bar of Arizona website.	
AR					On January 21, 2006 the House of Delegates of the Arkansas Bar Association voted not to adopt a disclosure rule.

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	**Considering Adoption** (6) (ME, NJ, NY, SC, UT and VT)	**Information Made Available to Public**	**Other Info (*See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
CA Effective 1/1/2010	Rule 3-410. Disclosure of Professional Liability Insurance. California Rules of Professional Conduct. http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3410.aspx			N/A	
CO Effective 1/1/09		Colorado Rules of Civil procedure, Rule 227 https://www.coloradosupremecourt.com/Registration/rules.htm		C.R.C.P. 227: **(c) Availability of Information.** The information provided by the lawyer regarding professional liability insurance shall be available to the public through the Supreme Court Office of Attorney Registration and on the Supreme Court Office of Attorney Registration website.	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (ME, NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (*See also*, Oregon: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
CT					At its February 23, 2009 meeting, the Connecticut Superior Court Rules Committee voted unanimously to deny a proposal to adopt an insurance disclosure rule. http://www.jud.ct.gov/Committees/rules/rules_minutes_022309.pdf
DE Beginning with 2007 Annual Registration Form.		Registration Form		2011 Registration Form: http://courts.delaware.gov/forms/download.aspx?id=50968	
DC					
FL					Declined to adopt. *See, In Re: Amendments to The Rules Regulating The Florida Bar (Biannual Report) Florida Supreme Court No. SC10-1967 dated April 12, 2012.*
GA					
HI Effective 12/1/07		**RSCH 2.17(d)** http://www.courts.state.hi.us/docs/court_rules/rules/rsch.htm#Rule_17		N/A	

As of February 10, 2016

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	**Considering Adoption** (6) (ME, NJ, NY, SC, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
ID		Idaho Bar Commission Rule 302(a)(5) https://isb.idaho.gov/pdf/rules/ibcr.pdf		Available to the public upon request.	
IL Effective 10/1/04		Amended Illinois Supreme Court Rule 756 http://www.state.il.us/court/SupremeCourt/Rules/Art_VII/artVII.htm#Rule756		Yes http://www.iardc.org/malpracticeinfo.html	
KS Effective 9/6/05		Supreme Court Rule 208A http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys&r2=281		Yes, by means designated by the Court.	http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys&r2=281
KY					On or about November 14, 2006 the KY Sup. Ct. declined to adopt a disclosure rule.
LA					

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (ME, NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (*See also*, Oregon: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
ME			**X** Maine Board of Bar Overseers submitted a comprehensive rewrite of its administrative rules in June 2014 to the Maine Supreme Judicial Court for consideration. *See*, Rule 1(g). (http://mebaroverseers.org/docs/Proposed%20Revised%20Maine%20Bar%20Rules%20-%20%206.20.14.pdf		
MD					
MA Effective 9/1/06		Supreme Judicial Court Rule 4:02 http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/sjc402.html		Yes.	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (ME, NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (*See also*, Oregon: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
MI Beginning with the notice issued for fiscal year 2003-2004		Administrative Order No. 2003-5, dated August 6, 2003 http://www.icle.org/contentfiles/milawnews/Rules/Ao/2003-27_08-06-03%20_or.html		**No.**	
MN Effective 10/1/06		Rule 6 of the Rules of the Supreme Court on Lawyer Registration. Annual Reporting of Professional Liability Insurance Coverage (Effective October 1, 2006) https://www.revisor.mn.gov/court_rules/rule.php?type=pr&subtype=supr&id=6		Yes. Rule 7. Access to Lawyer Registration Records	
MO					Not currently being considered.
NE		Supreme Court Rules · CHAPTER 3: ATTORNEYS AND THE PRACTICE OF LAW · Article 8: State Bar Association; Creation; Control; and Regulation. § 3-803. Membership. **http://supremecourt.ne.gov/supreme-court-rules/1901/%C2%A7-3-803-membership**		Shall be made available to the public.	
NV Adopted	http://www.leg.state.nv.us/CourtRules/sc	Amended Supreme Court Rule 79 (Adopted September		Yes. It will be part of the lawyer's public record available by	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (ME, NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (*See also*, Oregon: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
9/13/05 and effective 11/13/05	r.html	13, 2005 and effective November 13, 2005)		phone or email inquiry.	
NH Effective 3/1/03	New Hampshire Rules of Professional Conduct, Rule 1.19. (Disclosure of Information to the Client) http://www.courts.state.nh.us/supreme/orders/20072507.pdf			N/A	
NJ			X		Supreme Court Committee studying. Chair: Robert Fall
NM Effective 11/2/09	Rule 16-104 Rules of Professional Conduct (Current Rule not available online)				
NY			Under consideration.		
NC					Effective January 1, 2010, North Carolina lawyers are no longer required to inform the State Bar as to whether they maintain legal malpractice insurance.

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (ME, NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (*See also*, Oregon: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
ND Effective 8/1/09	http://www.court.state.nd.us/rules/Conduct/frameset.htm	Amended Rule 1.15 of the North Dakota Rules of Professional Conduct		Yes	
OH Effective 7/1/01	Ohio Rules of Professional Conduct, Rule 1.4(c) http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf			N/A	Lawyers who hire themselves out to do research and writing for other lawyers need not comply. (Ohio Supreme Court Bd. of Commissioners on Grievances and Discipline, Op. 2005-1, 2/4/05).
OK					No action taken to adopt a rule.
OR					All lawyers required to maintain professional liability insurance. For information on Oregon Professional Liability Fund https://www.osbar.org/plf/plf.html
PA Effective 7/1/06	Pennsylvania adopted RPC 1.4(c), effective 7/1/2006. http://www.pacode.com/secure/data/204/chapter81/s1.4.html			N/A	As part of attorney registration, Pennsylvania attorneys must state whether they have malpractice insurance. Whether they do or not is public information that appears on the Disciplinary Board's website. http://www.padisciplinaryboard.org/consumers/

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (ME, NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (*See also*, Oregon: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
RI Effective 4/15/07		Rule 1(b) of Article IV "Periodic Registration of Attorneys". (Effective April 15, 2007)		https://www.courts.ri.gov/Courts/SupremeCourt/Supreme%20Court%20Rules/Supreme-Rules-Article4.pdf	
SC			X		1) Beginning in 2012, each lawyer seeking license renewal or a new license will be asked to disclose voluntarily whether the lawyer maintained legal malpractice insurance coverage with a minimum amount of $100,000, and then: 2) Based on the information gathered in 2012 showing the percentage of uninsured lawyers, either a) Presenting to the South Carolina Supreme Court a potential proposed Rule of Professional Conduct possibly modeled, in part, on the ABA Model Court Rule; b) Adopting an internal South Carolina Bar rule that authorizes disclosure to the public of each lawyer's insurance information through the

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (ME, NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (*See also*, Oregon: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
					Bar and on the Bar's website, or c) Taking no action.
SD Effective 1/1/99	South Dakota Model Rules of Professional Conduct, Rule 1.4 (Communication) https://www.law.cornell.edu/ethics/sd/code/SD_CODE.HTM#Rule_1.4 (SDBAR links currently unavailable)	(SD also requires lawyers to disclose on their annual registration statements.)		N/A	SD has 7 years of certification to the Supreme Court - 97% have at least $100,000 in coverage, together with name and policy number of the policy. Over the past 7 years, the percentage has never dropped below 96% nor been higher than 97.5% in any given year. RPC 7.5 concerning letterhead requires the RPC 1.4(c) disclosure to be in black ink with type no smaller than the type used for the lawyer's names.

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (ME, NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (*See also*, Oregon: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
TX					By letter dated April 14, 2010 to the President of the State Bar of Texas, the Supreme Court of Texas declined to adopt an insurance disclosure rule. http://www.supreme.courts.state.tx.us/advisories/pdf/WBJ_Letter_Mandatory_Insurance_Disclosure_041410.PDF
UT			Rule 1.4 Proposed Amendment - Disclosure of Malpractice Insurance Rule 1.4. Communication. http://www.utcourts.gov/resources/rules/ucja/ch13/1_4.htm		Required to disclose on registration statement but no Rule enacted. Bar will collect date on coverage for a 2-year period (2009-2011).
VT			On December 28, 2006 the Civil Rules Committee proposed that the Vermont Supreme Court consider adoption of a rule requiring insurance disclosure, not in the Vermont Rules of Professional Conduct, but as part of the Rules for Licensing of Attorneys. In adopting the rule, consideration should be given to requiring disclosure of the liability limits and deductibles of the coverage.		

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (ME, NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (*See also*, Oregon: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
VA Amended effective 7/1/89; 1/1/90; 4/1/90.		Rules of the Virginia Supreme Court, Part 6 § 4 Paragraph 18. Financial Responsibility http://www.vsb.org/pro-guidelines/index.php/bar-govt/financial-responsibility /		Yes, on Bar's website: (See, www.vsb.org, under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance).	
WA Effective 7/1/07		Admission to Practice Rule 26 - Insurance Disclosure. (Effective July 1, 2007) http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaapr26		Yes.	
WV Effective 5/6/05		State Bar By-Laws – Article III (A) - Financial Responsibility Disclosure http://www.wvbar.org/wp-content/uploads/2012/04/WV-Bar-Const-By-Laws-and-Rule-Regulations.pdf Form: http://www.wvbar.org/wp-content/uploads/2012/04/FRD2012.pdf		Yes. . . . shall be made available to the public by such means as may be designated by the West Virginia State Bar.	

As of February 10, 2016

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (17) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (ME, NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (*See also*, Oregon: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
WI					
WY					

APPENDIX G

ABA Bar Leader
March-April 2004

State by state, mandatory malpractice disclosure gathers steam

By Robert J. Derocher

It was about five years ago that attorney Lawrence Ferguson took on a lawyer malpractice case in Columbia, Mo. His client was filing suit against an attorney for costing the client a $55,000 judgment and losing custody of her two children.

During discovery, Ferguson found that the attorney did not carry malpractice insurance. A short time later, before Ferguson could pursue what he thought was a strong case, the other attorney filed for bankruptcy and was eventually disbarred.

"My client got nothing. I was outraged by this," Ferguson says.

Not long after, Ferguson became an ardent advocate for mandatory malpractice disclosure by attorneys in Missouri. He is now vice chair of the Missouri Bar's Professionalism Committee, which has been working on a draft rule requiring lawyers to tell their clients if they don't have malpractice coverage.

"We require liability insurance for everyone who has a license and drives a car, and a car can do a lot of damage," he says. "Why can't we see our way for attorneys to have liability insurance? It seems to me a bit backward." While Ferguson and others are advocating for mandatory *disclosure*, not mandatory *coverage*, many think a disclosure rule is an excellent prompt to seek coverage.

In 2003 alone, three states put mandatory malpractice disclosure rules in place, joining six others with varying requirements. Bar association committees and courts in several other states are also looking at such proposals, while the ABA Standing Committee on Client Protection has developed a Model Rule on disclosure that could reach the full House of Delegates at its annual meeting in August.

For proponents, the changes are a long time in coming and are a signal that attorneys have a deep interest in protecting the public. But for many, change does not come easy. Opponents say disclosure rules can interfere with client relationships, put too much power in the hands of insurance companies, and add unnecessary costs—particularly for solo and small practitioners. (For a look at the financial aspects of this debate, see "Lawyers, and bars, weather the liability insurance downturn," November-December 2002, page 6.)

For states that have not adopted disclosure rules, the issue is likely to be a lively one again this year as backers leap on the growing momentum and doubters point to a tight, expensive insurance market.

A long history

The issue of mandatory malpractice insurance has been around since the late 1970s when skyrocketing malpractice insurance premiums led to one state, Oregon, making malpractice insurance a legal requirement for all practicing lawyers in the state. Today, it remains the only state with mandatory malpractice coverage.

It wasn't until the late 1990s that the issue resurfaced in the form of mandatory disclosure, rather than coverage. Saying it was an issue of client/consumer protection, courts in Alaska and South Dakota required attorneys to notify clients up front whether or not they had certain levels of malpractice coverage.

Building off the momentum, the ABA Standing Committee on Client Protection offered a Model Rule proposing that attorneys disclose to their clients whether or not they carry malpractice insurance. James Towery, former president of the State Bar of California, was the chair of that committee and helped draft the Model Rule.

"I think it's a professional responsibility we have," he says. "The great majority of clients assume that all lawyers have liability insurance, and are sadly disappointed when they find out that they don't."

But the Model Rule, when it first arose, failed to get support from key ABA committees and the proposal never made it to the House of Delegates for a vote.

Same idea, different approaches

While the issue cooled on the national level, it began to heat up on the state level. In 2001 and 2002, Ohio adopted a rule that was patterned largely after the Alaska rule. Not only do Ohio and Alaska require client notification ahead of time, they also require minimum amounts of liability coverage to trigger the notification.

Virginia and Delaware, however, took different routes in response to attorneys' concerns about disclosure. Virginia requires each lawyer to notify the mandatory Virginia State Bar whether or not he or she has any malpractice coverage. The bar then makes that information available to the public upon request, either by telephone or the Internet. Delaware attorneys must give a similar notification to the state Supreme Court, which holds the records for public review upon request.

In 2003, courts in North Carolina and Nebraska fulfilled requests from their mandatory bars to adopt the Virginia form of mandatory disclosure. New Hampshire, also last year, opted for a prior client disclosure rule similar to Alaska and South Dakota.

"We felt the [Alaska] approach was too intrusive," says Jim Dorsett, past president of the North Carolina State Bar. "We think this will provide protection not only for the public, but for attorneys as well." He says the rule generated little opposition from attorneys.

As in Virginia, the North Carolina State Bar will post the information on its Web site to make it available to the public. According to the Virginia State Bar, this portion of its Web site generated about 25,000 hits last year.

Dorsett also hopes the regulation will duplicate Virginia's results in the area of uninsured lawyers. The percentage of uninsured lawyers in the state jumped from 60 to 90 percent after mandatory disclosure.

Nebraska's 8,200 practicing lawyers began notifying the Nebraska State Bar Association of their insurance status in November when annual dues renewals were sent, says Jane Schoenike, the bar's executive director. "We got tons of phone calls," she says. "They wanted to know what this was all about."

Schoenike expects the information to be posted on the association's Web site by summer. From the bar's perspective, she adds, "The hardest part is going to be scanning in all those documents."

Not everyone agrees

While mandatory disclosure is clearly gaining momentum, the road is not without bumps for many states. The Indiana State Bar Association's House of Delegates voted last November to kill a move to ask the state's Supreme Court to require disclosure of minimum amounts of liability coverage, similar to Alaska and Ohio.

"[Opponents] were concerned that a proposal like that might lead to mandatory malpractice coverage laws coming from the Supreme Court," says Tom Pyrz, the bar's executive director. "Lawyers are always concerned about more regulations. I think it is very chilling, and people just didn't want to go with that."

Pyrz says there is a chance a bar committee will revisit the issue, possibly with an eye toward a Virginia-like requirement that doesn't mandate up-front disclosure.

A committee at the State Bar of Montana was expected to reexamine the issue this winter, a year after bar members from the mostly rural part of the state sounded off in a survey with strong opposition to liability disclosure. "People are watching what other states are doing," says Executive Director Chris Manos.

One of those states being watched closely is Michigan. Despite some objections from bar members, the state Supreme Court this year is ordering attorneys to tell the State Bar of Michigan whether or not they have malpractice insurance in order to gauge the need for a disclosure law. The information will be forwarded to the court to determine the need for mandatory disclosure.

"There's been no movement by lawyers to go in that direction," says Tom Byerley, the bar's director of professional standards. "A lot of people did not like the question." But attorneys who do not answer the question, he adds, will be unable to practice law in the state.

Michigan Supreme Court Justice Clifford Taylor, an advocate of disclosure, is undaunted by the opposition. "It's very important for professional organizations such as the state bar to remember that they're not there for lawyers. They're there for the public," he says. "This is a modest consideration."

Lawrence Ferguson says he has been somewhat surprised by the amount of opposition the proposal has generated in Missouri. A draft of a rule patterned after Ohio and Alaska never made it as far as the bar's Board of Governors.

"They see this as a politically charged item," he says. "Their take on it is that it just doesn't bode well to get into it."

Similarly spirited debate last year put a proposal on hold in Louisiana. "It's a controversial item," says James Willeford, a member of a Louisiana State Bar Association subcommittee that has been debating the issue. "I don't think there's anybody strongly advocating this right now. No one's really pushing hard."

In Illinois, a proposal last year that would have made it the second state to require malpractice coverage has been scaled back after opposition, says Dave Anderson, the bar's assistant executive director. The state Supreme Court's Rules Committee is now considering a rule requiring mandatory disclosure of minimum coverage amounts, similar to Alaska and Ohio.

Healthy debate ahead

The flurry of activity on the state level is encouraging to disclosure proponents such as Towery and Robert Welden, the current chair of the ABA Client Protection Committee. "I think it's a wonderful thing. It's long overdue," Towery says. While the Virginia, Nebraska, and North Carolina rules don't go as far as he would like, "it's better than nothing," he says. "The fact that there's a debate going on [in other states] is healthy."

Welden adds that passage of the ABA Model Rule will not only encourage other states, but will be a boon in the multijurisdictional movement that allows attorneys to practice in multiple states—which is itself a hotly contested issue. "I think the ABA should take some leadership," he says.

In Missouri, Ferguson is also encouraged by the momentum, despite the lack of action in his state. "I'm not giving up," he notes. "I think we'll get this passed."

sidebar

Who's doing what?

Eight states currently require some form of malpractice insurance disclosure for attorneys. There are exemptions in each state, usually for government/municipal attorneys and in-house counsel for companies. Here are the requirements:

* **Alaska, Ohio and New Hampshire:** Attorneys must notify clients in writing if they have no malpractice insurance, or if their coverage is less than $100,000 per claim and $300,000 aggregate. Clients must also be notified if insurance coverage is terminated or if coverage drops below the $100,000/$300,000 levels.

* **South Dakota:** Attorneys must specify on their letterhead if they have no malpractice insurance or if their coverage is less than $100,000 per claim.

* **Delaware, Virginia, Nebraska, and North Carolina:** Each state requires annual certification, either to the state's mandatory bar or to the state supreme court, that an attorney does or does not carry malpractice insurance. No minimum limits are required.

APPENDIX H

Should Legal Malpractice Insurance Be Mandatory?

INTRODUCTION

As malpractice claims against lawyers multiply at an alarming rate, individual attorneys are becoming increasingly concerned about having to defend possible malpractice claims against them and meeting the spiraling cost of legal malpractice insurance. State bar associations and the American Bar Association are currently studying what can be done about the situation.[1] As proposals to increase the availability and reduce the cost of malpractice insurance have been explored, it has been suggested that legal malpractice insurance coverage be required as a necessary condition to the practice of law.[2]

This Comment will explore background material on the question of making legal malpractice insurance mandatory and include responses to a questionnaire on legal malpractice insurance that was submitted to all state bar associations. Recent relevant experiences of foreign and state bar associations will be discussed, and arguments for and against a mandatory legal malpractice insurance proposal will be examined. In addition, the possible effects and problems of a mandatory program will be considered.

I. CLIENTS' SECURITY FUNDS

A review of the establishment of clients' security funds is an appropriate starting point for a discussion of mandatory legal malpractice insurance for two reasons: (1) clients' security funds were designed to complement legal malpractice insurance coverage, and (2) the arguments for and against clients' security funds and mandatory legal malpractice insurance are similar. Since 1959, state and local bar associations have established funds to compensate clients for the dishonest acts of their attorneys.[3] Some of these funds are financed by mandatory contributions from all association members. Others are funded voluntarily. Although forty-eight states and the District of Columbia currently

1. *See* Jericho & Coultas, *Are Lawyers an Insurable Risk?*, 63 A.B.A.J. 832, 835-36 (1977); Woytash, *Lawyer Malpractice: Is a Crisis Coming?*, B. LEADER, Oct. 1976, at 18.

2. *See* W. Gates, Mandatory Malpractice Insurance for Lawyers (Feb. 21, 1975) (paper presented at the meeting of the National Conference of Bar Presidents) (Gates is chairman of the ABA Special Committee on Lawyers' Professional Liability).

3. Bryan, *Clients' Security Fund Ten Years Later*, 55 A.B.A.J. 757, 757 (1969).

have such funds,[4] opinions originally were strongly divided over the wisdom of their establishment.

Attorneys favoring the establishment of clients' security funds saw meeting a moral obligation to the public and the profession as a primary reason for the funds.[5] Such a fund, it was argued, was necessary in order to uphold the integrity and dignity of the profession.[6] Moreover, it was contended that a clients' security fund would improve the bar's reputation by compensating clients for their lawyers' dishonesty.[7] A third reason given was that the bar's failure to recognize its responsibility to the public in this area would result in public pressure toward legislation for such protection.[8]

Commentators opposing clients' security funds replied that attorneys had no duty to pay for the defalcations of other lawyers.[9] Why should honest lawyers pay for the acts of dishonest attorneys? It would be better, these commentators argued, for the bar to use its energies in screening those admitted to the bar.[10] The existence and operation of the funds arguably would publicize the dishonesty of lawyers and worsen public relations.[11] Charges that such plans were unnecessary[12] and would result in added expense to individual lawyers were also made.[13] Moreover, the availability of such plans would possibly increase both dishonesty charges against members of the bar and actions for malpractice.[14]

As evidenced by the overwhelming number of states that have adopted clients' security funds, it is apparent that the legal profession was more persuaded by the arguments favoring the funds' establishment. Although many of the same arguments

4. Telephone interview with James H. Bradner, Assistant Director, Center for Professional Discipline, American Bar Association (Sept. 15, 1977) (notes on file in the office of the *Brigham Young University Law Review*).

5. *See, e.g.*, Smith, *The Client's Security Fund: "A Debt of Honor Owed by the Profession"*, 44 A.B.A.J. 125 (1958); Sterling, *The Argument for a Clients' Security Fund*, 36 CAL. ST. B.J. 957, 957 (1961); Voorhees, *The Case for a Clients' Security Fund*, 42 J. AM. JUD. SOC'Y 155, 157 (1959).

6. *See, e.g.*, Atkins & Kane, *Clients' Security Fund Maintains Bar's Integrity*, 44 FLA. B.J. 130, 132 (1970); Scott, *Some Pros and Cons of the Client Security Fund Proposal*, 22 THE SHINGLE 17, 18 (1959).

7. Sterling, *supra* note 5, at 958.

8. *Id.* at 959.

9. *See, e.g.*, McKnight, *The Argument Against Clients' Security Fund*, 36 CAL. ST. B.J. 963 (1961); Scott, *supra* note 6, at 18.

10. McKnight, *supra* note 9, at 963.

11. *See id.* at 964.

12. *See* Sterling, *supra* note 5, at 959.

13. McKnight, *supra* note 9, at 966.

14. *Id.* at 965.

apply equally to the question of mandatory malpractice insurance, it is important to note that clients' security funds were not established to cover lawyer negligence as does malpractice insurance but rather to compensate for attorney defalcations. John W. Bryan, Jr., former chairman of the Louisiana and ABA committees on clients' security funds, has made this clear:

> The Clients Security Fund is not a substitute for professional liability insurance as it does not cover negligence which is the risk insured against by the lawyer under the so called malpractice policy.
>
> Clients of lawyers with professional liability policies have no rights against the policy carrier because the standard form of policy excepts defalcation. The Clients Security Fund is a supplement to the malpractice insurance except that it is not in the nature of insurance but is a fund available for payments approved by the committee purely as a matter of grace and not of legal obligation either of the fund or the bar association.[15]

Bryan's observation makes it evident that clients' security funds were designed to complement legal malpractice insurance coverage. Bryan has emphasized this interrelationship and the need for mandatory legal malpractice insurance to complete the security of the client:

> The theory of both the American and British funds is that a client is relegated to the malpractice insurance of the lawyer or to the lawyer's own resources in the case of the negligent handling of a client's matter as distinguished from a defalcation.
>
> It may be that some lawyers do not have this coverage. This insurance should be made compulsory as a condition of the privilege of practicing law and as a way of completing the security of the client.[16]

Theoretically, then, a client would be protected from an attorney's negligence by legal malpractice insurance and from defalcations by a clients' security fund. Unfortunately, this ideal of complete protection has not yet been realized.

II. Survey Results

Although nearly all state bar associations have provided protection against a lawyer's defalcations with a clients' security fund, there is none that presently requires malpractice insur-

15. Bryan, *The Clients Security Fund in Louisiana—A Status Report*, 16 La. B.J. 141, 145 n.3 (1968).

16. Bryan, *supra* note 3, at 760.

ance.[17] It is likely that as the number of malpractice claims against lawyers increase, especially against uninsured attorneys, state bar associations in the near future will give greater attention to the question of mandatory legal malpractice insurance. To ascertain the current opinions of state bar associations on the question of mandatory legal malpractice insurance and other related issues, a questionnaire entitled "Yes-No Questions on Legal Malpractice Insurance" was sent to the executive directors of all state bar associations on September 27, 1977. In states that had both a voluntary and a unified bar,[18] the questionnaire was sent only to the unified bar. Forty-seven of the fifty state bar associations responded.[19] The results of the survey are summarized as follows:[20]

Questions	Number of Responses			
	Yes	No	Don't Know	No Response
1. Is your bar association in favor of mandatory legal malpractice insurance?				
a. members of the bar generally	4	10	32	1
b. members of the governing board	7	11	26	3
2. Does your bar association predict that mandatory legal malpractice insurance will significantly increase malpractice claims against attorneys?				
a. members of the bar generally	3	1	41	2
b. members of the governing board	4	8	31	4
3. Does your bar association sponsor a legal malpractice insurance program?	42	5	—	0
4. Does your bar association have any plans to become self-insuring?	22[21]	19	5	1

17. Oregon will require legal malpractice insurance on July 1, 1978. *See* notes 49-53 and accompanying text *infra*.

18. North Carolina, Virginia, and West Virginia. *See* AMERICAN BAR ASSOCIATION, 1977/78 DIRECTORY 3G-5G (1977).

19. The bar associations of Minnesota, New Mexico, and Oklahoma did not respond.

20. The *Review* gratefully acknowledges the assistance of Larry C. Farmer, Rodney Jackson, and Gerald R. Williams in the preparation of the questionnaire and in the compilation of the responses.

21. "Yes" answers include nine responses such as "studying self-insurance," etc.

5. Does your bar association have a clients' security fund?	44[22]	3	—	0
If yes, are you satisfied with your clients' security fund?	34	9	—	4
Are contributions to your clients' security fund mandatory?	34[23]	10	—	3

	Company	Number of Responses
6. Which insurance companies underwrite legal malpractice insurance in your state?	American Home Assurance Company	26
	American Bankers Insurance Company of Florida	22
	St. Paul Fire and Marine Insurance Company	8
	Continental Casualty Company (CNA)	3
	Lloyd's of London	2
	GATX Insurance Company	1
	Gulf Insurance Company	1
	Phoenix Insurance Company	1
	Transamerica Insurance Group	1

	Percent	Number
7. Approximately what percentage of your attorneys are covered by legal malpractice insurance?[24]	0-29	0
	30-39	5
	40-49	3
	50-59	6
	60-69	11
	70-79	4
	80-85	6
	No Response	12

The large number of "Don't Know" responses to questions 1 and 2 suggests a surprising lack of research and policy formulation concerning legal malpractice insurance. Many state bars

22. "Yes" answers include cases where the clients' security fund is administered by the state supreme court rather than by the bar.

23. "Yes" answers include cases where part of an attorney's dues or part of the bar budget goes to support the clients' security fund.

24. Using the estimates provided by the state bar executive directors and the number of attorneys given in AMERICAN BAR ASSOCIATION, 1976-1977 DIRECTORY OF BAR ASSOCIATIONS (1976), it is estimated that 55.42% of the attorneys in the 35 states responding carry malpractice insurance (149,190 out of 269,214). There is no external source to validate this estimate. An article published in 1970 cites various national estimates ranging from below 50% to above 90%. Denenberg, Ehre, & Huling, *Lawyers' Professional Liability Insurance: The Peril, the Protection, and the Price*, INS. L.J., July 1970, at 392.

apparently have not yet confronted the issue of mandatory malpractice insurance. Of the bar associations which answered either yes or no to question 1, there was a split of opinion between the governing boards, with more opposing than favoring mandatory insurance. According to the estimates of the executive directors, bars with members generally opposing mandatory insurance outnumbered bars with members generally favoring such a proposal by more than two to one. When coupled with the finding that fewer than fifty-six percent[25] of all attorneys have malpractice insurance, it appears that many attorneys prefer the risk of "going bare" to the cost of either voluntary or mandatory insurance.

Although there were many "Don't Know" responses to the questionnaire, certain correlations that can be inferred from the survey results help suggest why a particular bar association would be in favor of or opposed to mandatory insurance. One informative relationship is that between bar size and support for or opposition to mandatory insurance. This correlation is shown in Table 1.

TABLE 1.—*Attitudes of bar members and governing boards toward mandatory legal malpractice insurance as a function of bar size*

	Bar Members			Governing Boards		
Bar Size [26]	Favoring	Opposing	No Opinion [27]	Favoring	Opposing	No Opinion
0-2000	0	5	8	2	6	5
2000-5000	1	1	10	2	2	8
5000-10,000	1	3	6	1	3	6
over 10,000	2	1	8	2	0	7
Total	4	10	32	7	11	26

As Table 1 indicates, attorneys in bars with less than 2000 members reportedly are generally opposed to the idea of mandatory insurance. The least opposition and strongest support for mandatory insurance was reported among lawyers in bars with memberships over 10,000. By contrast, bar size was not as closely related to the governing boards' support for mandatory insurance as it was to the reported general opinions of bar members. Governing

25. *See* note 24 *supra.*

26. This category was based on the number of attorneys given in AMERICAN BAR ASSOCIATION, note 24 *supra.*

27. The "No Opinion" category of Tables 1, 3, and 5 includes only "Don't Know" responses.

board *opposition* to mandatory insurance, however, was inversely related to bar size.

The correlation between bar size and membership support for mandatory insurance may be the result of two factors. First, insurance administration costs and underwriting losses in a large bar can be distributed over a larger base, making mandatory insurance more feasible. Second, a bar association's ability to recognize intrinsic problems and to devise solutions may be related to bar size. In showing a high correlation between bar size and associations with plans to become self-insuring, other survey results, set out in Table 2, partially support this latter assertion.[28]

TABLE 2.—*Number of bar associations with plans to become self-insuring as a function of bar size*

Bar Size	Bars with plans	Bars without plans [29]
0-2000	1	10
2000-5000	7	5
5000-10,000	6	3
over 10,000	8	1
Total	22	19

Almost seventy-three percent[30] of the bars with memberships over 10,000 reported plans to become self-insuring; less than eight percent[31] of the bars with less than 2000 members reported self-insurance plans.

A correlation, similar to that between bar size and support for mandatory insurance, may also be seen between bar type (unified, voluntary, or partially unified) and support for mandatory insurance. As Table 3 shows, members of nearly fourteen percent of the twenty-nine unified bars reporting members' opinions were generally in favor of requiring legal malpractice insurance. The members of no voluntary bars were reported as generally favoring mandatory insurance.

28. This assumes, of course, that having a plan to become self-insuring demonstrates a bar's "ability to recognize intrinsic problems and to devise solutions."

29. The "Bars without plans" category of Tables 2, 4, and 5 does not include cases where either a "Don't Know" or no response was made to the question.

30. Of 11 bars with memberships over 10,000, eight reported plans to become self-insuring.

31. Only one bar association (Idaho) out of 13 bars with memberships under 2000 reported plans to become self-insuring.

TABLE 3.—*Attitudes of bar members and governing boards toward mandatory legal malpractice insurance as a function of bar type*

Bar Type [32]	Bar Members			Governing Boards		
	Favoring	Opposing	No Opinion	Favoring	Opposing	No Opinion
Unified	4	6	19	7	6	14
Voluntary	0	3	13	0	4	12
Partially Unified	0	1	0	0	1	0
Total	4	10	32	7	11	26

Table 3 also shows that among the governing boards of unified bars almost the same number of boards support the idea of mandatory insurance as reportedly oppose it. No voluntary bar governing boards, however, were reported as favoring a mandatory program.

One possible reason why neither the general memberships nor the governing boards of voluntary associations were reported in favor of mandatory insurance is the fact that a mandatory program is rather impractical where membership is on a voluntary basis.[33] A voluntary bar's governing board has little power to coerce the association's members to participate in a mandatory program. Such a program could also decrease new memberships in a voluntary bar.

Another pattern derivable from the survey data is the relationship between bar type and a bar's plans to become self-insuring. This correlation is shown in Table 4.

TABLE 4.—*Number of bar associations with plans to become self-insuring as a function of bar type*

Bar Type	Bars with plans	Bars without plans
Unified	16	11
Voluntary	6	7
Partially Unified	0	1
Total	22	19

32. Classification of type of bar was based on AMERICAN BAR ASSOCIATION, *supra* note 18, at 1G-5G.

33. Illinois State Bar Association reply to questionnaire. All responses to the questionnaire are on file in the office of the *Brigham Young University Law Review.*

As Table 4 indicates, of the bar associations reporting plans to become self-insuring, nearly seventy-three percent are unified bars. The near-even split among voluntary bars over self-insurance plans may again be explained by the lack of power of voluntary bar governing boards to require membership participation.

The survey results indicate that bars with plans to become self-insuring are more likely to favor mandatory malpractice insurance. If a bar plans to self-insure, there must be a fairly large number of participants to make the program feasible.[34] In light of the correlation between bar size and reported membership support for mandatory insurance, it is not surprising then that those bars considering self-insurance would also be likely to favor mandatory participation. Table 5 shows this result.

TABLE 5.—*Number of bar associations with plans to become self-insuring as a function of the attitudes of bar members and governing boards toward mandatory legal malpractice insurance*

Attitudes toward mandatory insurance	Bars with plans	Bars without plans
Bar Members		
Favoring	4	0
Opposing	4	5
No Opinion	14	13
Total	22	18
Governing Boards		
Favoring	5	2
Opposing	4	6
No Opinion	11	10
Total	20	18

The survey also showed that bars requiring contributions to their clients' security funds were much more likely to be satisfied with those funds than were bars with voluntary-participation funds. Of the bars responding to the question on satisfaction with clients' security funds, nearly eighty-five percent of the bars with mandatory programs were satisfied; by way of contrast, only sixty percent of those bars with voluntary programs were satisfied. These results are shown in Table 6.

34. To the extent that feasability of a self-insurance program is reflected in the plans of a bar association, this assertion is supported by the survey results in Table 2. *See* text accompanying note 28 *supra*.

TABLE 6.—*Number of bar associations satisfied with their clients' security funds as a function of the type of contribution to clients' security fund*

Type of contribution	Bar satisfied	Bar not satisfied
Mandatory	28	5
Voluntary	6	4
Total [35]	34	9

To the extent that satisfaction indicates success, the success of a clients' security fund apparently may be dependent on whether contributions to the fund are required.[36] This dependency suggests that a malpractice insurance program to be successful would also need to be mandatory. This would be especially true where a bar self-insures because of the necessity of having a sufficient base over which to spread the risks. In light of the low percentage of attorneys presently either carrying malpractice insurance or favoring the institution of mandatory insurance, it is unlikely that a voluntary program of bar-sponsored insurance would gain sufficient support to be successful.

The fact that there were so many "Don't Know" responses to the questionnaire suggests a greater need for exploration of the legal malpractice insurance problem. Considerable current awareness of the mandatory insurance proposal, however, is indicated by the fact that eighteen state bar executive directors gave definite responses to the survey question regarding bar governing board support for or opposition to the proposal. Although increased interest and research in this area are likely, it is difficult to predict whether the result will be adoption or rejection of mandatory programs.

III. RECENT EXPERIENCES IN MANDATORY LEGAL MALPRACTICE INSURANCE

Although relatively few state bar associations are in favor of mandatory malpractice insurance, three states have attempted to adopt mandatory programs; one state bar has succeeded. In addition, some foreign bar associations have required attorneys to

35. Four bars did not respond to the question regarding satisfaction with clients' security funds.

36. *See* Amster, *Clients' Security Funds: The New Jersey Story*, 62 A.B.A.J. 1610, 1610 (1976).

obtain legal malpractice insurance coverage. This section reviews the experiences of these foreign and state bars.

A. British Columbia[37]

Faced with dramatic increases in the cost of legal malpractice insurance, the Law Society of British Columbia developed a program to obtain insurance coverage for its members at reasonable rates. The Society had as its primary purpose the protection of its members. It realized, however, that the public would also be protected if every attorney was adequately insured.

The Society recognized that, in order to implement and control a malpractice insurance program, more was necessary than merely requiring each attorney to obtain malpractice coverage. Because the refusal of insurance companies to insure an attorney would bar him from practicing law, merely requiring each Society member to carry malpractice coverage would be equivalent to placing the power of deciding who would practice law in the hands of private insurance companies. In response to this problem, the Society implemented a mandatory program[38] under which all members would be insured by one insurer, but within which the Law Society and not the insurer would decide who was to be exempted or excluded.

The program is partially self-insured, with the Law Society and the insured attorney jointly paying the first portion of every claim. The policy limit is $100,000[39] per claim. Of this amount, each member pays a $3000 deductible per claim. The Society then pays the next $22,000 (in essence a $25,000 deductible to the insurer), and the insurer pays the remaining $75,000. The Society's losses in any policy year are limited to $500,000. Any losses in excess of this limit are paid by the insurer regardless of the amount.[40]

The program provides malpractice coverage to all the So-

37. The information in this section is based on a letter from and telephone interview with T.V. McCallum, Secretary of the Law Society of British Columbia. Letter from T.V. McCallum to Thomas L. Kay (Oct. 14, 1977) (on file in the office of the *Brigham Young University Law Review*); telephone interview with T.V. McCallum (Oct. 19, 1977) (notes on file).

38. The Canadian law societies have far more power to implement programs than do their American counterparts. They need no judicial or legislative approval to put a plan such as mandatory insurance into effect. Telephone interview with T.V. McCallum (Oct. 19, 1977) (notes on file in the office of the *Brigham Young University Law Review*).

39. All dollar amounts in this section are in Canadian currency.

40. The insured attorney must still pay the first $3000 of each claim, however. Telephone interview with T.V. McCallum (Feb. 20, 1978) (notes on file in the office of the *Brigham Young University Law Review*).

ciety's members at a very reasonable cost. Before the program went into effect on January 1, 1971, with Travelers Insurance Companies as the carrier, only forty percent of the Society's members had malpractice coverage. Today, except for those who are exempted from the insurance requirement, such as government and corporation employees, each member of the Society has $100,000 per claim coverage for $300 per year.[41] Out of this $300 assessment, the Law Society pays both the program's operating costs and the insurer's premium[42] and covers the $500,000 loss limit.

The Society's involvement in the program, both in a financial sense and through an active loss prevention program, demonstrates to the insurer that the Society and its members take a strong interest in the viability of the insurance program. The Society's involvement has made it possible to identify the sources of claims and to implement effective loss prevention measures. For example, after finding that thirty-three percent of all claims (fifty percent in dollar figures) arose from statute of limitations problems, especially the one-year statute of limitations of British Columbia's motor vehicle act, the Law Society devised and marketed a diary system that could be implemented in each law office. The Society also lobbied to increase the motor vehicle act statute of limitations period from one year to two years. Another thirty percent of claims were found to come from title search problems. In response to this problem, the Society developed a title search form for its members. Problems with mechanic's liens constituted the third largest number of claims. The Society has warned its members against the pitfalls of the mechanic's lien act and has also lobbied for its change.

In addition to mandatory insurance, the Law Society has a Special Fund, equivalent to a clients' security fund, that reimburses clients for the dishonest acts of their lawyers. The Society has noted an improvement in its public image since the adoption of the Special Fund and mandatory insurance. The public is now assured that no client will be unprotected. Knowledge of the insurance requirement by the public and by attorneys, however, has apparently led to an increase in the number of malpractice claims. This increase may also be explained by the fact that some

41. Additional coverage can be obtained for a modest cost. For example, an extra $900,000 coverage over the $100,000 mandatory limit would cost $160 per year. Thus, $1,000,000 of coverage would cost $460 per year.

42. Since 1976 the insurer has been GESTAS, a Canadian consortium of eight insurance companies operating out of Montreal.

lawyers may have become more careless in their practice because they know they are covered by insurance.[43]

The British Columbia Law Society feels that its program has been very successful on the whole. Nonexempt members and their clients are protected for what is reported to be one-sixth to one-seventh the cost of equivalent, individually acquired coverage written by a commercial carrier. Because of the success of the British Columbia program, nine of the ten other Canadian law societies have adopted similar mandatory programs.[44]

B. Norway[45]

The Norwegian Clients' Compensation Fund encompasses coverage for both malpractice and dishonesty. Established by the Norwegian Bar Association (Den Norske Advokatforening) in 1969, the fund is, in effect, a combined malpractice insurance program and clients' security fund. The fund is controlled by a council of three members, two appointed by Den Norske Advokatforening and one appointed by the Ministry of Justice. The program, administered by the Secretariat of Den Norske Advokatforening, requires each lawyer to contribute approximately $40 per year.

The fund is to be used in the council's discretion to cover any liability that a lawyer may incur as a result of his own or his firm's illegal conduct in the course of professional activities. Claims due to negligence may also be met by this fund. In order to be granted any compensation from the council, however, the client must first establish in court the attorney's liability for the dishonest or negligent act. After establishing the legal basis for the claim, the client may apply to the council for compensation. The council then determines the amount of compensation to be paid, if any. Generally, full compensation will be paid if the fund has the means to do so. The council's decisions are final and cannot be appealed in the courts. After compensating the client, the fund has the right to make a claim against the lawyer concerned.

---

43. The first $3000 of each claim must still be paid by the insured lawyer, however.

44. The Bar of Quebec has not adopted a mandatory program. Telephone interview with T.V. McCallum (Feb. 20, 1978) (notes on file in the office of the *Brigham Young University Law Review*). Reportedly, the programs adopted by the other nine law societies (including the one established by the Chamber of Notaries in Quebec) have experienced results similar to those of British Columbia. Telephone interview with T.V. McCallum (Oct. 19, 1977) (notes on file).

45. The information in this section is based on a letter from Kristen S. Fari, Secretary of Den Norske Advokatforening. Letter from Kristen S. Fari to Thomas L. Kay (Sept. 20, 1977) (on file in the office of the *Brigham Young University Law Review*).

C. *Washington*[46]

Washington was apparently the first state to consider implementation of a mandatory malpractice insurance program. In 1973, the Board of Governors of the Washington State Bar made a firm decision to institute such a program. A poll that year of the bar's membership had shown that seventy-two percent of those attorneys responding were in favor of the idea of mandatory malpractice insurance. The local bar presidents approved the idea in 1974 and urged its implementation. The State Bar Insurance Committee, however, was neither willing nor prepared to effectively implement the program at that time.

The Board of Governors instead instructed the bar staff to explore the alternatives available in the market place. Many insurance brokers made presentations to the staff. Some brokers had fully developed plans; others suggested that the Board of Governors select an experienced broker and then take some time to develop specifications before signing up a carrier. The Board decided to take the latter approach.

A Board committee was formed and, together with a broker, developed a plan that was later accepted by the Argonaut Insurance Company. The plan's essential elements were announced to the bar in August 1974. The program was to provide $1,000,000 coverage, with no deductible, for an annual premium of $155. The policy year and mandatory requirement were to begin on February 1, 1975. The policy, an "occurrence" and not a "claims made" type,[47] would not have given the insurer the right of individual cancellation. The insurer was committed to underwrite the program for two additional years with no more than a ten percent premium increase.

In conjunction with this announcement, the Board of Governors recommended that the Washington Supreme Court adopt a new rule requiring malpractice insurance coverage as a condition of practicing law. Bylaws were also established to make the program effective February 1, 1975, and to exempt certain attorneys from the insurance requirement. Those opposing the program made presentations to the court. One large county bar association

46. The information in this section is based on that in W. Gates, note 2 *supra*.

47. An "occurence" type of policy covers acts, errors, or omissions committed during the policy period regardless of when the claim is made. A "claims made" type of policy, by contrast, covers acts, errors, or omissions for claims presented during the policy period. For a discussion of the advantages and disadvantages of these two types of policies, see R. MALLEN & V. LEVIT, LEGAL MALPRACTICE §§ 459-460 (1977); Comment, *The "Claims Made" Dilemma in Professional Liability Insurance*, 22 U.C.L.A. L. REV. 925 (1975).

adopted a resolution opposing the program.

Before the debate could be resolved, however, a death blow was struck to the program when, in late October 1974, Argonaut was forced to withdraw because its parent corporation, Teledyne, had suffered enormous underwriting and investment losses. As a result, the mandatory program had to be postponed. The Washington Supreme Court was requested to defer its action on the proposed rule. A second poll was then conducted to determine the feelings of the bar's membership. Of the 2,830 attorneys who responded (out of 6,000 members), sixty-three percent were in favor of requiring legal malpractice insurance; however, only forty-two percent wanted the Board of Governors to continue its efforts to develop a compulsory insurance contract with a single carrier. Presently the Washington State Bar Association is considering the possibility of self-insurance.[48]

D. Oregon[49]

The Oregon State Bar has gone further than any other state bar association in implementing a mandatory legal malpractice insurance program. At their 1976 annual meeting, the members of the bar voted to authorize the Board of Governors to seek legislation authorizing a compulsory liability fund. The bill drafted and sponsored by the Board, Senate Bill 190, was passed by the Oregon Legislature and signed into law by Governor Straub in mid-1977. The new law authorizes the Board of Governors "to require all active members of the state bar engaged in the private practice of law in Oregon to carry professional liability insurance . . . ."[50]

The Board responded to the law's enactment by adopting a resolution establishing the Oregon State Bar Professional Liability Fund. The resolution requires "all active members of the Oregon State Bar engaged in the private practice of law" to carry, beginning July 1, 1978, "professional liability coverage with aggregate limits of not less than $100,000"[51] that will be offered by the Professional Liability Fund. The fund, to be managed by a Board of Directors consisting of seven active members of the Oregon State Bar engaged in private practice and appointed by the Board of Governors, will evaluate, investigate, negotiate, and de-

48. WASH. ST. B. NEWS, June 1977, at 19.

49. The information in this section is largely based on Statement of the Board of Governors, Oregon State Bar, Professional Liability Fund (1977 Annual Meeting).

50. ORE. REV. STAT. § 9.080(1) (1977).

51. Statement of the Board of Governors, *supra* note 49, at 8.

fend claims. The initial assessment for the period from July 1 through December 31, 1978, will be $250 per lawyer. New lawyers admitted to practice after September 1, 1977, will be assessed $125. Coverage will be on a "claims made" basis with a $100,000 limit on all claims arising out of the same act, subject to a maximum liability of $200,000 per coverage period. House counsel, public defenders, legal aid lawyers, and government attorneys will be excluded from the insurance requirement.[52] In addition, patent lawyers will be required to furnish evidence of comparable coverage with a private carrier, although they will not be required to subscribe to the fund.

The Oregon Bar anticipates that the plan will produce greater protection of the clients and the public, greater protection for the lawyer, and continued availability of professional liability protection at a reduced cost.[53] The absence of a profit factor and the utilization of a detailed recordkeeping system and loss prevention program should result in the Professional Liability Fund costing attorneys far less than comparable commercial insurance. Other reasons for reduced costs are the elimination of advertising costs and brokers' commissions, the elimination of unnecessarily large accumulations of reserves, and broad participation by all attorneys to spread the costs.

The experience of the Oregon State Bar in the future will be helpful to other state bar associations in formulating their own mandatory insurance programs. The success of the Oregon program is likely to influence other bars to implement mandatory self-insurance programs. Under a program like Oregon's Professional Liability Fund, mandatory coverage will be necessary to provide an adequate base over which to spread the risks.

E. California

California, like Oregon, attempted to create an alternative to private insurance. However, where Oregon succeeded, California failed. California's attempt came in the form of a bill sponsored in the state legislature by Assemblyman John T. Knox.[54] Knox's Assembly Bill 209 was designed to offer relief from the high cost of malpractice insurance by establishing the California Client Protection Fund, a public corporation that would exist within the

52. *See* ORE. REV. STAT. § 9.080(4) (1977).

53. ORE. ST. B. BULL., Aug. 1977, at 6.

54. *See* KNOX, *A.B. 209: "Alternative to Private Insurance"*, STATE B. CAL. REP., July 1977, at 1, 4.

state's judicial branch of government. This fund was to be maintained by requiring yearly contributions from the bar. Unlike private insurance, most of which is written on a "claims made" basis, contributions would be based on the amount paid out to clients in the previous year. This "claims paid" formula was a unique idea to professional liability coverage. The first-year (1978) contribution was to be $400 per attorney. The limit of coverage was to be $250,000 per occurrence, with an aggregate total of $500,000 per contribution period.

Knox's bill sparked a vigorous debate among California attorneys. Knox's supporters, seeing no reasonable alternative to the proposal, viewed the reduced cost to attorneys and the increased public protection as primary reasons for adopting the proposed legislation. The fund should be mandatory, these supporters argued, because it would be unconscionable to allow an attorney to practice without providing for his clients' financial security.[55]

The bill's opponents argued that the plan was being sold on the basis of an artifically low initial contribution. They viewed the "claims paid" structure as being financially unsound. Such a fund, incorporating an extreme cost deferral, has the potential for weakening the legal profession and subjecting it to ultimate state control, they said. Opponents also contended that mandatory participation was undesirable because it forced a lawyer into an "untried social experiment." Other, superior alternatives were said to be available at comparable overall costs.[56]

Assemblyman Knox finally withdrew the proposed Client Protection Fund provision from the bill and converted it into a proposal for a special study of attorney malpractice and client protection. This action came after the Los Angeles and San Diego county bar associations voiced their opposition to the bill and after a statewide attorney plebiscite conducted by the state bar showed that only a slim majority supported the proposal.[57] Thus diluted, the bill was passed by the California Legislature, but was vetoed by Governor Brown on October 3, 1977. Brown's veto message stated that the bill "contemplates compulsory insurance for one professional group. Compulsory insurance inevitably leads to a state fund, a prospect we should think about long and hard."[58]

---

55. Cotkin, *Arguments for A.B. 209—Attorneys Professional Responsibility Fund,* STATE B. CAL. REP., July 1977, at 7.

56. Miller, *Arguments Against A.B. 209—Attorneys Professional Responsibility Fund,* STATE B. CAL. REP., July 1977, at 5.

57. STATE B. CAL. REP., Aug. 1977, at 1.

58. Press Release from Office of the Governor of California (Oct. 3, 1977) (quoted in

IV. The Arguments

Considering the many state bar associations that have apparently not yet decided to support or oppose the mandatory legal malpractice insurance proposal, a review and analysis of the arguments for and against such a proposal may be valuable. The following arguments will deal mainly with mandatory proposals with one insurer or with self-insurance.[59]

A. Financial Protection of Clients and Attorneys

As has been noted above,[60] legal malpractice insurance completes a client's protection when coupled with an existing clients' security fund. Although it may be unconscionable for a lawyer to practice law without first providing financial security for his clients,[61] many lawyers have chosen to "go bare." It is estimated that less than fifty-six percent of all attorneys have malpractice insurance.[62] When large numbers of attorneys choose not to provide for their clients' protection, the bar arguably should require that all lawyers obtain insurance coverage as a privilege of practicing law.

Opponents may argue that there are few unsatisfied malpractice claims against lawyers and that a mandatory program should not be imposed where there has been no significant problem. Although unsatisfied claims against lawyers are not yet a matter of general public attention, bar associations need not await "scandal or public outcry" before bringing about needed reform.[63] Requiring attorneys to obtain malpractice coverage would assure that no client would go without a remedy for an attorney's negligence.

Requiring malpractice insurance would not only provide financial security to the client but would also protect the attorney. Lawyers engaged in private practice without malpractice insurance risk financial disaster from even a minor inadvertence.[64] If

---

State B. Cal. Rep., Oct. 1977, at 14).

59. Some of the following arguments would be somewhat different if, rather than a mandatory self-insurance or sole-insurer program, there was merely an insurance requirement for all attorneys. Requiring all attorneys to obtain insurance might induce more companies to write legal malpractice insurance policies, thus increasing the number of insurers from which lawyers might choose. An increased number of competing insurance companies soliciting business might arguably result in a reduction in the cost of insurance.

60. Notes 15-16 and accompanying text *supra*.

61. Cotkin, *supra* note 55, at 8.

62. Note 24 *supra*.

63. W. Gates, *supra* note 2, at 2.

64. Neil, *A Realistic Response to the Professional Liability Insurance Problem*, Ore.

the attorney's financial protection were the only consideration, the bar might have no responsibility to require that all lawyers carry malpractice insurance. When coupled with the bar's responsibility to protect the public, however, the protection of the bar's members further justifies implementation of a mandatory program.

B. Cost

Any consideration of a proposal to remedy the existing malpractice insurance situation must deal with the proposal's effect on the cost of insurance.[65] If a mandatory program is more expensive then existing insurance, the proposal will obviously be far more difficult to adopt. By contrast, a mandatory program less expensive than existing insurance alternatives would come as a welcome relief to the present state of soaring insurance premiums.

Proponents of mandatory insurance argue that a mandatory program will reduce the cost of malpractice coverage. The increase in the number of attorneys insured will spread the risk over a broader base and thus arguably reduce the cost.[66] Opponents contend that the inclusion of lawyers presently uninsured in the base will not necessarily reduce the cost. It is possible that the lawyers without insurance are actually those most prone to malpractice claims because they are poor risks and cannot afford the resulting high premiums. Requiring these lawyers to have insurance, opponents argue, will make premiums even higher because there will be an increase in the number of claims that will outweigh the advantage of a larger base of insureds.

There are other reasons why coverage should cost less under a mandatory program, however. Administration of a mandatory program would yield information about the sources and causes of malpractice claims. That information could be used to implement loss prevention programs that would have the longrun effect of decreasing the number of claims made.[67] States that adopt a professional liability fund, such as Oregon's self-insurance plan,

---

ST. B. BULL., Mar. 1977, at 5. *See also* Dixon, *'Going Bare' May Be Hazardous to Your Fiscal Health*, J. LEGAL MED., Nov.-Dec. 1976, at 23.

65. This section will deal only with the cost of insurance to attorneys. Arguably, the cost of services to clients should also be considered since under a mandatory program a client who wanted to save money and was willing to bear the risk of employing an uninsured attorney would be prevented from doing so. It is unlikely, however, that the cost of services to a client would vary greatly between insured and uninsured attorneys.

66. Note 53 and accompanying text *supra*.

67. W. Gates, *supra* note 2, at 4. *See also* text accompanying note 74 *infra*.

would also have decreased costs because of the elimination of advertising expenses, profit margins, brokers' commissions, and unnecessary reserves.[68]

Opponents also maintain that knowing the existence of compulsory coverage will cause people who might not otherwise make a claim to do so.[69] Lawyers, they argue, will be less hesitant to bring actions against other lawyers. The number of increased claims from these two sources will in turn increase premiums. The experience of British Columbia has shown that mandatory coverage may be accompanied by increased claims.[70] Even with an increase in the number of claims, however, lawyers in British Columbia pay substantially less for insurance than they reportedly would if they had to obtain coverage without a mandatory program.[71] The Oregon State Bar also projects a dramatic decrease in costs with its mandatory program.[72]

C. Public Image

The self-imposition of an insurance requirement in recognition of the public interest, it is argued, will improve the bar's public image[73] by making certain that the public will be compensated for attorney malpractice. A bar-imposed mandatory program covering all lawyers will show that attorneys are sincerely interested in the welfare of their clients and the public.

Pointing to the problem of increased claims caused by public awareness of insurance coverage, opponents may argue that making malpractice coverage compulsory is a public admission by the bar that attorneys are often negligent. It seems more probable, however, that any detrimental effect such an "admission" might

68. *See* text accompanying note 53 *supra*.

69. SPECIAL COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, AMERICAN BAR ASSOCIATION, LEGAL MALPRACTICE INSURANCE: A PRIMER FOR THE ORGANIZED BAR 153 (1977). *See also* Johnson, *Malpractice: My One-man Battle to Go Bare*, MED. ECON., Feb. 7, 1977, at 120.

70. *See* Letter from T.V. McCallum to Thomas L. Kay (Oct. 14, 1977) (on file in the office of the *Brigham Young University Law Review*). Each state bar may also determine if establishing a clients' security fund has increased dishonesty claims against lawyers.

71. *See id.*

72. *See* text accompanying note 53 *supra*.

Related to the cost argument is the contention that a client should be permitted to choose whether to employ an insured or uninsured attorney. In effect, granting the client such a choice gives him the option of selecting the services of an uninsured lawyer (presumably for a lower fee) and thus bearing the risk of having an unsatisfiable malpractice claim against his attorney. While such an argument may have some force when the client is financially sound enough to bear the potential loss, the contention loses its vitality when poor or nonaffluent clients are involved.

73. W. Gates, *supra* note 2, at 2.

have on the bar's reputation would be more than offset by the improved public image caused by the indirect showing of concern for clients' protection made by adoption of a mandatory program.

D. Malpractice Loss Prevention

As noted above, the administration of a mandatory legal malpractice insurance program will provide a state bar association with information that will aid in malpractice prevention. Loss prevention is the best way to attack the roots of the legal malpractice problem; information about the causes of losses is essential to a plan for prevention. Because of the small percentage of attorneys that have insurance and the fact that insurance companies pool several states together for risk spreading reasons, there are no accurate figures on the causes of a state's malpractice problems. Often a large number of claims in State *A* will have a direct result on premiums in State *B*.[74]

Only under a mandatory program of self-insurance or with one insurer, it is argued, can a bar effectively discover the causes of its malpractice problems. One commentator contends, however, that simply involving the bar in claims handling would give a bar the information it needs.[75] In Wisconsin, for example, each attorney policyholder agrees that information about any claim asserted against him may be reviewed by the bar's insurance committee. This system allows the bar to compile information on problem areas and to implement educational programs where necessary. Proponents argue that, under a mandatory self-insurance or one-insurer program, premiums can be made to relate directly to a state's own loss experience. As a result of the direct effect losses would have on premiums, lawyers and bar associations would be more involved in loss prevention under a mandatory program than otherwise. British Columbia's experience with a mandatory program is again illustrative. There, the Law Society, through experience gained in the program's administration, identified the three largest causes of claims and then worked to remove those causes. The Society devised practical systems to prevent lawyer negligence and lobbied for changes in those laws that often caused malpractice problems.

74. For example, "[o]ne legal malpractice insurer sought the same substantial premium increase last year [1976] in Oregon, Washington and Idaho, even though there had been no claim at all against any of its insured lawyers in Idaho in the preceding year." Neil, *supra* note 64, at 5.

75. Stanley, *President's Page*, 63 A.B.A.J. 155 (1977).

The variety of possible loss prevention measures extends beyond the British Columbia experiences. One writer has this vision of other possibilities:

> I can see State Bar Journal articles describing case histories and statistical analyses of causes of losses and, more importantly, checklists and procedures for loss avoidance. I can see continuing legal education seminars on the subject. I can also see an increase in the occasions for the consistently careless lawyer to become involved in his bar's disciplinary processes. In short, as local loss experience becomes a matter of direct significance to each local lawyer's pocketbook the business of loss control is going to receive more effective attention.[76]

These and other measures will be made possible or encouraged by mandatory insurance and will have positive effects in reducing the size of the legal malpractice problem.[77]

E. Threat of Legislative Enactment

Failure of the bar to require legal malpractice insurance of its members, it is argued, may result in action by the legislature. The failure of many doctors to carry coverage has resulted in several states now requiring doctors to have malpractice insurance in order to practice.[78] If a large number of lawyers continue to practice law without insurance while the incidence of malpractice suits increases, similar legislation for the legal profession may well result.[79] A legislatively enacted program prompted by the bar's failure to act is likely to be less favorable to the bar than a bar-created program. For example, if the legislature simply made malpractice insurance a requirement of practicing law, there would be no cost savings or way to identify losses and implement a loss prevention program. In addition, such legislation would be accompanied by public attention to the failure of lawyers to protect their clients from negligence and unsatisfied judgments, thereby resulting in unfavorable publicity for the bar.

---

76. W. Gates, *supra* note 2, at 4.

77. All this is not to say that bar associations cannot identify the causes of malpractice without implementing a mandatory insurance program. Because of the larger base of insureds and the increased amount of bar involvement in program administration, the identification of sources of malpractice would likely be easier under a mandatory program.

78. *See* Goldberg, *Malpractice: Can the States Outlaw Going Bare?*, MED. ECON., Dec. 13, 1976, at 31.

79. *See also Why the Malpractice Crisis Has to Get Worse to Get Better*, MED. ECON., Jan. 24, 1977, at 47.

F. Constitutionality

The constitutionality[80] of a compulsory legal malpractice insurance requirement or program may well be attacked in the courts. The primary issue would be whether the insurance requirement was an unconstitutional interference with the opportunity of practicing the legal profession. This issue will probably be resolved in the same way as it has been in the medical context.

Several recent medical malpractice insurance cases demonstrate the reception met by doctors' challenges to insurance requirements. For example, in *Pollock v. Methodist Hospital*,[81] the federal district court upheld a hospital requirement that a physician carry malpractice insurance as a condition of his employment at the hospital. The court dismissed the doctor's due process challenge, observing that the

> plaintiff has no liberty or property interest sufficient to invoke the due process requirements of the Fourteenth Amendment. While the right to practice an occupation is a liberty interest protected by the Fourteenth Amendment, . . . plaintiff is not precluded from exercising that right by the insurance requirements of the defendant hospital. He need only comply with the requirements in order to continue his membership on the hospital staff. . . . This consideration is sufficient to dispose of plaintiff's possible property interest as well.[82]

In *Jones v. State Board of Medicine*,[83] both physicians and hospitals brought an action for declaratory judgment as to the constitutionality of Idaho's Hospital-Medical Liability Act. The doctors contended that the Act's malpractice insurance coverage requirement constituted a denial of due process because it impermissibly deprived them of their constitutional right to pursue a recognized profession. Although the Idaho Supreme Court agreed that the pursuit of an occupation was a liberty and property interest to which the due process protections of the state and federal constitutions attached, the court stated that the power to require doctors to carry malpractice insurance was clearly within the state's police power. The court compared the insurance re-

80. The validity of the manner of adoption of the mandatory requirement or program may also be at issue. Because of the wide variations in state laws and procedures regarding adoption of such an insurance proposal, a discussion of this issue is beyond the scope of this Comment.

81. 392 F. Supp. 393 (E.D. La. 1975).

82. *Id.* at 396 (citations omitted).

83. 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

quirement to the bonding requirement of other trades and professions. The court observed that the

> requirements of obtaining medical malpractice insurance as a condition to licensure bear a rational relationship to the health and welfare of the citizens of the state by providing protection to patients who may be injured as a result of medical malpractice and to this extent does not violate the guarantees of due process of law.[84]

There has been only one case to date invalidating a mandatory medical malpractice insurance program. In *McGuffey v. Hall*,[85] the constitutionality of legislation enacted by the Kentucky General Assembly, similar to that of the Idaho Legislature in *Jones*, was challenged in two separate declaratory judgment actions. The court viewed the purpose of the legislation to be three-fold: (1) to increase the availability of malpractice insurance, (2) to reduce the cost of malpractice insurance, and (3) to assure that medical malpractice judgments and settlements would be satisfied. Noting both that the requirement of malpractice coverage did not increase the availability nor reduce the cost of insurance and that there was no prior history of unsatisfied claims against doctors or hospitals, the court held, on state (not federal) constitutional grounds, that the legislation was an unjustified exercise of the state's police power.[86]

As *McGuffey* demonstrates, it is possible that, absent proof of unsatisfied claims and an increase in the availability and reduction in the cost of insurance, legislation that only mandates insurance coverage for lawyers may be struck down as in conflict with a state's constitution. Any mandatory program, however, reasonably related to the accomplishment of its purposes should satisfy both state and federal constitutional challenges.

G. Conflict of Interest

Arguably, a mandatory program will create a conflict of interest within the bar. The conflict, it is argued, arises as a result of two factors: (1) the direct effect losses will have on malpractice premiums, and (2) the bar's interest in keeping down both the number and size of claims. The mere fact that an attorney is among the insureds in a self-insured or one-insurer mandatory program arguably may mean that he has a conflict of interest

84. *Id.* at 868, 555 P.2d at 408.
85. 557 S.W.2d 401 (Ky. 1977).
86. *Id.* at 414.

when involved in prosecuting a legal malpractice case because the defendant attorney and both counsel would be covered by the same program or insurer.

However, the fact that the defendant, the defendant's attorney, and the plaintiff's attorney are all covered by the same program or insurer, and nothing more, should not create a substantial ethical problem. Under either a mandatory program or the presently existing systems, the ethical conflict is too indirect to be considered a problem in itself. It would be necessary to show that the plaintiff's counsel, for the purpose of keeping malpractice premiums down by limiting the plaintiff's recovery, had either inadequately represented his client or colluded with the defense counsel.

Indeed, with respect to this possible ethical problem, there is not a great difference between a mandatory self-insurance or sole-insurer program and the situation in a legal malpractice case today. Presently, because of the limited number of malpractice carriers, there is a good possibility that the defendant lawyer and attorneys for both sides will be insured, if at all, by the same company. Even if the defendant lawyer and the attorneys are each insured by different companies, the overall result may be similar. This results because a rate increase granted the defendant's insurer to compensate for its large loss may apply to other insurers as well.

H. Choice of Insurer

Opponents also contend that a mandatory program could result in limiting an attorney's choice of insurer.[87] This argument is especially forceful where a state bar self-insures or insures with only one carrier. The choice-of-insurer argument, however, loses some of its force when applied to new attorneys and other attorneys who are obtaining malpractice insurance for the first time. Currently only two companies are actively soliciting new business.[88] Thus, there is not a great deal of choice even at present. If

87. SPECIAL COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, *supra* note 69, at 152.

88. The companies are American Bankers Insurance Company of Florida (generally through the brokerage of Shand, Morahan & Company, Inc.) and American Home Assurance Company. *Id.* at 15-16; *see* T. Sheehan, The History of Lawyers Professional Liability Insurance 3-4 (Aug. 10, 1977) (paper presented at the annual meeting of the ABA Section of Insurance, Negligence and Compensation Law, Showcase Program for Lawyers, Chicago, Illinois). Other companies, however, continue to provide renewal coverage. The Arkansas, California, Chicago, Florida, and Illinois bar associations have on-going insurance programs with various other insurers. Lloyd's of London will write policies on an individual risk basis; this type of coverage is most frequently used by the larger law firms. SPECIAL COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, *supra* note 69, at 16.

a state bar, however, simply requires all attorneys to carry malpractice coverage, rather than requiring participation in a mandatory self-insurance or one-insurer program, such action arguably will create a market and induce more insurers to offer coverage, thereby actually increasing the attorney's choice of insurers.

V. Analysis and Suggested Resolution of the Problem

One of the strongest arguments for requiring legal malpractice insurance is that relating to the financial protection of clients. Because currently only a low percentage of attorneys carry adequate malpractice insurance, there is a substantial risk that clients may suffer unremedied malpractice-caused financial injuries.[89] The counterargument is that there is presently no need for a mandatory insurance program in light of the small number of unsatisfied judgments against attorneys.[90] Attorneys, it is contended, should not be compelled to purchase insurance where there has been little, if any, evidence of injury to the public. Lawyers as a profession, however, have a responsibility to act *before* there is a public outcry or legislative enactment.

The cost of insurance arguably will be less under a mandatory program. The effect that an increase in the number of attorneys insured will have on the cost of insurance is disputed. The increased base may reduce the cost by spreading the risk. On the other hand, including lawyers in the base that are presently uninsured may increase the number of poorer risks and thus increase the cost. In addition, clients and attorneys may be less hesitant to sue attorneys for malpractice, knowing that all attorneys are insured. The experience of the Law Society of British Columbia, however, indicates that a mandatory program may reduce the cost of legal malpractice insurance.

Another argument in favor of mandatory insurance is that loss identification and prevention will be facilitated by a mandatory program. Loss identification and prevention measures, it is true, can be implemented without imposing an insurance requirement. Nevertheless, these measures will be easier to implement under a mandatory program. The direct effect a bar's losses will

89. To the extent that increasing numbers of malpractice claims indicate a greater incidence of malpractice, the risk to clients may actually be growing.

90. The number of unsatisfied judgments may be a poor indicator of the degree of public injury caused by attorney malpractice, however. Many injured clients may choose to bear the loss rather than prosecute a malpractice action to its conclusion. Moreover, the negotiation process may result in only partial remedies for injured clients who do bring actions but settle them.

have on its attorneys' premiums will also be a strong motivator to make a loss prevention program work.

In light of the increased financial protection afforded clients, the possible reduction in insurance cost, and the better opportunity to reduce malpractice through loss identification and prevention programs, it seems reasonable to impose a legal malpractice insurance requirement on practicing attorneys.

VI. Implementation of a Mandatory Program

Once the decision is made to adopt a mandatory legal malpractice insurance program, a bar association must face some additional decisions in implementing its program. This section reviews a few of these decisions.[91]

A. Type of Mandatory Program

Each bar that adopts a mandatory *program*, as opposed to a simple insurance *requirement*, must decide whether to implement it with a commercial carrier or through some other alternative,[92] such as a self-insurance fund as in Oregon or a combination of self-insurance and commercial insurance as in British Columbia.[93] Because few insurance companies are currently writing new legal malpractice policies, a bar association's options may be limited. Added to this limitation is the fact that insurers are apparently unwilling to forego their underwriting discretion as a mandatory program might demand. Representatives of American Bankers Insurance Company of Florida and American Home Assurance Company, the only two companies writing new policies, have expressed such an unwillingness.[94] Since a mandatory pro-

91. A bar must also decide on the (1) amount deductible, (2) amount of coverage required, (3) exclusions from coverage, (4) procedure for enacting the requirement (legislation or supreme court petition), (5) type of coverage (claims made, occurrence, etc.), and (6) availability of excess coverage over the minimum requirement.

92. Special Committee on Lawyers' Professional Liability, *supra* note 69, at 109; Stern & Martin, *Solutions to the Attorney Malpractice Insurance Crisis*, Barrister, Fall 1977, at 44.

93. Implementation of the British Columbia system in the United States would raise significant questions of insurance law, particularly if the bar associations had to qualify as insurance companies under state law. Stanley, *supra* note 75, at 155. The Oregon Professional Liability Fund, it should be noted, will be exempt from that state's insurance code. *See* Ore. Rev. Stat. § 9.080(1) (1977).

94. Telephone interview with Allan Pither, Vice President of American Bankers Insurance Co. of Florida (Oct. 6, 1977) (notes on file in the office of the *Brigham Young University Law Review*); telephone interview with Leo J. Gilmartin, Representative of American Home Assurance Co. (Oct. 5, 1977) (notes on file).

gram would require that all active members of the bar be able to obtain coverage from the carrier,[95] implementation of such a program with a commercial carrier would necessitate overcoming the companies' hesitancy. It is possible that either company would alter its position if presented with a program similar to that of British Columbia with its large deductible feature.

If a commercial carrier will not forego its underwriting discretion, a state bar association will be confronted with a dilemma. If the bar requires each attorney to carry malpractice insurance, the insurance companies in effect will be controlling who practices law in that state. An insurance company's decision not to insure an attorney would effectively bar him from practice. If, as is probable, the bar association is unwilling to cede that power to the insurer, it may be impossible to implement a mandatory program through a commercial carrier.

One alternative to this dilemma is for the bar to self-insure. Many state bar associations have plans to self-insure or are studying the possibility.[96] The experience of Oregon's self-insuring fund and those of other states that adopt this alternative will provide useful information as to the viability of self-insurance.

B. Exemptions

If a mandatory program is instituted, a state bar must also decide which attorneys will be exempted from the insurance requirement. The plans proposed in Oregon, California, and Washington all suggest decisions different in form but substantially the same in effect.

Oregon's self-insuring professional liability fund excludes house counsel, public defenders, legal aid lawyers, and government lawyers. Although patent attorneys are not required to contribute to the fund, they will be required to provide evidence of similar coverage.[97] This exception for patent attorneys is based on their practice's unique nature and on the availability of similar coverage through a national association.[98]

---

95. SPECIAL COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, *supra* note 69, at 152.

96. *See* text accompanying note 21 *supra*.

As might be expected, some insurance executives do not think self-insurance is a viable alternative for most bar associations. Telephone interview with Allan Pither, Vice President of American Bankers Insurance Co. of Florida (Oct. 6, 1977). In Pither's view, many attorneys and bar associations think there is something "magic" about self-insurance. Pither also indicates that a bar association needs at least 5,000 members to be able to self-insure effectively. At present, only 24 associations are over that threshold. *See* note 24 *supra*.

97. Statement of the Board of Governors, *supra* note 49, at 2.

98. *Id.*

The original California proposal, Knox's unamended bill, excluded attorneys employed by any governmental agency or entity; state, local, or federal officers; and any lawyer representing only his employer.[99] This employer category would have included corporations, labor unions, cooperatives, and other similar entities.

Washington's proposed plan basically excluded attorneys who had no more than one client.[100] In dealing with the problem of who constitutes a client, the Washington bar decided that donated legal work for a nonprofit organization would not make that organization an additional client.

Each program seems to have the same underlying policy, *i.e.*, that certain attorneys are not generally subject to malpractice claims and therefore should not be required to carry malpractice insurance. It does not seem to make much difference whether this policy is expressed in terms of attorneys not in private practice or attorneys who have only one client.

C. Bar Defense and Discipline of Insured Attorneys

Another problem, more subtle in nature, may occur under a mandatory self-insurance program. The problem arises when a self-insuring bar defends a malpractice claim against one of its members; in such a situation, the bar may be ethically prohibited from using information obtained in that defense in a subsequent disciplinary proceeding against the attorney involved.[101] While the problem may arise under a voluntary self-insurance program, it is more likely to occur under a mandatory system.

The problem, however, can be avoided if the bar association retains outside firms to defend malpractice claims. Information thus obtained by defense counsel would be protected by the attorney-client privilege, and its disclosure would violate a disciplinary rule.[102] In order to prevent this problem from arising, a bar should retain a firm to do its defense work and remind the firm

---

In addition to excluding certain attorneys, Oregon will also assess new bar members only one-half of the regular contribution required under the program to be implemented. Requiring a lower premium of new attorneys appears reasonable in light of the straitened financial circumstances of most new attorneys.

99. Knox, *supra* note 54, at 4.

100. W. Gates, *supra* note 2, at 7.

101. It is likely that more vigorous disciplinary action will be taken against the consistently careless or incompetent lawyer under a mandatory program. *See* text accompanying note 76 *supra*.

102. ABA Code of Professional Responsibility DR 4-101(B).

that it has no duty to reveal to the bar information obtained in the process of defending malpractice claims.

VII. Conclusion

Legal malpractice and malpractice insurance are serious problem areas. The cost of malpractice insurance continues to increase dramatically. As a result attorneys are going without insurance and more are likely to "go bare" in the future. As more attorneys practice without insurance coverage, the public stands a greater chance of suffering an unremediable injury at the hands of a negligent attorney.

Practicing law is a privilege that carries with it responsibilities. Mandating legal malpractice insurance will help lawyers protect themselves and the public. Making insurance mandatory may significantly reduce premiums. More important, however, is the possibility that loss control programs made possible by a mandatory program will significantly reduce legal malpractice. The more directly the bar and its members are involved, the greater the likelihood of reducing the incidence of legal malpractice.

As each state bar association considers plans for providing malpractice coverage for its members, serious consideration should be given to a mandatory program. The benefits of such a program appear to greatly outweigh the detriments.

Thomas L. Kay

APPENDIX I

8 GEOJLE 637

Georgetown Journal of Legal Ethics
Spring, 1995
Note

MANDATORY MALPRACTICE INSURANCE FOR LAWYERS: IS THERE A POSSIBILITY OF PUBLIC PROTECTION WITHOUT COMPULSION?

Nicole A. Cunitz [FNa1]

I. INTRODUCTION

"Protect yourself." These words are ringing in the ears of lawyers across the United States as both the frequency of legal malpractice claims and the size of awards are growing exponentially. [FN1] Increasingly, the chance of being sued has forced lawyers to purchase malpractice insurance. However, as of this writing, only Oregon has adopted a mandatory legal malpractice insurance scheme. [FN2] In examining the issue of mandatory coverage, there are two primary questions that must be asked. The first is whether or not lawyers have an ethical responsibility or legal obligation to procure legal malpractice insurance. [FN3] Do the ethical rules discuss an attorney's responsibility to provide a means for compensating harm or simply describe the attorney's responsibility to prevent harm? The second issue is whether or not the public is being harmed in the absence of mandatory malpractice insurance. In light of these questions, is there a need for a new standard?

Notions of a lawyer's responsibility stem from sources ranging from public perception to disciplinary rules. Legal malpractice claims are based *638 in either tort or contract theories or in a combination of the two. [FN4] In addition, malpractice plaintiffs often cite the Model Rules of Professional Conduct (Model Rules) or the Model Code of Professional Responsibility (Model Code) when contending that a lawyer has breached a professional duty. [FN5] Charles P. Kindregan, in his book Malpractice and the Lawyer, explains: "The existence of an attorney-client relationship creates an implied warranty that the lawyer will use the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances." [FN6] Malpractice insurance provides a method of compensation for those persons who have sustained a loss as a result of an attorney's carelessness. [FN7] The four basic elements of legal malpractice are:

(i) the existence of an attorney-client relationship; [FN8]
(ii) the existence of a duty on the part of the attorney;
(iii) the failure to perform the duty in accordance with established standards of care or conduct; and
(iv) damages proximately caused by the failure. [FN9]

A cause of action for legal malpractice generally accrues when the client discovers or reasonably should have discovered the facts essential to the claim and the client has suffered due to the attorney's negligent conduct. Visible damage caused by the malpractice must exist in order for the client *639 to establish a claim. [FN10] This requirement may preclude malpractice claims from being filed since, as some jurisdictions note, it might not be possible to determine the extent of the harm until the malpractice suit has actually reached the court. [FN11]

The growth in malpractice cases has heightened the intensity of the debate on mandatory malpractice insurance for lawyers. The state of Oregon adopted a system of mandatory malpractice, while other states, such as New Jersey, have rejected this approach. [FN12] Although the American Bar Association (ABA) has considered a mandatory malpractice scheme, it did not go so far as to recommend it for inclusion in the Model Rules. Mandatory malpractice insurance scheme have been considered by Arizona, California, Colorado, Delaware, Washington, and Wisconsin. [FN13] These State Bar Associations have realized that rising insurance rates have resulted in a crisis. In response, they have organized commissions to investigate solutions to the crisis. The commissions often are responsible for surveying the state's practicing attorneys and studying the amount and nature of legal malpractice suits occurring in that state. In Colorado, a 1989 Bar Association survey found that approximately two out of three Colorado attorneys had professional liability insurance. [FN14]

While there is a substantial amount of information regarding legal *640 malpractice, there remains a paucity of information regarding the advantages and disadvantages of legal malpractice insurance. Therefore, this Note must often couple speculation with the available hard data. Part II examines legal malpractice insurance in light of the legal malpractice crisis and introduces the applicable ethical rules. In that section, the Note explores the tension between the lawyer's ethical obligation to prevent public harm and the proposed solution of mandatory malpractice insurance. Part III.A. introduces arguments in favor of requiring malpractice insurance for attorneys. Applying the

Oregon example, this part demonstrates the advantages of compulsory coverage. Part III.B. examines the negative aspects of mandatory insurance.

Part IV compares liability in the legal profession to that in the medical profession and concludes that the legal profession can learn from the medical profession's experience with mandatory medical malpractice insurance. Part V prescribes some alternatives to a nation-wide mandatory insurance program and suggests that the public can be protected without mandatory malpractice insurance for lawyers. Part VI concludes with recommendations for the lawyer or law firm faced with the increase in risk of legal malpractice. This Part suggests that both lawyers and law firms can take affirmative steps to mitigate these risks in addition to procuring malpractice insurance.

In accepting legal malpractice as a troubling and increasingly complex issue facing the legal profession, lawyers must search for a solution to ensure that clients are protected. Mandatory malpractice insurance is a viable alternative, but not necessarily the best. In the absence of mandatory insurance requirements, the market will determine who will be insured and the cost of that insurance. Before adopting mandatory malpractice insurance, lawyers should study the current debate concerning medical malpractice which demonstrates the types of problems and limited relief such a system might provide in the legal arena. Prudent lawyers will opt for malpractice insurance coverage in the face of their profession's malpractice crisis.

II. LEGAL MALPRACTICE INSURANCE: A RESPONSE TO THE GROWING LEGAL MALPRACTICE CRISIS

The debate on mandatory malpractice insurance is driven by the growth of malpractice and perceived market failures. Cycles in the insurance market result in differing availability of insurance coverage for attorneys depending on whether it is a hard or soft market cycle. Periods of great availability and reasonable premiums are considered soft market cycles, which are followed by hard market cycles with increased premiums and the *641 abandonment by insurers of certain classes of insurance. [FN15] William C. Moore, Jr., Chairman of McNeary Insurance Consulting Services, Inc., and T. Stephen Helms, Vice President with MMI Companies in Atlanta, state that "these market trends have led to a general perception of instability in the pricing of malpractice insurance over the last ten years and have caused much of the existing underlying distrust of the traditional insurance market." [FN16] The underlying distrust may lead some lawyers to "go bare."

A. GROWTH OF MALPRACTICE LITIGATION

Legal malpractice has been described as a crisis both by those in and out of the profession. Robert O'Malley, a founder and President of Attorneys' Liability Assurance Society (ALAS) stated: "All of the largest [legal malpractice] claims in the history of the American legal profession have occurred in the past seven years." [FN17] The effects of the increase in malpractice actions are multifold. Recoveries are larger than ever before, the cost of malpractice insurance is higher, and there is a diminishing availability of malpractice insurance for lawyers. As the number of malpractice claims is increasing, so too are the sources of potential liability.

The increase in malpractice claims results from a variety of irreversible social factors. These factors include a heightened public awareness of legal malpractice, an explosion in the litigation field, an increase in publicity given to medical malpractice suits, [FN18] and a decrease in confidence in the legal profession arising out of the Watergate fiasco. [FN19] While these social factors may not be mitigated or eliminated, lawyers can reduce their vulnerability and strive to protect their clients from damage caused by malpractice.

Recent decisions holding lawyers liable to non-clients have contributed to an increase in malpractice rates and increased concern by the legal profession. [FN20] However, states are split over whether privity between the attorney *642 and client should be required to maintain legal malpractice actions. [FN21] The test used by some jurisdictions is whether the services performed by the attorney were intended to benefit the third party. Public policy seems to cut both ways. For example, while the prevailing norm is that the attorney's duty is to his client and not to a third party, states may impose such a duty as a matter of public policy in certain situations. [FN22]

Changes in the nature of an attorney's practice have contributed to the increase in malpractice suits. As lawyers assume positions as directors or board members in clients' companies, they expose themselves to greater risks. [FN23] Yet another factor contributing to the increase is the involvement of some large law firms in dealings with failed Savings and Loans. One of the more highly publicized examples is that of the New York law firm of Kaye, Scholer, Fierman, Hays & Handler which paid $61 million to settle a class action suit by investors and pay claims from the Office of Thrift Supervision, both arising out of the firm's relations with a failed Savings and Loan. [FN24]

Lawyers are encouraged to avoid unethical and incompetent behavior by the regulations laid out in the professional rules and ethical considerations. [FN25] These rules encourage self-policing by the profession. State Bar Examiners are responsible for admitting lawyers of good character, and the *643 Model Rules and Model Code explicitly require a lawyer to report to an investigative authority any knowledge regarding another lawyer's fitness as a lawyer.

[FN26] Often, however, malpractice suits will occur prior to or simultaneous to such reports.
Prior to the 1980s, there had not been a nationwide study of the causes of legal malpractice. Lawyers generally were not concerned about professional liability [FN27] as legal malpractice suits were not as common as they are today. [FN28] *644 This was due to a number of factors including a reluctance among lawyers to sue their colleagues, a lack of attorney malpractice insurance, and the difficulty in determining what constituted attorney malpractice. These factors increased the likelihood that claims against lawyers would prove unsuccessful. [FN29]

B. THE RESPONSE OF LEGAL MALPRACTICE INSURANCE

In the mid-1980s, interest in mandatory malpractice insurance for lawyers expanded as a result of concerns over higher insurance premiums, limited coverage due to selective underwriting, and the narrowing reinsurance market. [FN30] These concerns have not been eradicated, and today there is a renewed interest in mandatory malpractice insurance as evidenced by the number of inquiries addressed to the A.B.A., recent articles in the A.B.A. Journal, and the A.B.A. Conference in October of 1993 on malpractice. [FN31]
The A.B.A. National Legal Malpractice Data Center was created in the early 1980's to study both the causes and implications of legal malpractice. On February 4, 1992, the A.B.A. House of Delegates adopted a report of the McKay Commission [FN32] which recommended a study of mandatory malpractice insurance:
Recommendation 18 Mandatory Malpractice Insurance Study
The American Bar Association should continue studies to determine whether a model program and model rule should be created to: (a) make appropriate levels of malpractice insurance coverage available at a reasonable price; and (b) make coverage mandatory for all lawyers who have clients. [FN33]
*645 The commission gathered testimony from representatives of the Oregon Bar Association Professional Liability Fund, the A.B.A. Standing Committee on Lawyers' Professional Liability, and other individuals on the issue of malpractice insurance. [FN34] In the comments following this recommendation, the commission considered recommending that the Supreme Court promulgate a rule requiring compulsory coverage for those lawyers with clients. No Supreme Court rule has been adopted as of yet.
Understandably, this issue is of such import to the livelihood of attorneys that it has led to considerable debate. Not surprisingly, there is no national consensus with different jurisdictions taking different approaches. The malpractice crisis, however, did lead to the creation of the ALAS, a mutual insurance company owned by 375 large law firms, formed in response to a perceived need for insurance. It remains to be seen what further efforts will be made in response to the debate over mandatory legal malpractice insurance.

III. FRAMING THE DEBATE OVER MANDATORY LEGAL MALPRACTICE INSURANCE

"Every man owes something to the upbuilding of his profession . . . "
--Theodore Roosevelt
Is mandatory malpractice insurance a solution to the malpractice crisis? After all, the problems surrounding insurance are serious. Advocates argue that mandatory insurance would provide protection for clients who are currently unprotected. [FN35] A system of mandatory malpractice insurance would increase the availability of insurance coverage. As the number of claims against lawyers continues to climb, it is increasingly difficult for some lawyers to obtain coverage. The average cost per claim is multiplying and insurance companies are forced to limit their coverage to legal entities which do not present hazardous risks. [FN36] Further, the explosion of liability insurance rates in the 1980s has resulted in many attorneys going uninsured or "going bare."
In exploring the question of mandatory malpractice insurance for lawyers, one must look at the costs and benefits of such a scheme. This inquiry must also include an analysis of the following questions: (1) what are the attorney's ethical obligations to protect the public against legal malpractice, (2) how far-reaching are these obligations, (3) where are potential conflicts of interest, (4) what are the benefits of adopting a mandatory malpractice *646 insurance program, (5) why is so much pressure currently applied to state bar associations to consider adopting such programs and, (6) is the public being harmed as a result of the current system of voluntary professional liability protection? In the absence of any proof of public harm, one must examine if there are other benefits to a mandatory malpractice scheme besides public protection.

A. PROPONENTS OF MANDATORY INSURANCE AND THE OREGON EXAMPLE

The prevention of public harm is cited as the chief rationale for requiring mandatory malpractice insurance as a condition of licensure. While the empirical proof of public harm when practitioners "go bare" is missing, potential public harm must be considered. It is estimated that, in some states, as many as fifty percent of practicing attorneys may be uninsured. [FN37] Although some critics claim that uninsured or underinsured attorneys may engage in more risky behavior than insured attorneys, this supposition is unsubstantiated. [FN38] However, the fact that an

attorney is uninsured may discourage a client from filing a claim. Thus, clients may go uncompensated in the face of uninsured attorneys.

1. Mandatory Insurance Protects Clients

Mandatory malpractice insurance may provide recourse for clients. The high percentage of attorneys "going bare" includes both attorneys who practice patent law (a field that does not give rise to many malpractice claims) and attorneys who do not engage in a private practice. [FN39] Nevertheless, this percentage demonstrates that many attorneys are not seeking coverage. [FN40] In addition to a lack of coverage, attorneys may not have *647 substantial personal assets that could be used to compensate victims in the event of legal malpractice. [FN41] Attorneys generally "go bare" for four reasons. First, they do not believe that the nature of their practice is such that they will face a malpractice claim. [FN42] Second, they are willing to accept the risk. [FN43] Third, they do not have the money to pay the insurance premiums. [FN44] Finally, they do not want to compensate the victim of malpractice. [FN45]

Thomas Bousquet, the director of the Texas Academy of Legal Malpractice Attorneys, urges that the "time has come in Texas for mandatory professional coverage to protect clients." [FN46] From an attorney's general fiduciary duty, Bousquet infers a responsibility to compensate clients for their damages. Further, he contends that "lawyers owe a higher duty to refrain from causing damage to their clients than other professionals, and this duty includes the duty to compensate them for attorney-inflicted damages." [FN47] Although the Model Code and the Model Rules help establish guidelines for attorneys' professional conduct, there is no ethical duty to acquire malpractice insurance. [FN48] There are numerous rules aimed at preventing public harm, but the rules do not address compensation for such harm. Thus, it appears that the existing Model Rules are not a sufficient deterrent to malpractice.

2. Mandatory Insurance Might Reduce Future Rate Increases: An Overview of Malpractice Insurance

Beyond the issue of public harm, another rationale for requiring mandatory malpractice insurance relates to rapidly escalating legal malpractice *648 insurance premiums. Premiums have risen so dramatically that they have been characterized as so "monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush." [FN49] In response to rising insurance rates, Congress and state legislatures have enacted legislation aimed at both curtailing lawsuits and limiting awards. [FN50]

Supporters of mandatory insurance coverage claim that such a requirement would reduce future rate increases. [FN51] If mandatory insurance requirements were adopted, there would be greater stability in the insurance market, less restrictive coverage, and greater availability of coverage. In addition, a mandatory program would be less expensive than a voluntary insurance program because it eliminates broker commissions, marketing costs, taxes, regulatory fees, and required contributions to state guaranty funds. [FN52] Professional liability insurance enables lawyers to pay a relatively small premium through state bar dues for potentially large losses resulting from a malpractice claim. [FN53] The insurer is able to spread the risk of loss among all of its policy holders.

There are two varieties of liability insurance. The first is an occurrence policy which protects the lawyer from acts and omissions for the duration of coverage regardless of when the claims are asserted. [FN54] The second is a claims-made policy which protects the attorney only during the period of coverage and only if the attorney had no knowledge of potential claims when he applied for coverage. [FN55] This latter policy is the most common form of insurance coverage for lawyers. [FN56] In addition, firms may obtain umbrella coverage for losses beyond those covered by the primary form of insurance. [FN57] Umbrella coverage also includes risks outside the area of legal malpractice.

Insurance companies are faced with many problems relating to the area of legal malpractice. For instance, it is difficult for companies to estimate *649 the extent of malpractice risk. Gaining experience and spreading the costs from one firm onto others is one way that liability insurance companies deal with this type of underwriting. "[T]he underwriting risk for a particular prospective insured is the likelihood of that insured being subject to a claim or liability relative to other prospective insureds. If all lawyers in all forms of practice in all localities were equally risky, the underwriting problem would be relatively simple," but such simplicity is rare. [FN58]

To spread the risk, insurance companies set high insurance rates. These rates have continued to increase, and there is no evidence that they are leveling off. [FN59] In fact, insurance premiums are increasing at alarming rates. For instance, ALAS, the Chicago-based mutual professional insurance company, has increased its rates in 1993 by twenty percent, with a total increase of seventy-two percent since 1991. [FN60] Outside the state of New York, ALAS only insures firms of forty or more lawyers. As of April 1993, ALAS insured 50,000 attorneys, with the average individual premium totaling $4,915. [FN61] Similarly, Minet Inc., which insures many large New York firms, raised its rates for 30 of its largest clients an average of ten to twenty percent on October 1, 1993. [FN62] St. Paul Fire and Marine Insurance Co., which insures about 50,000 attorneys, most of whom are in firms with between

fifteen and twenty-five lawyers, hiked its professional liability insurance rates by seven percent on January 1, 1993. [FN63]
On the other hand, some insurers believe that rates may soon start decreasing. Steve Brady, the vice president for professional underwriting at St. Paul Fire and Marine Insurance Co., attributes the rise in his company's increased rates to thrift litigation. [FN64] Many speculate that as the number of failed thrift cases continues to decline, the number of pending malpractice cases will start tapering off as well. Felisa M. Neuringer, spokeswoman for the Resolution Trust Corporation, notes that because the industry is healthier, professional liability litigation may slow down. [FN65] However, ALAS reports that although the frequency of claims is shrinking, the severity of those claims is growing. "By 1987, for example, ALAS had no claims valued over $10 million, and about 90 percent of the claims were valued under $2 million. But by 1992, 48 percent of its claims were valued in excess of $2 *650 million and 12 percent were greater than $10 million." [FN66] Mandatory malpractice insurance may not only help to stabilize these skyrocketing malpractice insurance costs but may also decrease the number significantly.

3. Mandatory Insurance Might Equalize Attorneys' Vulnerability to Claims
Proponents of mandatory coverage argue that an insurance requirement would equalize attorneys' vulnerability to claims. Thomas Bousquet states "[i]n states without mandatory insurance, lawyers now carrying the professional liability insurance are the ones being sued, because few attorneys will sue uninsured motorists or uninsured lawyers. This unfairly penalizes the lawyer who does carry insurance." [FN67] As it is, legal malpractice claims reflect only a portion of the malpractice that is actually occurring. Wronged clients may not be aware of their rights or of the malpractice itself. [FN68] Concurrently, clients may not accurately estimate their chances of winning a malpractice claim or may wish to avoid the legal system altogether. Equal vulnerability is troubling, though, since clients might learn of their attorney's coverage and be tempted to raise frivolous malpractice claims.

4. Lawyers Are In a Better Position to Insure Against Loss
Proponents of mandatory malpractice coverage for lawyers argue that an insurance requirement is the most efficient method for protecting the public against harm because lawyers are in a better position than their clients to insure against loss. For administrative and financial reasons, lawyers can insure themselves as a group whereas clients must insure themselves on an individual basis. If measured on a per capita basis, attorneys are likely to pay lower insurance premium rates than clients for the same coverage. [FN69] Further, lawyers have been educated about the importance of properly following court administrative procedures as well as practice management procedures.

*651 5. The Oregon Example
The experience of the state of Oregon provides another argument for compulsory coverage. [FN70] Oregon adopted a mandatory malpractice insurance program in 1977, in reaction to a malpractice crisis in the mid-1970s, which left many lawyers with either no coverage or huge premiums. [FN71] Under the plan, every Oregon lawyer is required to obtain coverage from the state fund. [FN72] Rates are based on actual claims experience, not on the size of the firm or area of practice. [FN73] No commercial insurer is involved since the bar sets up its own professional liability fund which operates like a trust fund. Non-practicing and patent lawyers are exempted from the fund and therefore do not pay an assessment with their bar dues each year. The plan provides $300,000 minimum coverage to each attorney, and additional coverage is available. The average premium is $1,800 per year. [FN74]
Proponents of mandatory malpractice insurance point to Oregon as an example of the benefits of compulsory coverage:
To date, the Oregon fund has been successful. It has built up a substantial fund and has the stability to weather most eventualities. There has been no notable increase in the amount of claims because of mandatory coverage. The fund has the large number of lawyers protected to give credibility in determining its assessment as well as statistics to aid it in controlling issues through educational seminars. [FN75]
The Oregon Professional Liability Fund (PLF) provides:
The board [of governors of the Oregon State Bar] shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer's professional liability fund. This fund shall pay, on behalf of active members of the state bar engaged in the private practice of law whose principal offices are in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as a result of any act or omission *652 of such member in rendering or failing to render professional services for others in the

member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible. [FN76]
The Oregon State Bar Association determined that a Professional Liability Fund in Oregon would cost individual attorneys less than comparable commercial insurance. [FN77] It thus created the Professional Liability Fund through state legislation in 1978, becoming the first state to create compulsory malpractice insurance coverage. [FN78] The bar's reasoning is as follows:
(a) there was no profit factor;
(b) advertising commissions would be eliminated;
(c) accumulation of reserves in anticipation of unasserted claims was not necessary;
(d) broad participation spread the risk and reduced the cost; and
(e) the PLF would utilize a detailed record-keeping system to determine vulnerable areas of professional liabilities so as to minimize future problems. [FN79]
The Oregon experiment demonstrates yet another advantage to mandatory malpractice insurance -- loss prevention assistance for attorneys. A mandatory fund system facilitates the collection of information that assists in loss prevention. The fund could also invest money and administrative resources in running programs and distributing information to lawyers participating in the mandatory program.

6. Mandatory Insurance Might Improve the Image of the Legal Profession
Another argument for mandatory insurance is that it might improve the image of the legal profession. [FN80] If every attorney is insured, there are likely to be more malpractice claims filed and more cases reaching the court system. This in turn would generate publicity and draw attention to the issue of attorney malpractice. It is possible that the public will alter its perception of the legal profession once informed that attorneys are not immune from prosecution and cannot escape liability for their mistakes.
As discussed above, the arguments for mandatory malpractice insurance *653 demonstrate that such a scheme may provide recourse for unprotected clients, reduce future rate increases, equalize attorneys' vulnerability to claims, and might improve the image of the legal profession. Further, lawyers are in a better position than clients to insure against loss. Mandatory malpractice insurance would allow them to do this. The Oregon example illustrates how a mandatory program may be capable of reducing the cost of insurance.

B. NEGATIVE ASPECTS OF MANDATORY MALPRACTICE INSURANCE: WHY IS THE LEGAL COMMUNITY LOATH TO REQUIRE IT?

Arguments against mandatory malpractice insurance are based on the costs as well as the fears of further regulation in the legal profession. Some attorneys argue that compulsory insurance is coercive in nature while others argue that the existence of the insurance requirement will spur an increase in frivolous malpractice claims. Charles Kindregan explains, "If we expect men and women to fill the difficult role of legal advisers and advocates in our litigation-minded society, we must afford the lawyer certain protections against spiteful claims. Otherwise lawyers will become too defensive and self-protective in the legal services they render." [FN81]
This section first addresses the lack of proof of public harm in the absence of mandatory malpractice insurance. The ensuing discussion focuses on other arguments against mandatory malpractice insurance including the coercive nature of such a program, the high cost of insurance, the possibility of discrimination against certain lawyers, and the possibility of insurance costs being passed on to the client.

1. There is No Proof that the Public is Being Harmed By the Absence of Insurance Coverage
The primary objection to mandatory malpractice insurance is that statistical evidence is insufficient to support the conclusion that the public is being harmed by the absence of compulsory coverage. The voluntary insurance programs that exist in every state except Oregon may not be as useless to the public as some argue. Yet, there are no statistics substantiating the argument that the existence of uninsured lawyers results in claims going uncompensated. The state of Wisconsin cited this issue in rejecting mandatory malpractice insurance: there was "no pattern of uncompensated malpractice claims." [FN82] Due to the lack of empirical evidence available, it is difficult to discern the extent of public harm in the absence of mandatory insurance. *654 It seems that in the absence of such evidence, adopting a compulsory coverage requirement may not be justifiable.

2. Insurance Coverage May Not Guarantee Client Protection
One problematic aspect of insurance coverage is that insurance companies can sometimes extricate themselves from liability coverage, thus leaving the injured client in the cold. For instance, legal malpractice claims against lawyers are subject to statutes of limitations. [FN83] A typical statute of limitation is five years. [FN84] Further, if the

insured misrepresents his knowledge of existing or potential claims against him when applying for coverage, the insurance company may be relieved of the responsibility of coverage. [FN85] In these instances, the existence of insurance is no guarantee of client protection.

It is also possible that many clients would not fully be compensated. Critics view the minimum liability requirement of most existing programs as inadequate and contend that a mandatory malpractice insurance program may not fully satisfy clients' claims. Insurance companies and lawyers may need to renegotiate these minimum liability requirements in order to provide adequate coverage. One study revealed that two-thirds of all malpractice claims against lawyers are either dismissed or result in no payment to the victim. [FN86] Further, lawyers may not disclose a potential claim for fear of the consequences. "The unfortunate fact is that many lawyers know of a potential claim but fail to disclose it because of their reluctance to accept responsibility for their acts -- thereby creating another potential roadblock to compensation for clients who are harmed." [FN87] One reason why a lawyer might fail to disclose potential claims is that although malpractice insurance may reduce the lawyer's financial loss resulting from a legal *655 malpractice suit, the personal and professional harm that an attorney may suffer cannot be mitigated by insurance.

3. A Mandatory Requirement Is Coercive In Nature

Oregon's professional liability fund has been opposed by those who claim that it is coercive. In the case of Ramirez v. Oregon State Bar, an attorney challenged the Oregon state bar's requirement that all attorneys in private practice carry malpractice insurance issued by Oregon State Bar PLF on the grounds that the fund deprived him of due process in violation of the Fifth Amendment. [FN88] The Court held that the legislative distinction between lawyers engaged in private practice and government or corporate lawyers is rationally related to the valid state objective of protecting those injured by attorney malpractice, and therefore does not violate equal protection. Nevertheless, the fund appears to usurp an attorney's freedom of choice.

Similarly, in Bennett v. Oregon State Bar, [FN89] an attorney raised an objection to the mandatory insurance requirement on the grounds that the requirement was contrary to due process and equal protection in its attempt to impose liability for damages upon a party who is not at fault. [FN90] In other words, the attorney objected to paying for the damages resulting from another's negligence. Notwithstanding the attorney's objections, the Supreme Court of Oregon found that the issue was not the mandatory insurance requirement but whether an attorney can be required to contribute to a client security fund as a condition of membership in the bar. [FN91] The court concluded that this requirement was indeed proper. [FN92]

4. Insurance Coverage Is Too Costly

Critics of mandatory insurance are wary of the high cost of insurance premiums. The "hard" insurance market of the 1980s was a striking contrast to the "soft" market during the 1970s and early 1980s. Premium rates remained low due to high interest rates and the competitiveness of the insurance market. In the 1980s, interest rates began to decrease which in *656 turn caused an increase in premiums. The current trend favors further increases in insurance rates both directly and indirectly. Geoffrey C. Hazard Jr., an expert on legal ethics, explains that indirect rate increases appear "in the form of exclusions of certain kinds of exposure, higher 'deductibles' (i.e., the amount the firm must pay before the insurance coverage is engaged and the cost of defending claims against the limits of coverage)." [FN93]

5. Compulsory Insurance Coverage Discriminates Against Certain Lawyers

Yet another difficulty with malpractice insurance is that the system incorporates discrimination against certain specialties and smaller firms. Studies have shown that securities lawyers, tax lawyers, antitrust lawyers, family law lawyers, and trial lawyers (especially plaintiffs' attorneys) are more vulnerable to malpractice suits than other types of lawyers. [FN94] Smaller firms are likely to find it harder to obtain insurance coverage than large firms due to a general unwillingness on the part of insurance companies to insure smaller firms. [FN95] Compulsory malpractice insurance would not alter the unwillingness of insurance companies to provide coverage to these groups.

6. Insurance Costs Will Be Passed On to the Client

Mandatory malpractice insurance imposes both direct and indirect costs. Those opposed to mandatory insurance coverage worry that insurance costs will be passed on to the client. As in all economic models, it seems likely that attorneys' fees would increase in order to cover increases in insurance expenses. "Professional liability insurance is generally the third highest *657 cost of a law practice, following office rent and salaries. It is also the most expensive intangible cost to the practice. As such, most purchasers and sellers believe that price alone will dictate who buys what." [FN96] In addition, as demonstrated by the statistics of the National Legal Malpractice Center, the

lawyers least able to bear additional costs are sole and small firm practitioners who are the ones most likely to represent clients in the lower economic strata. As these practitioners are forced out of business, the public will endure the indirect as well as direct costs of a mandatory malpractice insurance scheme.

7. Other Arguments Against Mandatory Malpractice Insurance

Critics are concerned that insurance companies will gain too much control over the attorney's ability to practice law. By making it impossible to practice without coverage, lawyers would be regulated in the name of protecting the public. This paternalism lies behind many of the regulations that attorneys now face. It imposes a harsh financial obligation upon the attorney and eliminates an attorney's choice among commercial insurers who might be offering competitive prices.

If every lawyer must be covered, bad lawyers might become indifferent to malpractice since they would be subsidized by good lawyers. This, in turn, would discourage good lawyers from practicing, and take away a lawyer's incentives to avoid claims. Further, some attorneys may be disposed to commit acts of malpractice because they know that they will be covered by malpractice insurance, and the threat of facing disciplinary proceedings will not act as a sufficient deterrent for bad lawyers.

A long-term effect of mandatory insurance coverage is that it would encourage further specialization. Insurance companies would likely charge higher coverage rates for general practitioners. Finally, there is no guarantee that adopting mandatory insurance would guarantee complete coverage. Attorneys with a potential claim may be unwilling to report the claim to the insurer since it would result in a potential defense.

Critics of mandatory malpractice rely on libertarian notions of freedom of choice and contract, and they propose alternatives to compulsory insurance. These alternatives may be less coercive and therefore more acceptable to lawyers, but they do not provide much in the way of protection for the clients. Thus, in attempting to reconcile the two sides of the debate, it is critical to consider the alternatives and research how other professions have found a balance between providing acceptable regulation and affording clients sufficient protection.

*658 IV. ANOTHER PARADIGM: WHAT CAN WE LEARN FROM THE LESSON OF MANDATORY MEDICAL MALPRACTICE INSURANCE?

Some view the increase in legal malpractice claims as a natural occurrence because of the similar crisis facing other professions, such as the medical profession. "Lawyers, it appears, have been hoisted on their own petard: Their malpractice crisis simply follows in the wake of a wave of suits against other professions." [FN97] While it was once improbable that one professional would sue another, this is no longer the case. "In today's society professionals no longer garner the deference they once enjoyed," noted New York University law professor and ethics expert Stephen Gillers. [FN98]

Not only has medical malpractice resulted in large jury verdicts and settlements, it also has resulted in a tarnished view of plaintiffs' attorneys. Notwithstanding the public image problems that these suits have created for the legal profession, the suits are quite valuable to this study of malpractice and malpractice insurance. In fact, malpractice suits against doctors paved the way for suits against lawyers. As Stephen Gillers states, "Suing doctors made it socially acceptable to sue professionals." [FN99] Medical and legal claims have the following common elements: the duty of care, ethical obligations, fear of liability for the professionals, and increasing insurance premiums. However, the standard of care for the legal profession seems as difficult to define as that for the medical profession. In studying the impact of mandatory malpractice insurance, it may be helpful to analyze how the medical profession confronts medical malpractice because doctors faced malpractice before lawyers did and because the two professions face similar obstacles in their practices.

A. UNCOMPENSATED VICTIMS IN BOTH PROFESSIONS

Economic loss is the primary harm in legal malpractice. In contrast, there are usually more foreseeable and critical effects of medical malpractice. Emotional distress is generally not considered in examining legal malpractice claims and there is generally no physical damage to the client. While there have been cases of legal malpractice involving emotional injuries, these occur more frequently in medical malpractice claims. [FN100]

Medical malpractice studies demonstrate that victims of medical malpractice *659 often go uncompensated. [FN101] One study revealed that only approximately forty percent of victims with severe injuries received a tort payment. [FN102] Such data indicate that negligently injured patients are dramatically undercompensated. Recovery for medical malpractice is dependent upon patients' decisions to sue their doctors, but it is clear that many patients do not assert legal claims against their doctors.

Similarly, gross undercompensation of malpractice victims in the legal arena may be deduced from an examination of the medical arena. However, one important difference must be considered -- the greater availability of quality

medical services. Due to the larger variety of medical insurance, quality medical services are available to a greater percentage of people than are quality legal services. [FN103]
Current studies show that many negligent doctors are not penalized for malpractice, and that negligent doctors may not be the subject of litigation due to the plaintiff's risk and fear of an unfavorable verdict and high legal expenses. In addition, there is no clear pattern of jury decisions in malpractice cases so the awards may be either extraordinarily large or zero. One study revealed that eighty percent of all medical malpractice suits filed did not bear evidence showing negligent medical care and that fifteen out of sixteen persons injured due to negligence never received compensation. [FN104] Some states, such as Kansas, are moving toward a reduction or elimination of mandatory insurance for doctors. [FN105]
Some believe that medical malpractice suits have initiated a trend toward large settlements. This trend will be difficult to reverse. Geoffrey Hazard hypothesizes, "If experience with medical malpractice is an indicator . . . the number of [legal malpractice] suits is still far less than the number of provable, serious malpractice cases." [FN106] Hazard's view suggests that mandatory legal malpractice coverage might cause an increase in the amount of legal malpractice cases filed and eventually won by injured clients.

*660 B. LAWYERS COULD LEARN TO PRACTICE "DEFENSIVE LAW"

Similar to the concept of "defensive medicine," lawyers could learn to practice "defensive law." Defensive medicine is generally defined as a system of informing patients of risks, getting referrals, preserving client information, and maintaining good communication with the patient. [FN107] Implementing these measures has prevented some medical malpractice claims from arising. A defensive law practice might consist of getting experts' opinions on the legal matter, maintaining docket control and case information, and keeping up good lines of communication with the client.

C. STATE'S POWER TO REGULATE PROFESSIONALS SUCH AS DOCTORS AND LAWYERS

Malpractice is a problem that many professionals must address. Accountants, for instance, are subject to the same type of liability as doctors and lawyers in malpractice cases. [FN108] Accordingly, accountants are held to high standards of reasonable care and competence. [FN109] These standards originate in common law as captured by the Restatement (Second) of Torts:
Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities. [FN110]
Generally, an accountant cannot limit his liability by disclaimer. He may limit the extent of his performance in the initial contract, but disclaimers will be strictly construed against the accountant. [FN111] This principle holds true for lawyers as well.
Although one's right to practice a particular profession should not outweigh another's right to be safe from resulting injury, it is not necessarily *661 intuitive that the state has the power to mandate this safety at the expense of the professional. Courts have held that the state has police power to require malpractice insurance. Jones v. State Board of Medicine [FN112] is illustrative of the state's power to regulate professions. In Jones, the Idaho Supreme Court held that pursuit of one's occupation was a liberty and property interest to which due process protections of the state and federal constitutions attached. [FN113] However, the power to require doctors to carry malpractice insurance was well within the state's police power. [FN114] Further, the Idaho Supreme Court found that there was a rational relationship between the Act's requirements for obtaining insurance as a condition of licensure and the state's duty to protect the general welfare of its citizens. [FN115]

D. THE MEDICAL PROFESSION'S MOVE TO CHECK MEDICAL MALPRACTICE

While the American Medical Association has pressured the White House to adopt its proposal to check medical malpractice problems, the Clinton Administration's failure to reform national health care makes it unlikely that such a proposal will be adopted. [FN116] The proposal is based on California's malpractice liability legislation, the Medical Injury Compensation Reform Act (MICRA), [FN117] and suggests the following: a $250,000 cap on non-economic awards, the elimination of the collateral source rule that forces those found liable for malpractice to pay for all of the victim's expenses, and an option for those found liable for malpractice to pay the compensation in installments. [FN118]
Opponents of MICRA argue that, in fact, it has done nothing to reduce high health care costs. [FN119] MICRA was passed in 1976, but in 1990, California had the second highest per capita health care costs in the United States. [FN120] Ralph Nader, in his article The Myth of Medical Malpractice, contends, "It would be legislative malpractice for the President and Congress to restrict malpractice victims' rights in the face of the overwhelming

evidence that the malpractice liability system should be strengthened, not weakened." [FN121] Claiming that reform should not restrict victims' rights, Nader suggests affirmative steps that can be taken to address medical malpractice: improve consumer access to information about negligent physicians, *662 strengthen the state medical boards' disciplinary functions, encourage insurance companies to lower premiums by spreading the risk, and establish risk-management programs for physicians. [FN122] Nader's arguments and suggestions are equally applicable to the legal profession.

Thus, the similarities between the legal and the medical professions indicate that because mandatory coverage for doctors has created many problems and has not deterred malpractice, mandatory malpractice coverage for lawyers is not likely to deter legal malpractice. Mandatory coverage will draw further public attention to the problem of malpractice, ultimately stimulating additional negative commentary of the legal profession. [FN123] While increased attention may encourage attorneys to avoid malpractice, it could taint the entire profession in the process.

V. ALTERNATIVES: CAN THE PUBLIC BE PROTECTED WITHOUT MANDATORY MALPRACTICE INSURANCE FOR LAWYERS?

There are several alternatives to a mandatory malpractice insurance requirement: client security funds, professional liability funds, and disclosure and reporting requirements. These alternatives should be considered, among other reasons, because of the cyclical nature of the insurance industry. Due to a lack of competition, insurers have been free to increase their rates dramatically. State bars therefore must explore other options of insuring their members while guaranteeing the continued availability of a market. [FN124]

A. VOLUNTARY STATE BAR ADMINISTERED CLIENT SECURITY FUNDS

The creation of a client security fund is an acceptable method of meeting a lawyer's obligation "to participate in collective efforts of the bar to reimburse persons who have lost money or property as a result of the misappropriation or defalcation of another lawyer." [FN125] The comment to Model Rule 1.15 recommends that lawyers participate in clients' security funds where available. [FN126] Today, every jurisdiction has some form of client security fund. Yet, participation is not always mandatory; the aforementioned *663 rule only uses the word "should" in discussing such participation. [FN127] Most client security funds are funded by annual dues paid by members of each state's bar association. [FN128] Some funds are financed by voluntary contributions from members of the bar and/or the transfer of funds derived from attorneys' state licensing fees. While many states have client security funds, it is unclear whether or not these funds sufficiently compensate victims of legal malpractice in the absence of supplemental malpractice insurance coverage. [FN129]

B. OREGON'S PROFESSIONAL LIABILITY FUND

The State of Oregon has created a professional liability fund. While this approach has been discussed in some studies as a useful alternative to mandatory malpractice insurance, it is mandatory in nature since the state requires that lawyers obtain coverage from a single bar fund. The creation of this type of fund eliminates competition but gives the state bar association a monopoly on insurance coverage. Notwithstanding its disadvantages as mentioned in Part III of this Note, the benefits of such a program, including an increased utilization of bar foundations, are significant.

C. DISCLOSURE AND REPORTING REQUIREMENTS: CALIFORNIA, VIRGINIA AND ARIZONA MODELS

Another alternative to mandatory malpractice insurance would be to require lawyers to prove their financial ability to withstand suits. Forced disclosure would mitigate public harm because potential clients would have the opportunity to reject an uninsured attorney. Under this program, an attorney would inform clients in writing at the commencement of representation whether or not insurance is carried, the extent of the coverage, and specific information regarding the policy and the carrier. During the representation, if the policy is terminated or modified, the attorney would be required to inform the client. These requirements could be imposed by state bar associations or by statute.

The states of California and Virginia adopted this approach by statute. [FN130] Attorneys in California must provide written fee agreements that disclose *664 pertinent policy information and limits. [FN131] If an attorney fails to make disclosure, then the fee agreement is voidable at the client's option. Failure to disclose may result in disciplinary proceedings, and the attorney may only collect a "reasonable" fee. [FN132] Virginia lawyers are also subject to a disclosure requirement. [FN133] The disclosure must include whether or not insurance is carried and whether any outstanding malpractice judgments exist. [FN134] This information is freely available to the public, and lawyer misrepresentation in this area can result in disbarment. [FN135]

The advantages to this alternative include low administrative costs and client empowerment through free choice of lawyers. Competition in marketing legal services will encourage attorneys to seek coverage. This marketing aspect will promote self-monitoring in the legal profession, as the attorney will avoid malpractice because it would affect insurability and, in turn, future marketability. [FN136] A disadvantage of this alternative is that if an attorney misrepresents his position, some clients may be harmed in the event of malpractice. While this may not occur on a large scale due to the risk of disbarment, it is nonetheless a factor. One other disadvantage to this alternative is that a client may not be able to process the disclosed information. Intimidation may cloud the client's judgment if the client is uncomfortable asking about the lawyer's insurance or simply intimidated by the legal system.

Arizona is currently considering implementing a reporting requirement. [FN137] Under the requirement, bar members will have to prove financial *665 responsibility in order to be a member in good standing of the State Bar of Arizona. This requirement may be met by presenting any of the following: proof of an insurance policy, a $100,000 surety bond, an irrevocable letter of credit, cash, or another acceptable form of security. [FN138] However, the requirement does not mandate insurance coverage.

D. OTHER ALTERNATIVES

The legal industry may benefit from greater regulation of both the legal and insurance industry. In addition, law firms could opt for higher deductibles to keep premium costs at a reasonable level or else they could join mutual liability insurance associations. As previously discussed, "going bare" is another option, but an unrealistic one in today's legal market because "[l] awyers who believe they will never harm a client can be as wrong as a safe lawyer or a prudent medical professional." [FN139] While cases of malpractice may arise due to circumstances beyond the lawyer's control, the lawyer is in a better position to insure this risk and is therefore held accountable.

The American legal malpractice system stands in stark contrast to the systems in foreign countries. Attorneys in England, Ireland, and Australia are required to carry certain minimum amounts of professional liability insurance. [FN140] In Canada, a mandatory program was adopted in 1972 because members of the Canadian Law Societies could not obtain insurance in the private sector. The Law Societies provide a minimal in-house insurance program. Norway's Clients' Compensation Fund provides coverage for legal malpractice and dishonesty. [FN141] The fund, a combination of a malpractice insurance program and a client security fund, is controlled by a council *666 which taxes bar members annually in order to provide a compensation fund. [FN142] A wronged client must establish a legal claim in court and then apply for compensation from the council. [FN143]

E. GREATER EMPHASIS ON PREVENTION AND/OR ANTI-MALPRACTICE PROGRAMS

The final alternative to mandatory malpractice insurance is not so much an alternative as a requisite in today's large firm practice -- prevention or anti-malpractice programs. Continuing legal education programs on risk management may help prevent malpractice from occurring. [FN144] This in turn would reduce the amount of claims submitted to insurance agencies resulting in decreased premiums. George Spellmire, of Chicago's Hinshaw & Culbertson, believes that "lawyers have to implement measures in their firms to supervise each other," as required by Model Rules. [FN145] Supervisory measures could include a system of peer review similar to that used by accounting firms. [FN146] Other measures include simply "getting the office running better and doing a better job of stroking clients." [FN147]

Experts in the field of legal malpractice are now grouping the issue with other disciplinary-based issues because the two are so closely related. [FN148] Grouping malpractice with disciplinary issues intuitively makes sense because the creation of a standard of professional responsibility may ultimately prevent legal malpractice. Although it has not adopted a standard of professional responsibility, the state of Oregon has adopted a loss prevention program which "can only be implemented to the greatest extent through a mandatory bar program." [FN149] The purpose of the loss prevention *667 program is to reduce malpractice and therefore reduce the ensuing malpractice claims. [FN150] Oregon's loss prevention activities focus on four areas:

(1) education by way of written materials and workshops, (2) in-office assistance with law office systems,
(3) alcohol and chemical dependency counselling and intervention, and
(4) stress, burnout, and career change counselling and intervention. [FN151]

In summary, a plethora of alternatives to mandatory malpractice insurance exists in addition to various ways of reducing reliance on such insurance. Prevention and risk management programs may be the best option for reducing legal malpractice in that they are fairly simple and inexpensive to implement. Yet, preventive measures will not eliminate legal malpractice altogether. [FN152] The measures must be considered in conjunction with an attorney's individual decision whether or not to insure himself.

VI. CONCLUSION

This debate has been framed as a zero sum game: either adopt mandatory insurance requirements or let the market determine who will be insured and the cost of that insurance. However, the overriding goal in adopting mandatory malpractice appears to be the protection of clients. As this Note has discussed, mandatory malpractice insurance is only one of several, but not necessarily the best, means to ensure that clients are protected. Lawyers would do well to look to the current debate concerning medical malpractice to see the types of problems and limited relief such a system might provide in the legal arena.

Legal malpractice claims are an integral part of the profession. As a matter of both public policy and sound business judgment, it is imperative that attorneys insure themselves. By obtaining malpractice insurance, attorneys would further the spirit and intent of the Model Rules. Yet, there is no evidence that adopting a per se requirement of malpractice insurance is the answer to the malpractice crisis. It seems more like a bandage than a panacea. Considering both the implications of adopting a mandatory malpractice insurance plan and arguments against such a plan, this paper recommends adopting other alternatives.

While the subject of malpractice insurance is currently a priority for insurance companies and state bar associations, the solution should not be placing further regulations and requirements on the lawyer. Malpractice insurance requirements infringe upon the attorney's right to exercise independent *668 judgment and common sense. Rather, attorneys should be relied upon to insure themselves against risk. In this age of skyrocketing malpractice awards, most attorneys are seeking coverage rather than risking personal bankruptcy and public humiliation. Large premiums can be paid by steadily increasing attorney fees.

In balancing the costs against the benefits, one gains insight as to whether or not malpractice insurance should be compulsory. Influencing the balance is the attorney's ethical obligation to the client. Ethical considerations are often ignored in economic equations because ethical considerations are not regulatory. The Model Rules and the Model Code do not require malpractice insurance. Just as the ethical considerations in the Model Code are not mandatory, malpractice insurance might well be considered an elective rather than a condition for licensure within a state or within the nation.

It is clear that further studies must be conducted in order to collect data on the number of uninsured versus insured attorneys. [FN153] This information could be obtained by adopting mandatory reporting requirements such as those considered in Arizona by interviews with attorneys defending against malpractice claims, by insurers who cover attorneys, and by questionnaires distributed through state bar associations. Until the data has been collected, it is merely speculative to assert that public harm is the impetus for adopting mandatory malpractice.

Although it is frightening for injured clients to be without recourse and disturbing to members of the legal profession who see voluntary malpractice insurance as a problem, the decision whether or not to insure oneself against malpractice should remain a lawyer's decision. Prudent attorneys will obtain insurance to maintain their client base. Additionally, the damage of malpractice can be dealt with using preventive rather than compensatory measures. Increased deterrence against malpractice through legal education, both before and after passing the bar, coupled with business pressure will encourage attorneys to insure themselves and eventually may extirpate the problem of legal malpractice.

[FNa1]. J.D. 1995, Georgetown University Law Center. I would like to thank Professor Robert F. Drinan, S.J., the editorial staff of the Georgetown Journal of Legal Ethics, and my family and friends for their support and assistance in the preparation of this Note.

[FN1]. Sheldon G. Larky, Legal Negligence: Strategies to Avoid Law-Practice Pitfalls, TRIAL, Feb. 1987, at 30, 31 (citing evidence that legal malpractice claims rose from 1 for every 50 lawyers in 1980 to 1 for every 17 lawyers in 1985); Ronald E. Mallen, Cutting Through the Malpractice Maze, THE BRIEF, Summer 1986, at 10.

[FN2]. Or. Rev. Stat. § 9.080 (1989). Attorneys in Canada, England, Ireland, and Australia are required to carry a minimum amount of professional liability insurance as a condition of licensure. Thomas G. Bousquet, It's Time for Mandatory Malpractice Insurance, Texas Lawyer, Dec. 6, 1993, available in lexis, Nexis Library, texas lawyer file. See infra notes 140-43 and accompanying text (contrasting the American legal malpractice system with that in foreign countries).

[FN3]. In addition, the question remains whether the insurance industry has the ability to determine who will or will not be allowed to practice law and why society should or should not place this right with the insurance industry.

[FN4]. AM. BAR ASS'N STANDING COMM. ON PROFESSIONAL RESPONSIBILITY, THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE 4 (1992) [hereinafter DESK GUIDE].

[FN5]. In Lipton v. Boesky the Michigan Supreme Court held that a violation of the Code is rebuttable evidence of malpractice:
The Code . . . is a standard of practice for attorneys which expresses in general terms the standards of professional conduct expected of lawyers in their relationships with the public, the legal system, and the legal profession. Holding a specific client unable to rely on the same standards in his professional relations with his own attorney would be patently unfair. . . . However, the Scope section of the Model Rules states that "Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules . . . are not designed to be a basis of civil liability . . . . Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty. 313 N.W.2d 163, 166-67 (Mich. 1981). See MODEL RULES OF PROFESSIONAL CONDUCT pmbl (1983) [hereinafter MODEL RULES] The Model Rules have been adopted in some form by a majority of states and the District of Columbia.

[FN6]. CHARLES P. KINDREGAN, MALPRACTICE AND THE LAWYER 7 (1981).

[FN7]. A common law right of recovering damages from a lawyer due to his negligence was first recognized in Stephens v. White, 2 Va. 203 (1796).

[FN8]. Note that the existence of an attorney-client relationship is elemental to a legal malpractice suit since an attorney is liable only to his client and not to a third party. Further, there is no fiduciary duty to an adverse party. Jack W. Shaw, Jr., Attorney's Liability, to One Other Than His Immediate Client, For Consequences of Negligence In Carrying Out Legal Duties, 45 A.L.R.3d 1181 (1994).

[FN9]. AMERICAN BAR ASSOCIATION, PREVENTING LEGAL MALPRACTICE 2 (1978) [[hereinafter PREVENTING LEGAL MALPRACTICE].

[FN10]. "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of a future harm -- not yet realized -- does not suffice to create a cause of action for negligence." Budd v. Nixen, 6 Cal.3d 195, 200 (1971).

[FN11]. See generally United States National Bank of Oregon v. Davies, 548 P.2d 966, 969 (1976).

[FN12]. NEW JERSEY LAW JOURNAL, REPORT OF THE NEW JERSEY ETHICS COMMISSION OF THE SUPREME COURT OF NEW JERSEY, Mar. 15, 1993. The New Jersey Ethics Commission of the Supreme Court of New Jersey was not able to recommend mandatory legal malpractice insurance, but they did make the following recommendation:
Recommendation No. 17 Malpractice Insurance
All attorneys engaged in the private practice of law in New Jersey who do not carry professional malpractice insurance should be required to disclose such non-coverage to their clients.
Id. In the comments following the recommendation, the commission justified its rejection of mandatory malpractice insurance on the lack of guaranteed access to such insurance at a reasonable rate for all attorneys. The commission viewed its recommendation as "a necessary interim step which will provide some protection to clients who unwittingly seek the services of uninsured attorneys." Id.

[FN13]. John J. Lynch, The Insurance Panic for Lawyers, 72 A.B.A. J., July 1986, at 42. Washington's Board of Governors recommended mandatory malpratice coverage, but the issue became moot when the primary carrier withdrew. See Jerome B. Schultz, On the Horizon: Mandatory Legal Malpractice Insurance -- Do We Really Need It?, ABA STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY 5.1 (Feb. 15, 1985). California's proposal was recommended by the State Bar Association but then vetoed by the Governor. Id.

[FN14]. Emily Couric, The Tangled Web: When Ethical Misconduct Becomes Legal Liability, 79 A.B.A. J., Apr. 1993, at 64, 67.

[FN15]. See generally JO ANN FELIX, A LAWYER'S GUIDE TO LEGAL MALPRACTICE INSURANCE (1982) (discussing market cycles in the insurance industry).

[FN16]. STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, ISSUES IN FORMING A BAR-RELATED PROFESSIONAL LIABILITY INSURANCE COMPANY 11 (1989) [[hereinafter BAR-RELATED INSURANCE COMPANY].

[FN17]. Id. O'Malley further noted that there have been fourteen legal malpractice settlements of twenty million dollars or more during this period. Id.

[FN18]. "By bringing and winning these actions for great sums of money, lawyers made it acceptable to sue professionals and to seek large recoveries or settlements. The idea that it is wrong to sue someone who tried to help you when you were in trouble is no longer influential." STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 612 (3d ed. 1992).

[FN19]. RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2.1, at 35 (3d ed. 1989) (noting that a Gallup Poll taken a few years after Watergate reported "that less than 25% of those interviewed rated the honesty and integrity of attorneys as either high or very high").

[FN20]. DESK GUIDE, supra note 4, at 137; See also H. Robert Fiebach, Expanding the Plaintiff Pool, 81 A.B.A. J., Jan. 1995, at 76 (discussing the success of nonclients in malpractice claims against lawyers). For example, Fiebach discusses an example in the estate and trust field where lawyers are being held responsible by non-clients where alleged intended bequests fail because instruments were not executed before grantors or testators died. Id. Fiebach further states:
In this changing climate, it should be comforting to know that the standard professional liability insurance policies for lawyers do not limit coverage to claims by clients, and that most policies would provide defense and coverage for claims by nonclients as long as the claims arise out of the rendering of professional services.
Id.

[FN21]. Id. See, e.g., Lucas v. Hamm, 364 P.2d 685, cert. denied, 368 U.S. 987 (1962).

[FN22]. DESK GUIDE, supra note 4, at 138-39. For example, lawyers may be held liable to third parties who have reasonably relied on their opinions. See Fiebach, supra note 20, at 76.

[FN23]. See generally Robert E. O'Malley & William Freigvogel, Lawyers' Entrepreneurial Activities: How to Maintain Professionalism, Avoid Malpractice Claims, and Not Get Rich While Practicing Law, in DESK GUIDE, supra note 4, at 149. O'Malley and Friegvogel assert:
[A] major problem is that too many of the ALAS lawyers are continuing to engage in various forms of entrepreneurial and other extracurricular activities, which in many cases make it more likely that they will be sued, and make it more difficult to defend the actions if they are sued. Among other things, entrepreneurial activities often provide the plaintiffs with a persuasive conflict of interest allegation.
Id.

[FN24]. Couric, supra note 14, at 65.

[FN25]. The increase in malpractice claims and damage recoveries may tempt attorneys to negotiate limits on malpractice liability. However, this limitation is prohibited by the Model Rules:
A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
MODEL RULES Rule 1.8(h). See The Florida Bar v. Leopold, 320 So. 2d 819 (Fla. 1975) (holding that a release that was not a general release and executed by client after client received advice of independent counsel violated Model Code DR 6-102). Similarly, the Model Code reads: "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102 (1969) [[hereinafter MODEL CODE]. Ethical Consideration 6-6 of the Model Code adds: "A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities . . . "

While a violation of the Model Rules does not establish a breach of a legal duty, courts will consider ethical rules when determining legal malpractice liability. MODEL CODE EC 6-6. The Model Rules provide:
Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability . . . [N]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.
MODEL RULES scope. See also Ann Peters, Note, The Model Rules As a Guide for Legal Malpractice, 7 GEO. J. OF LEGAL ETHICS 609 (1993) (discussing the use of the Model Rules as a basis for malpractice liability); Jonathan M. Epstein, Note, The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm, 7 GEO. J. OF LEGAL ETHICS 1011, 1021 (1994) (discussing the link between ethics rules and the standard of care for legal malpractice).

[FN26]. The Model Code requires a lawyer to report to a tribunal or other investigative authority any knowledge that raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness in other respects as a lawyer. MODEL CODE DR 1-103. See also Model Rule 8.3(a) which reads:
A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
MODEL RULES Rule 8.3(a).

[FN27]. Duke Nordlinger Stern, Reducing Your Malpractice Risk, 72 A.B.A. J., June 1986, at 52.

[FN28]. See DESK GUIDE, supra note 4, at 27 (revealing the relationship between firm size and percentage of malpractice suits). See also E. Kendall Stock and Donna D. Lange, Not to Panic -- Suits Happen, 80 A.B.A. J., Nov. 1994, at 92 (discussing the inevitability of legal malpractice suits and the lawyer's necessary preparation for a legal malpractice suit). Preparation includes familiarizing oneself with one's professional liability insurance policy. A lawyer should be familiar with "the limits of liability, the deductible amount, whether the deductible applies to claims expenses and costs, whether the costs of defense is included in the limits of liability, whether fines or sanctions are covered, and whether pre-judgment interest is covered." Id. If faced with a suit, a lawyer should review the case file immediately and notify his or her insurance carrier. Id.

[FN29]. KINDREGAN, supra note 6, at 7 (explaining that the nature of the law practice is such that subjective judgments by the attorney have to be made and cannot be measured easily against any absolute standard).

[FN30]. Nancy Blodgett, Forced Insurance: States Weigh Malpractice Rules, 71 A.B.A J., Apr. 1985, at 45. The concept of mandatory malpractice insurance did not originate in the United States. Schultz, supra note 13, at 5.4. Norway adopted a Clients' Compensation Fund and, in 1972, Law Societies in upper Canadian provinces adopted mandatory malpractice insurance. Id.

[FN31]. Sandy Goldsmith, By the Letter: Writing Around Potential Malpractice Hazards, 79 A.B.A. J., July 1993, at 103. The conference was presented by the ABA Standing Committee on Lawyers' Professional Liability. The conference titled "Are You Your Own Worst Enemy? Malpractice Avoidance in the '90s," was held in Boston. Speakers explained that "the best way for lawyers to minimize the likelihood of malpractice claims is to screen clients and cases, and to document the progress of cases they handle." Id.

[FN32]. The commission is officially called The Commission Evaluation of Disciplinary Enforcement. It was created in 1989 to study lawyer discipline and to provide a model of regulation for the twenty-first century. See KIRK R. HALL, REPORT FROM THE ABA NATIONAL LEGAL MALPRACTICE CONFERENCE, MINIMUM FINANCIAL RESPONSIBILITY FOR LAWYERS (1993).

[FN33]. ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, LAWYER REGULATION FOR A NEW CENTURY, REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT 81 (1992).

[FN34]. Id.

[FN35]. FELIX, supra note 15, at 63.

[FN36]. BAR-RELATED INSURANCE COMPANY, supra note 16, at 22 (discussing the fact that some lawyers such as sole practitioners are higher risks than others such as large law firms).

[FN37]. MINIMUM FINANCIAL RESPONSIBILITY FOR LAWYERS, ABA NATIONAL LEGAL MALPRACTICE CONFERENCE 1 (Sept. 30-Oct. 1, 1993). A 1987 California survey revealed that almost half of the state's private practitioners did not carry insurance. Debra Cassens Moss, Malpractice, Going Bare: Practicing Without Malpractice Insurance, 73 A.B.A. J., Dec. 1987, at 82. However, Lester Rawls, Chief Executive Officer of Oregon's Professional Liability Fund, estimates that 30 to 35 percent of the lawyers in every state are going bare, "either because they can't get coverage at all, or it's priced so high they can't afford it." Id. Similarly, Duke Nordlinger Stern, a member of the ABA's Standing Committee on Lawyer's Professional Liability, estimates that 20 to 45 percent of lawyers in private practice are going bare. Id.

[FN38]. Further, one may posit that an uninsured attorney may practice with a greater degree of professional responsibility in the absence of insurance coverage. It is also possible to argue that both insured and uninsured attorneys practice with the same degree of professional responsibility.

[FN39]. Likewise, patent lawyers and lawyers not engaged in private practice are not included in AMERICAN BAR ASSOCIATION, REPORT OF THE NATIONAL LEGAL MALPRACTICE CENTER, CHARACTERISTICS OF LEGAL MALPRACTICE (1989) (including tables of the percentage of malpractice claims for various areas of law) [[hereinafter LEGAL MALPRACTICE REPORT].

[FN40]. Bousquet, supra note 2; see also Daniel B. Moskowitz, Lawyers Cut Back on Malpractice Insurance as Rates Increase, WASH. POST, July 1, 1991, at F24. Moskowitz reveals that "[a]s malpractice insurance rates climb -- jumping 30 percent annually in recent years -- more lawyers opt not to carry the coverage at all." Id.

[FN41]. Deborah L. Rhode, L. Rev. Symposium: The Future of the Legal Profession, Institutionalizing Ethics, 44 CASE W. RES. 665, 697-98 (1994) ("So, too, many valid civil liability claims go unredressed because the lawyer has insufficient insurance or personal assets, and the bar's client security funds are woefully inadequate").

[FN42]. Bousquet, supra note 2 (cautioning that "[l]awyers who believe they will never harm a client can be as wrong as a safe driver or a prudent medical professional"); William H. Fortune & Dulaney O'Roark, Risk Management For Lawyers, 45 S.C. L. REV. 617, 632 (1994) (discussing the evolution of malpractice claims against lawyers and the developing view that their was a need for malpractice insurance).

[FN43]. Id.

[FN44]. Id. (stating that: "The only legitimate argument against mandatory insurance is the cost of the premiums.")

[FN45]. Id.

[FN46]. Id.

[FN47]. Id.

[FN48]. This should be compared with the English rule that advocates a much stronger duty to acquire insurance. See A GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS, Rule 14:5 (1974).

[FN49]. Addair v. Majestic Petroleum Co., Inc., 232 S.E.2d 821, 821 (W.Va. 1977) (quoting Beardmore v. Carrington, 95 Eng. Rep. 790, 793 (1764)).

[FN50]. For example, Alabama passed a package of laws targeted at legal malpractice. See Ala. Code §§ 6-5-570 to -581 (1983).

[FN51]. "It is reasonable to assume that if every lawyer in private practice in the state was required to carry malpractice insurance, the premiums for the insurance would go down." Bousquet, supra note 2.

[FN52]. HALL, supra note 32, at 18.

[FN53]. An attorney's best way to investigate an insurance firm is to contact the state's department of insurance or the National Association of Insurance Commissioners in Kansas City, Missouri. The insurance firm should be admitted to do business in the state. Further, the attorney should make sure that the insurance firm has not been the subject of cease-and-desist orders or other adverse actions.

[FN54]. Robert T. Reid, LAWYERS' MALPRACTICE INSURANCE COVERAGE IN THE UNITED STATES, 265 PLI/PLI ORDER NO. N4-4447 (1985).

[FN55]. Id.

[FN56]. Id.

[FN57]. FELIX, supra note, at 2 (discussing the functions of umbrella coverage).

[FN58]. Geoffrey C. Hazard Jr., Ethics, NAT. LAW J., Mar. 14, 1994, at A17.

[FN59]. Rita Henley Jensen, Malpractice Rates May Level Off, NAT. LAW J., July 19, 1993, at 1, 28 [hereinafter Jensen, Malpractice Rates].

[FN60]. Rita Henley Jensen, Malpractice Rates Rise Again; For Third Straight Year, NAT. LAW J., Apr. 12, 1993, at 3.

[FN61]. Id.

[FN62]. Id.

[FN63]. Id.

[FN64]. Id.

[FN65]. Id.

[FN66]. See Jensen, Malpractice Rates, supra note 59, at 28.

[FN67]. Bousquet, supra note 2.

[FN68]. HALL, supra note 32, at 5. Hall posits:
Some clients may be too unsophisticated (or too poor or desperate) to understand the implications of a disclosure indicating the lawyer carries no malpractice coverage. These could be people at the bottom of the socio- economic scale, or people served by lawyers at the bottom ranks of their profession. These are often the very types of clients who need protection the most.
Id.

[FN69]. Alan O. Sykes, The Economics of Vicarious Liability, 93 YALE L.J. 1231, 1236 (1984).

[FN70]. See generally Or. Rev. Stat. § 9.080 (1985).

[FN71]. HALL, supra note 32, at 10.

[FN72]. Or. Rev. Stat. § 9.080 (1985).

[FN73]. HALL, supra note 32, at 13. Hall states, "[w]e treat all lawyers the same until they have shown themselves to be different by generating claims (at which point the lawyers are surcharged). This eliminates a tremendous amount of paperwork, and treats all Oregon lawyers as equals." Id.

[FN74]. Bousquet, supra note 2.

[FN75]. FELIX, supra note 15, at 65.

[FN76]. Or. Rev. Stat. § 9.080(2) (1985).

[FN77]. HALL, supra note 32, at 10.

[FN78]. Reid, supra note 54. As of 1985, the coverage provides $200,000 for indemnity and $50,000 for defense expenditures to each attorney licensed to practice in Oregon. Id. Further coverage is available through commercial means. Id. Reid predicts that if other states adopt a mandatory malpractice insurance requirement, "it is quite feasible we will see so-called captive insurance carriers being created for each state." Id.

[FN79]. VIRGINIA STATE BAR, REPORT OF THE SPECIAL COMMITTEE TO STUDY LAWYER FINANCIAL RESPONSIBILITY (Apr. 1988).

[FN80]. This is debatable, however, because one may argue that the public's perception of lawyers will not change simply by requiring lawyers to obtain malpractice insurance.

[FN81]. KINDREGAN, supra note 6, at 1.

[FN82]. See T.G. Schneyer, Mandatory Malpractice Insurance for Lawyers in Wisconsin and Elsewhere, WIS. L. REV. 1019, 1040 (1979).

[FN83]. See Ronald E. Mallen, Limitations and the Need for "Damages" in Legal Malpractice Actions, 60 DEF. COUNS. J. 234, 234 (1993). Failure to meet a statute of limitations may be grounds for malpractice. The Model Code provides that: "[a] lawyer shall not . . . [n]eglect a matter entrusted to him." MODEL CODE DR 6-101(A)(3).

[FN84]. Wysocki v. Reed, Scoby and Webster, 222 Ill.App.3d 268, 280 (1991) (where defendant argues that the plaintiff's legal claim was barred by the five-year statute of limitations for legal malpractice claims).

[FN85]. See, e.g., Home Insurance Company v. Matthews, 998 F.2d 305 (5th Cir. 1993) (looking at the issue of whether an insurance company had waived its right to void a legal malpractice policy because the insured misrepresented his knowledge of a claim against him); Home Insurance Company v. Dunn and Davis and Lindquist, 963 F.2d 1023 (10th Cir. 1992) (holding that the lawyer's representation when he applied for coverage was intentionally done and thus voids the insurance contract). Neither case discusses any harm caused by the lawyer to his clients. Harm is not a factor here, but the public policy of voiding fraudulent contracts is one. See also Pacific Insurance Co. v. Higgins, 1993 Del. Ch. LEXIS 68 (discussing situation where two professional liability insurers sought to rescind the legal malpractice insurance policies that they had issued to a Delaware attorney on the ground that the attorney misrepresented material facts).

[FN86]. See William Gates, Charting the Shoals of Malpractice, 73 A.B.A. J., July 1987, at 62.

[FN87]. Bousquet, supra note 2.

[FN88]. Ramirez v. Oregon State Bar, 493 U.S. 957 (1990). The court concurred with the decision in Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989) (ruling that the Oregon Bar is exempt from antitrust liability and that the attorney's claim that state bar's requirement violates the Racketeer Influenced and Corrupt Organizations Act is frivolous).

[FN89]. 470 P.2d 945 (Ore. 1970).

[FN90]. Id.

[FN91]. Id.

[FN92]. Id. In finding against the plaintiff, the Supreme Court of Oregon cited the U.S. Supreme Court case of Lathrop v. Donohue, 367 U.S. 820 (1961) (holding that the compulsory enrollment in the Wisconsin State Bar imposed only the duty to pay dues and upholding the constitutionality of the rules and bylaws). While the arguments for mandatory malpractice insurance are not identical to those for client security funds, they are in fact quite similar.

[FN93]. Hazard, supra note 58, at A17.

[FN94]. LEGAL MALPRACTICE REPORT, supra note 39. The statistics provided by the National Legal Malpractice Center show that the ten areas of law with the highest percentage of claims are the following:

Personal Injury -- Plaintiff 25.1%
Real Estate 23.3%
Collection & Bankruptcy 10.5%
Family Law 7.9%
Estate, Trust & Probate 7%
Corporate/Business Organization 3%
Criminal 3%
Personal Injury -- Defense 3.2%
Business Transaction/Commercial Law 3%
Worker's Compensation 2.1%

Id.

[FN95]. Debra Moss states: "Larger law firms have it a little easier because they are insured with the selective ALAS (Attorney's Liability Assurance Society) which insures firms of 40 or more lawyers." Moss, supra note 37, at 82.

[FN96]. BAR-RELATED INSURANCE COMPANY, supra note 16, at 102.

[FN97]. Couric, supra note 14, at 65-66.

[FN98]. Id. at 66.

[FN99]. Id.

[FN100]. See Holliday v. Jones, 215 Cal.App.3d 102 (1989) (awarding $400,000 in emotional distress damages against the lawyer when it was foreseeable that the lawyer's negligence would cause immediate and direct severe emotional distress to his client).

[FN101]. PAUL C. WEILER ET. AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 69-71 (1993). This study involved extensive reviews of hospital records to determine the number of negligently caused injuries which was then compared to the number of claims filed during the same period. Id. at 33-42, 71-73.

[FN102]. Id. at 70-71.

[FN103]. JEFFREY M. SMITH, PREVENTING LEGAL MALPRACTICE 1-2 (1981).

[FN104]. Sen. Pete V. Domenici, Health Care Reform: Yes: A Prime Factor, 78 A.B.A. J., Aug. 1992, at 42. Mr. Domenici introduced legislation that advocates moving most medical liability cases out of the courtroom and into binding arbitration. Id. He argues that arbitration would provide faster decisions as well as more predictable outcomes. Id.

[FN105]. Curt McConnell, Hayden Supports Reducing, Eliminating Mandatory Insurance, UPI, Aug. 2, 1988, available in LEXIS, NEXIS library, UPI file.

[FN106]. Couric, supra note 14, at 66.

[FN107]. Ralph Nader, The Myth of Medical Malpractice, ROLL CALL, July 19, 1993, available in LEXIS, Nexis Library, ROLL CALL file.

[FN108]. See generally Denise M. Orlinski, An Accountant's Liability to Third Parties: Bily v. Arthur Young & Co, 43 DEPAUL L. REV. 859, 886 (1994).

[FN109]. "Generally, it is established law throughout this country that an accountant does not guarantee correct judgment, or even the best professional judgment, but merely reasonable care and competence." Delmar Vineyard v. Timmons, 486 S.W.2d 914, 920 (Tenn. 1972) (citing Stanley L. Bloch Inc. v. Klein, 258 N.Y.S.2d 501 (1965)). See also Gammel v. Ernst & Ernst, 72 N.W.2d 364 (Minn. 1955) (holding accountants to high standard of reasonable care); Maryland Casualty Co. v. Cook, 35 F. Supp. 160 (E.D. Mich. 1940) (establishing accountant standards).

[FN110]. RESTATEMENT (SECOND) OF TORTS § 299A. See also Ryan v. Kanne, 170 N.W.2d 395, 404 (Iowa 1969). (stating that: "They cannot escape liability for negligence by a general statement that they disclaim its reliability . . . "

[FN111]. See, e.g., Rhode Island Hospital Trust National Bank v. Swartz, Bresenoff, Yavner & Jacobs, 455 F.2d 847, 851-52 (4th Cir. 1972).

[FN112]. 555 P.2d 399 (Idaho 1976).

[FN113]. Id. at 408.

[FN114]. Id.

[FN115]. Id.

[FN116]. See generally Nader, supra note 107.

[FN117]. Cal. Bus. & Prof. Code § 800 (1995).

[FN118]. Nader, supra note 107.

[FN119]. Id.

[FN120]. Id.

[FN121]. Id.

[FN122]. Id.

[FN123]. Geoffrey Hazard, one of the nation's leading experts on legal ethics and columnist for the National Law Journal, mentioned in a recent article a timely ABC "Prime Time" show that seemingly criticized the present legal discipline system. Hazard noted, "We all know that during the past decade there has been a barrage of criticism of lawyers' ethics." Geoffrey C. Hazard, Jr., Discipline By Numbers, NAT. LAW J., Apr. 11, 1994, at 21.

[FN124]. Id.

[FN125]. MODEL CODE EC 9-7.

[FN126]. MODEL RULES Rule 1.15 cmt. (stating that "[w]here such a fund has been established, a lawyer should participate").

[FN127]. "In many states, lawyer contributions to these funds still are made voluntarily, and clients' security funds often have failed where participation has been voluntary. For instance, in 1981, the Colorado state fund was essentially bankrupt, and in Minnesota a fund with $114,000 was faced with $850,000 of claims." M. Peter Moser, Ethical Issues of Compulsory Client Protection: The Model Rules and Beyond (unpublished article circulated by the ABA) (on file with author).

[FN128]. PREVENTING LEGAL MALPRACTICE, supra note 9, at 31.

[FN129]. For more information on clients' security funds, see Defrauded Client Assistance Program Strained; Md. Faring Well, THE DAILY RECORD, June 24, 1985, available in LEXIS, Nexis Library, THE DAILY RECORD file.

[FN130]. Cal. Bus. & Prof. Code §§ 6147-48 (1995). See also Schultz, supra note 13, at 5.21.

[FN131]. Id.

[FN132]. Id.

[FN133]. See Va. Sup. Ct. R., Pt. 6, § IV, Paragraph 14(d)(i) (mandating that professional law corporations must demonstrate their financial responsibility by filing with the Virginia State Bar either a certificate of insurance or an executed written agreement of all the shareholders of the corporation jointly and severally guaranteeing payment of valid final judgments for errors by the corporation up to a certain limit).

[FN134]. See generally Id.

[FN135]. HALL, supra note 32, at 4.

[FN136]. Id.

[FN137]. The Draft of Proposed Rules is as follows:
Attorneys to provide proof of financial responsibility
(A) At the time of payment of the annual membership fee, each active member shall also give proof of financial responsibility to the State Bar of Arizona as a condition precedent to active membership.
(B) The requirement of financial responsibility may be satisfied in any one of the following ways:
(i) Proof that the member currently has in force lawyers' professional liability insurance insuring the attorney against liability from damages resulting from any claim made against the attorney, arising out of the performance of professional services for others; the policy shall insure the attorney against liability for damages in the amount of $100,000.00 per claim and $300,000.00 aggregate. The deductible shall not exceed $5,000.00, except that the deductible may exceed that amount to the extent that one or more attorneys is a named insured under the policy and each insured attorney is a partner or shareholder in a group practice where each of the partners and shareholders are jointly and severally liable for the acts, errors and omissions of the partners, shareholders and their employees; in that event, the deductible amount shall not exceed $5,000.00 multiplied by the number of insured partners or shareholders.
(ii) The posting of $100,000.00 surety bond or an irrevocable letter of credit in the amount of $100,000.00 or $100,000.00 in cash, to be payable to any person presenting a valid final judgment of any court of competent jurisdiction in the State of Arizona arising out of the attorneys; [sic] performance of professional services.
(iii) Any other form of security acceptable to the Board of Governors of the State Bar of Arizona.
Schultz, supra note 13, at 5.18.

[FN138]. Id.

[FN139]. Bousquet, supra note 2.

[FN140]. Id.

[FN141]. Schultz, supra note 13, at 5.13.

[FN142]. Id.

[FN143]. Id.

[FN144]. Cf. Hazard, supra note 58, at A17.

[FN145]. Model Rule 5.1(b) provides, "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct." MODEL RULES Rule 5.1(b). See Randall Samborn, Innocent Attorneys Not Covered; Malpractice Policy, NAT. LAW J. June 1, 1992, at 3.

[FN146]. See Stanley Sporkin, Lawyer and Accountant Responsibility (Remarks Before the Conference on Lawyers and Accountant Liability and Responsibility), in REFORMING LEGAL ETHICS IN A REGULATED ENVIRONMENT 483-84 (1994) (describing the accounting profession's response to criticism as compared to the response of the legal profession). See also Ted Schneyer, Professional Discipline for Law Firms?, 77 CORNELL L. REV. 1 (1991) (contending that a system of law firm discipline should supplement individual discipline for attorneys).

[FN147]. Moskowitz, supra note 40, at F24. Moskowitz quotes Sheree Swetin, the ABA's specialist in professional liability, who states that "almost 50 percent of the claims come out of administrative or client-relations errors." Id.

[FN148]. Allen Snyder, a former chairman of the District of Columbia's Board on Professional Responsibility, commented, "There is a fine line between disciplinary issues and malpractice . . . . In many cases, ethics and malpractice merge or are closely related." Couric, supra note 14, at 64.

[FN149]. HALL, supra note 32, at 14.

[FN150]. Id.

[FN151]. Id.

[FN152]. By addressing questions about your policy coverage before any claims are filed, you may not be able to avoid a claim, but at least you will be prepared for it." Stock & Lange, supra note 28, at 92.

[FN153]. Current comparisons of the costs and benefits are inaccurate or simply incomplete since there is no statistical data proving public harm in the absence of a mandatory program.
END OF DOCUMENT

APPENDIX J

WHAT THEY DON'T KNOW CAN HURT THEM: WHY CLIENTS SHOULD KNOW IF THEIR ATTORNEY DOES NOT CARRY MALPRACTICE INSURANCE

Jeffrey D. Watters*

* Jeffrey Watters clerked for Justice Don Willett in 2008–09 and is now an associate at Baker Botts, L.L.P., in Houston. The author would like to thank Justice Willett for his mentorship and assistance during his clerkship. The views in this Article are that of the author and do not necessarily reflect the views of Justice Willett, Baker Botts, L.L.P., its individual lawyers, or its clients.

I. INTRODUCTION

A divorced mom with two young children enters your law office and tells a painful story. Her ex-husband sued to terminate her parental rights, so she hired an attorney to take and explain her side. Before the case went to trial, however, her attorney commits a major blunder that dooms the case. The upshot: Mom lost custody of her kids. Your research convinces you Mom has a strong legal-malpractice claim, but on the eve of trial, the previous attorney is disbarred and files for bankruptcy. These developments don't trouble you too much . . . until you learn the attorney didn't carry malpractice insurance. Game over: your client is left with nothing.[1]

Legal-malpractice insurance is an integral part of attorneys' protection against mistakes they make while practicing law, mistakes that often cost clients far more than what their attorneys could otherwise pay. Yet, for a variety of reasons, many attorneys don't carry malpractice insurance. Given this fact, what should the profession do to protect innocent clients who are injured by uninsured attorneys? One top-down approach is requiring all lawyers to carry legal-malpractice insurance. But mandating coverage is a heavy burden, and so far only Oregon has made it work. In bigger states like Texas, it is doubtful the Oregon approach will work.[2] Short of mandatory coverage is this middle-ground approach: requiring uninsured attorneys to disclose that fact to clients, who can decide for themselves how to proceed.[3]

---

[1] This scenario is loosely based on a story found in *State by State, Mandatory Malpractice Disclosure Gathers Steam*, 28 A.B.A. B. LEADER, Mar.–Apr. 2004, *available at* http://www.abanet.org/barserv/bl2804.html.

[2] Robert Johnston & Kathryn Lease Simpson, *O Brothers, O Sisters, Art Thou Insured?: The Case for Mandatory Disclosure of Malpractice Insurance Coverage*, PA. LAW., May–June 2002, at 28, 30.

[3] James Podgers, *Time-Out Call: Sponsor Holds Off on Proposal Regarding Malpractice Insurance Disclosures*, 89 A.B.A. J. 66, 66 (2003).

In this Article, I identify the main arguments both for and against mandatory disclosure of malpractice insurance. Then, I examine what other states have done in this area, focusing on states that have adopted mandatory disclosure rules and discussing what form those rules take. Finally, based upon the arguments of both sides and the experience of other states, I analyze whether a mandatory-disclosure rule is warranted and, if so, what form it should take. Given the need for clients to be fully informed and have all the information in front of them, I conclude that Texas should adopt a rule requiring attorneys to disclose if they do not have malpractice insurance directly to their clients as well as to the State Bar for publication on a website.

II. ARGUMENTS FOR MANDATORY DISCLOSURE

The proponents of a mandatory-disclosure rule have four main arguments: (1) whether an attorney has malpractice insurance is a material fact clients should know when making their decision on who represents them; (2) attorneys owe a heightened duty to their clients and also to the legal profession; (3) requiring disclosure will encourage attorneys to obtain malpractice insurance; and (4) disclosure gives the State Bar better information about the current state of malpractice insurance coverage.

A. Mandatory Disclosure Gives Clients the Information They Need so They Can Make an Informed Decision on Representation

Proponents of mandatory disclosure argue that clients deserve to know all information material to the representation before hiring an attorney.[4] Whether or not their prospective attorney carries malpractice insurance is something clients will want to know before making their decision.[5] In fact, in a telephone survey of the public done by the Texas State Bar, eighty percent of respondents said that when deciding to hire an attorney, it was either very important or moderately important to them to know whether their attorney carries malpractice insurance.[6] Additionally, those surveyed were asked if an attorney should be required to inform a potential client whether or not the attorney carries malpractice insurance, and seventy

[4] *See* Nicholas A. Marsh, Note, *"Bonded & Insured?": The Future of Mandatory Insurance Coverage and Disclosure Rules for Kentucky Attorneys*, 92 KY. L.J. 793, 805–06 (2004).

[5] *See* Robert Elder, *Proposal Would Require Lawyers to Tell Clients if They're Insured*, AUSTIN AM.-STATESMAN, May 21, 2008, at B6.

[6] *Id.*

percent of respondents agreed that the attorney should inform potential clients.[7]

This survey data shows that the public considers malpractice insurance an important factor when they are evaluating which attorney to hire to represent them. The focus, then, of a mandatory-disclosure rule is on giving clients a piece of information they consider important so that clients can make a fully informed decision. A mandatory-disclosure rule gives clients a chance to decide whether or not to work with an uninsured attorney, rather than force them to know enough to ask if their attorney has malpractice insurance first.[8]

On that same note, one reason why a mandatory-disclosure rule is preferable over putting the onus on clients to ask is that clients already assume attorneys must carry malpractice insurance.[9] If they come into the representation thinking that their attorney does carry malpractice insurance, then that impression should be corrected if it is in fact not true and the attorney does not carry malpractice insurance.

B. Attorneys Have a Heightened Responsibility to Their Clients and to the Legal Profession

Another argument for why attorneys should have to disclose if they do not carry malpractice insurance is that attorneys owe a fiduciary duty to their clients.[10] The fiduciary duty, encompassing the duties of good faith and loyalty, extends to letting clients know the status of the attorney's malpractice insurance.[11] The attorney should always act in the client's best interest and the special attorney-client relationship puts the onus on attorneys to disclose important facts material to the representation, such as their malpractice insurance status.[12]

Related to the fiduciary duty is the attorney's duty of communication—

---

[7] Mary Alice Robbins, *Survey: Public Wants to Know if Lawyer's Insured*, TEX. LAW., May 5, 2008, at 1, 1, *available at* http://www.law.com/jsp/LawArticlePC.jsp?id=1202421197904&slreturn=1&hbxlogin=1.

[8] Indiana State Bar Association, *Mandatory Malpractice Insurance to Be Debated Feb. 14*, RES GESTAE, Jan.–Feb. 2003, at 7, 10.

[9] *See* James E. Towery, *The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance*, VT. B.J., Fall 2003, at 35, 35.

[10] James C. Gallagher, *Should Lawyers Be Required to Disclose Whether They Have Malpractice Insurance?*, VT. B.J., Summer 2006, at 5, 5.

[11] *See id.*

[12] *Id.*

that is specifically informing the client of information the client would consider important, even if not instructed to do so.[13] It has been suggested that the duty of communication arises from an attorney's existing duties as the agent of his client, stemming from common law agency principles and from the attorney's existing fiduciary duties.[14] As the survey results discussed above indicate, whether their attorney has malpractice insurance is certainly something clients consider important.[15] Thus, with both fiduciary duties and an attorney's duties as an agent vesting a duty of communication in the attorney, attorneys might already have an implicit duty to tell clients whether or not they have malpractice insurance, even absent a formal rule recognizing it.[16]

Another responsibility attorneys have is to the legal profession. Due to the expectations clients have about malpractice insurance, clients are more easily injured when it turns out the attorney does not have malpractice insurance.[17] When a client is injured due to an attorney's negligence and there is no malpractice insurance to provide a safety net, then the client will be let down by the very person who is supposed to vindicate his rights.[18] By affirmatively taking steps and disclosing non-coverage to the client, attorneys represent the best part of our profession by pro-actively protecting clients.

C. Disclosure Encourages Lawyers to Obtain Malpractice Insurance

Proponents note that there is a coercive effect on attorneys that have to tell their clients they do not carry malpractice insurance.[19] It logically follows that if clients refuse to hire attorneys who do not carry malpractice insurance, then those attorneys will have to start carrying malpractice insurance in order to attract those clients.[20] And more attorneys carrying

---

[13] *See* Marsh, *supra* note 4, at 807–08.

[14] *Id.* at 806–07.

[15] *See supra* Part II.A.

[16] *See* Marsh, *supra* note 4, at 810; *see also* Samuel C. Stretton, *Clients Need to Know Whether Their Lawyer Has Malpractice Insurance*, 27 PA. L. WKLY. 1034, 1034 (2004).

[17] *See, e.g.*, *supra* Part I.

[18] *See* Nicole D. Mignone, Comment, *The Emperor's New Clothes?: Cloaking Client Protection Under the New Model Court Rule on Insurance Disclosure*, 36 ST. MARY'S L.J. 1069, 1081 (2005).

[19] Jason Miller, *New Rule Would Require Attorney Disclosures Regarding Malpractice Coverage*, 18 LAW. J. 7, 7 (2005).

[20] *See* Farbod Solaimani, Note, *Watching the Client's Back: A Defense of Mandatory*

malpractice insurance is a desirable goal in that more clients will be protected from their attorneys' mistakes.[21]

In this respect, proponents note that mandatory disclosure is better than mandatory coverage.[22] Rather than a blanket requirement that malpractice insurance be carried, mandatory disclosure will encourage attorneys to obtain malpractice insurance if that is what their clients find important.[23] But if clients do not consider malpractice insurance important, then the attorneys will not be compelled to carry malpractice insurance. Thus, a mandatory disclosure rule gives clients the power to determine what is important to them.

D. Disclosure Gives the State Bar Better Information About the Current State of Malpractice Insurance Coverage

Finally, proponents note a side benefit to mandatory-disclosure rules. One of the problems with outright mandating all attorneys carry malpractice insurance is the paucity of information regarding how many attorneys actually do not carry malpractice insurance.[24] The State Bar of Texas attempted to get a number by commissioning a survey and found that 36.2 percent of Texas attorneys do not carry malpractice insurance.[25] Still, that is just an estimate and it is hard to gauge exactly how many attorneys are without malpractice insurance. Some estimates are higher than the State Bar survey, with over fifty percent estimated to not have malpractice insurance.[26] If attorneys are required to disclose whether or not they have malpractice insurance to the State Bar, then the Bar will have better numbers to gauge the exact scope of the problem.

III. ARGUMENTS AGAINST DISCLOSURE

Opponents of a mandatory-disclosure rule argue: (1) there is no

Insurance Disclosure Laws, 19 GEO. J. LEGAL ETHICS 963, 974 (2006).

[21] *See id.*

[22] Steve N. Six, *Mandatory Malpractice Insurance Disclosure: Is the Time Right for Kansas?*, 72 J. KAN. B. ASS'N. 14, 14 (2003).

[23] *See id.*

[24] Gallagher, *supra* note 10, at 5.

[25] Mary Alice Robbins, *Bar Task Force Studies Insurance Disclosure Rule*, TEX. LAW., Nov. 19, 2007, *available at* http://www.law.com/jsp/article.jsp?id=1202435484624.

[26] Robert Elder, *Task Force Rejects Plan for Lawyers to Disclose Insurance*, AUSTIN AM.-STATESMAN, May 22, 2008, at B6.

evidence that a mandatory-disclosure rule is necessary; (2) a mandatory-disclosure rule will have an overall harmful effect; and (3) a mandatory-disclosure rule will only confuse or mislead clients.

A. Disclosure Is Not Necessary

The main argument against a mandatory-disclosure rule is that it simply is not necessary.[27] There is a lack of data that indicates that attorneys without malpractice insurance are a problem.[28] No one has shown a large amount of malpractice judgments that go unsatisfied due to a lack of malpractice insurance or that clients are seriously concerned with the issue.[29]

In fact, several attorneys have noted that their clients have never asked them whether or not they carry malpractice insurance, so it can't be all that important to them. The bottom line is that there is no need to change the status quo.

B. Disclosure Has Negative Side Effects

Not only is disclosure not necessary, but opponents claim that there will be a number of negative side effects to a mandatory-disclosure rule. First, a mandatory-disclosure rule encourages clients to choose attorneys based solely on who has malpractice insurance.[30] By giving clients something to latch onto, mandatory disclosure elevates malpractice insurance above other issues, such as competency to handle the matter and billing rates, that should play at least as important a role in the client's representation decision.[31]

Because disclosure will encourage clients to choose representation based solely on who has malpractice insurance, a mandatory-disclosure rule stigmatizes those attorneys who cannot afford it, which are disproportionately small firm and solo attorneys.[32] Not having malpractice insurance does not speak to the attorney's ability, experience, or the number

---

[27] *See* Edward C. Medrzycki, *Should Disclosure of Malpractice Insurance Be Mandatory?*, GP SOLO, Apr.–May 2003, at 37, 40.

[28] *Id.* at 41.

[29] *Id.*

[30] *See id.*

[31] *See id.*

[32] *Id.*

of past malpractice claims against that attorney.[33] All it usually means is that the attorney cannot afford malpractice insurance on the small amount of money he brings in.[34] However, that is not what the client will perceive if a mandatory-disclosure rule is enacted.[35]

Thus, to avoid losing clients, these solo and small firm attorneys will be forced to acquire malpractice insurance.[36] But since their operating margin is already so slim, the costs of acquiring malpractice insurance will be passed on to their clients, thereby raising the cost of legal representation and making it less affordable.[37] This development would especially be alarming since solo and small firm attorneys most often serve the poor and low-income clients who are most in need of affordable legal services.[38]

Another negative side effect to a mandatory-disclosure rule is that by alerting clients to the potential of insurance coverage, it will encourage them to sue for malpractice more readily.[39] If clients know a readily-accessible source of money in insurance is potentially available, they will be more ready to sue if they are unhappy about the results of their litigation.[40] It will also encourage frivolous lawsuits from clients hoping for a quick settlement with the insurance company.[41]

Another negative side effect of a mandatory-disclosure rule is that it will shift regulation of the profession from the State Bar over to the insurance companies.[42] By having clients decide representation based on who does and does not have malpractice insurance, it encourages all attorneys to obtain malpractice insurance.[43] But not all attorneys can be covered.[44] Insurance companies will refuse to cover some attorneys, especially those

---

[33] *See id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *See* Gallagher, *supra* note 10, at 6.

[38] *Id.*

[39] Ed Poll, *A Bigger Burden, Mandatory Malpractice Insurance Disclosure: Who Benefits?*, 7 LEGAL MGMT. 24, 26 (2006).

[40] *Id.*

[41] *See* Bill Brooks, *Stage Set for House Debate Regarding Mandatory Disclosure of Malpractice Coverage*, RES GESTAE, June 2003, at 13, 13.

[42] Rodney Snow, *Is Mandating Disclosure in Your Fee Letter That You Do Not Carry Malpractice Insurance a Sound Idea?*, 18 UTAH B.J. 12, 13 (2005).

[43] *See supra* Part II.C.

[44] *See* Brooks, *supra* note 41, at 13.

in high-risk practice areas and new attorneys who are unproven.[45] Requiring disclosure will, in effect, let insurance companies determine who can practice law.[46]

C. *Disclosure Will Not Be Helpful*

Opponents also claim that a mandatory-disclosure rule will not really be all that helpful. First, mandatory disclosure itself is only a partial remedy. The only real way to ensure that all clients are protected from their attorney's malpractice is to require that all attorneys carry malpractice insurance.[47] Since the proposed rule only extends to disclosure and not coverage, the same evils currently present (i.e. unpaid malpractice claims) will continue.

Furthermore, disclosure is inherently deceptive. Telling clients that the attorney is covered by malpractice insurance alone is not enough. Most malpractice policies are claims-made, and not occurrence, policies, which means insurance will only cover claims brought in the policy period, regardless of when the malpractice actually took place.[48] Just because an attorney is covered by malpractice insurance now, that does not mean he will continue to be covered in the future when the client brings a malpractice case.[49] Furthermore, each malpractice policy has a number of exclusions, most notably an intentional-acts exclusion, that will cause a number of claims not to be covered.[50] So a bare-bones disclosure does not address the many reasons a claim will not be covered, which leads back to the original problem of malpractice without a remedy.

Additionally, just disclosing that an attorney has malpractice insurance does not speak to the amount of coverage that the attorney has.[51] Passing a mandatory-disclosure rule will encourage attorneys to purchase cheap policies that do not really provide any coverage at all, just so they can say

---

[45] *Id.*

[46] *Id.*

[47] *See* Solaimani, *supra* note 20, at 974; *see also* Edward Poll, Commentary, *Risky Business: A Look at Liability Insurance*, MINN. LAW., May 12, 2008, *available at* http://www.minnlawyer.com/article.cfm?recid=77408.

[48] *See* Medrzycki, *supra* note 27, at 40.

[49] *Id.*

[50] George A. Berman, *Mandatory Insurance Disclosure: A Solution in Search of a Problem*, BOSTON B.J., May–June 2005, at 31, 31–32.

[51] *See* Indiana Bar Association, *supra* note 8, at 8.

that they have malpractice insurance.[52] And even if adequate policy limits are purchased, most malpractice policies are eroding, with the cost of the attorney's defense coming out of the policy limits.[53]

Finally, opponents argue that disclosure will not help because clients will not understand what malpractice insurance is and that it is not there for their benefit.[54] Many clients will be surprised, for example, to learn that the insurance company will in fact fight to try and prove the attorney did not commit malpractice and will not pay the claim unless and until they absolutely have to.[55]

IV. EXPERIENCE OF OTHER STATES

In light of the more abstract arguments over mandatory-disclosure rules, it is instructive to see what other states have done in considering mandatory-disclosure rules. In looking at their experiences, we can see the various models of a mandatory-disclosure rule and the resulting ramifications in each state.

To date, of the twenty-eight states that have faced this same issue, twenty-five of them have adopted some form of a mandatory-disclosure rule and only four have not.[56] States that have adopted a mandatory-disclosure rule fall into two main categories: those that mandate disclosure to the State Bar and those that mandate disclosure directly to the client.[57] Each group of states is considered here, as well as the ABA Model Rule and the unique situations in South Dakota and Oregon.

A. ABA Model Rule

After four years of discussion and debate, the American Bar Association House of Delegates narrowly passed a model mandatory-disclosure rule in 2004.[58] While the ABA usually leads the charge on new ethical rules, by

---

[52] *See id.*

[53] *See* Berman, *supra* note 50, at 31.

[54] *See* Mendrzycki, *supra* note 27, at 40.

[55] *See* Berman, *supra* note 50, at 32.

[56] *See* ABA Standing Committee on Client Protection, Chart of State Implementation of ABA Model Rule on Insurance Disclosure, http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf (last visited Dec. 9, 2009) [hereinafter ABA Chart].

[57] *See* Solaimani, *supra* note 20, at 975.

[58] ABA Annual Meeting, *ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 411

the time the model rule was adopted ten states had already passed mandatory-disclosure rules.[59] Subsequent to the adoption of the model rule, fourteen more states have adopted mandatory-disclosure rules.[60]

The ABA model rule has been called the "most lawyer-friendly" version of a mandatory-disclosure rule.[61] It mandates disclosure only as to whether a lawyer has malpractice insurance or not.[62] Disclosure is made only to state bar regulators and not to the general public.[63] The model rule is silent as to other aspects of disclosure, such as the best way to transmit that information to the public and minimum coverage limits.[64] Decisions on those issues were left to the individuals states.[65] Finally, the model rule is a rule of court and not a disciplinary rule.[66] Thus, the penalty for non-compliance is a suspension from practice until the attorney provides the information and not a formal disciplinary proceeding.[67]

B. States That Have Declined to Pass a Disclosure Rule

To date, only four states have rejected a disclosure rule.[68] In Arkansas, the State Bar Board of Governors recommended adoption of such a rule, but that recommendation was defeated by the House of Delegates.[69] Similarly, in Kentucky, the State Bar has twice recommended adoption of a disclosure directly to clients rule, only to have both suggestions rejected by the Kentucky Supreme Court.[70] Even given that, Kentucky is not totally bereft of disclosure. Attorneys who practice as limited liability corporations

---

(2004), *available at* http://litigationcenter.bna.com/pic2/lit.nsf/id/BNAP-63Q28B (last visited Dec. 9, 2009) [hereinafter ABA Annual Meeting].

[59] *Id.*

[60] *See* ABA Chart, *supra* note 56.

[61] *See* ABA Annual Meeting, *supra* note 58, at 412.

[62] *See* ABA Model Court Rule on Insurance Disclosure, http://www.abanet.org/cpr/clientpro/malprac_disc_rule.pdf (last visited Dec. 9, 2009).

[63] *See id.*

[64] *See id.*

[65] *See* ABA Annual Meeting, *supra* note 58, at 412.

[66] *Id.*

[67] *Id.*

[68] *See* ABA Chart, *supra* note 56.

[69] GRIEVANCE OVERSIGHT COMM. APPOINTED BY THE SUP. CT. OF TEX., REPORT 2009 3 (2009), http://www.txgoc.com/Final_2009_Report.pdf [hereinafter GRIEVANCE OVERSIGHT COMM. REPORT].

[70] *Id.*

(LLCs) are required to make public disclosure.[71] Recently, both Connecticut and Florida have also voted to reject disclosure rules.[72]

C. Virginia

The great majority of states that have adopted a mandatory-disclosure rule have followed the ABA model rule.[73] These states only require attorneys to disclose whether they have malpractice insurance only to their respective state bar.[74] The best example of how this type of disclosure works is in Virginia, which has the simplest and least intrusive disclosure requirement.[75]

In Virginia, each attorney must disclose whether or not he has malpractice insurance on the state bar's annual registration statement.[76] Notably, the Virginia rule does not include any minimum limits that an attorney must certify he has, just simply whether or not the attorney currently has malpractice insurance written by an insurer authorized to do business in Virginia.[77] The Virginia State Bar then takes that information from the annual registration statements and makes it available to the public via a searchable database on its website.[78] Plugging in the first and last name of an attorney pulls up all those matches who do not carry malpractice insurance.[79] Since first putting up the searchable database web page, Virginia officials report that the web page has averaged 1,200 hits a month.[80]

While most states that follow this model disclose this information to the public via a webpage, some states make the information available on request or do not make that information publicly available at all.[81]

---

[71] *Id.*

[72] *See* ABA Chart, *supra* note 56.

[73] *Id.*

[74] *Id.*

[75] Johnston & Simpson, *supra* note 2, at 31.

[76] *See* VA. SUP. CT. R. 6:4-18.

[77] *See id.*

[78] *Id.*; Virginia State Bar, Attorney Search, http://www.vsb.org/attorney/attSearch.asp (last visited Jan. 3, 2010).

[79] *Id.*

[80] Paul Felsch, *Illinois Supreme Court Amends Rule on Malpractice Insurance*, ST. LOUIS DAILY REC., July 21, 2004.

[81] *See* ABA Chart, *supra* note 56.

D. South Dakota

On the complete opposite side of the spectrum of Virginia is South Dakota. South Dakota has the most stringent reporting requirement of any state.[82] In essence, the South Dakota rule requires disclosure to the client or potential client in every communication with them.[83]

Unlike all the other states, this rule requires continuous reporting, with disclosure mandated in "every written communication with a client."[84] The rule also specifies that the disclosure must be "in black ink with type no smaller than the type used for showing the individual lawyer's names."[85] Also unlike other states, the disclosure requirement extends to every advertisement by the attorney, whether written or in the media.[86] To avoid the impact of the South Dakota mandatory-disclosure rule, the attorney must have malpractice insurance of at least $100,000.[87]

E. Alaska and Pennsylvania

Somewhere between Virginia and South Dakota are the five states that require disclosure directly to the client.[88] The best examples of how this type of disclosure rule works are Alaska and Pennsylvania.

Alaska was the first state to require any form of disclosure when it passed its rule in 1999.[89] The Alaska rule mandates that an attorney must inform a client in writing if the attorney does not have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate.[90] The rule also requires that the attorney keep a record of the written disclosures for six years after the end of the attorney's representation of that client.[91] While the rule itself does not require any specific language to be used in the written disclosure, the comments to the rule suggest language

---

[82] *See* Marsh, *supra* note 4, at 813.

[83] *Id.*

[84] S.D. R. PROF'L CONDUCT 1.4(d).

[85] *Id.* R. 7.5(e).

[86] *Id.* R. 7.2(k)(l).

[87] *Id.* R. 1.4(c).

[88] *See* ABA Chart, *supra* note 56.

[89] Ronald E. Mallin & Jeffery M. Smith, 5 LEGAL MALPRACTICE § 36:1 (West 2008 & Supp. 2009).

[90] ALA. R. PROF'L CONDUCT 1.4(c).

[91] *Id.*

that can be used.[92]

While this was the early approach to mandatory disclosure, with two other states adopting the direct-to-client approach within the first two years of the adoption of the Alaska rule[93], most of the states that subsequently adopted a mandatory-disclosure rule modeled the ABA approach discussed above.[94] Recently, however, Pennsylvania became the most recent jurisdiction to adopt a direct disclosure-to-client rule.[95]

F. Oregon

Oregon is unique in that it eschews a mandatory-disclosure rule in favor of mandatory malpractice coverage.[96] In the 1970s, when faced with a malpractice insurance crisis, many state bar associations formed their own insurance programs to compete against the insurance companies.[97] Oregon, however, took the movement one step further by making their bar association's insurance coverage both mandatory and exclusive.[98] This scheme ensures that everyone participates and thereby spreads the risk.[99] As of 2000, approximately 6600 lawyers participated in the Professional Liability Fund.[100] Coverage is provided at $300,000 per claim and $300,000 aggregate per year and the cost of that coverage in 2000 was $1800 per attorney.[101]

---

[92] *Id.* (Alaska Comment).

[93] James E. Towery, *The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance*, VT. B.J., Fall 2003, at 35, 35–36 (noting that South Dakota passed a disclosure directly to client rule in 1999 and Ohio in 2001).

[94] *See* ABA Chart, *supra* note 56.

[95] Asher Hawkins, *Malpractice Insurance Disclosure Rule Ok'd*, THE LEGAL INTELLIGENCER, Jan. 11, 2006.

[96] *See* Marsh, *supra* note 4, at 800. While Oregon is the only state that currently requires malpractice insurance coverage, Virginia is considering the issue. *See* Darrel Tillar Mason, *Mandatory Malpractice Insurance—It's Time to Call the Question*, US ST. NEWS, Sept. 4, 2008, *available at* 2008 WLNR 16916357 (*also available at* http://vsb.org/site/news/item/mandatory-malp-ins-080408/).

[97] *See* KIRK R. HALL, OR. ST. BAR PROF'L LIAB. FUND, MINIMUM FINANCIAL RESPONSIBILITY FOR LAWYERS, 14–15 (2000).

[98] *See id.* at 15.

[99] *See id.*

[100] *Id.*

[101] *Id.* at 15–16.

V. ANALYSIS

After review of the arguments for and against and how other states have handled this issue, Texas is faced with two distinct, yet related questions. First, is there a need for a mandatory disclosure of an attorney's malpractice insurance status? Second, if there is a need for mandatory disclosure, what form should the disclosure take?

A. Is Disclosure Needed?

First, does Texas need a rule for mandatory disclosure of an attorney's malpractice insurance coverage? I believe that Texas does. The principal argument against disclosure is that not enough evidence exists to support a mandatory-disclosure rule.[102] But these types of claims do not lend themselves to being easily quantifiable.[103] Much more numerous than legal malpractice judgments languishing unpaid on court dockets are those cases that are never filed in the first place due to it being financially infeasible without the prospect of malpractice insurance.[104] There is no real way to empirically measure the exact extent of the problem.

Additionally, the arguments for mandatory disclosure do not derive their weight from recitation of statistics.[105] Rather, the arguments are more intangible in nature, focusing on disclosure being the right thing to do.[106] Clients deserve to have all relevant information at their disposal when making the decision on which attorney to hire.[107] And the public certainly considers their attorney's malpractice insurance coverage to be important, as evidenced by the State Bar's survey.[108] This obligation is further underscored by the nature of the attorney-client relationship. In fact, commentators have suggested that a duty to disclose the attorney's malpractice coverage already exists implicitly under the attorney's fiduciary duty and the duty of communication.[109]

While malpractice insurance is primarily to protect attorneys and their assets, its availability does provide a significant amount of client protection,

---

[102] Mason, *supra* note 96.

[103] *Id.*

[104] *See* Towery, *supra* note 93, at 36.

[105] *See supra* Part II.A.

[106] *See id.*

[107] *See id.*

[108] *See id.*

[109] *See* Gallagher, *supra* note 10, at 5; *see* Marsh, *supra* note 4, at 807–08.

even if that is not its primary purpose.[110] In fact, legal malpractice claims are the only avenue available to most clients when their attorney negligently handles their case.[111] The grievance system is only engaged when the attorney breaches a rule, not when he commits simple negligence.[112] Further, even when restitution is available in grievance system cases, clients frequently suffer harm beyond the required restitution.[113] And back-up measures like Client Protection Funds only compensate a client when the client has suffered loss due to the attorney's misappropriation or theft, not when the attorney commits malpractice.[114]

An additional reason in favor of the Bar adopting a disclosure rule is that it continues the tradition of the profession regulating itself. While this has been a long-standing tradition, state legislatures have increasingly intruded on that prerogative.[115] Far from a theoretical possibility, legislative intrusion has become a reality in Texas on this exact issue. After a State Bar Task Force voted to not recommend any disclosure rule, proponents warned of a backlash in the Legislature.[116] In the very next session, Representative Naishtat introduced a bill that would require the Texas Supreme Court to adopt a rule mandating disclosure if an attorney lacked professional liability insurance.[117] That bill would have required the attorney either display in a prominent location a notice that the attorney is not covered by professional liability insurance or provide notice in some other manner.[118] While that bill did not pass, it shows that the issue is on the Texas Legislature's radar and that it is monitoring the situation.

Beyond the arguments in favor of a mandatory-disclosure rule, the parade of horribles trotted out by opponents is not borne out by other states'

---

[110] *See* Mason, *supra* note 96.

[111] *See* ABA Model Court Rule on Insurance Disclosure, *supra* note 62, at 4.

[112] *Id.*

[113] Editorial, *Time May Be Right for Mandatory Malpractice Insurance*, MICH. LAW. WKLY., Oct. 27, 2003, *available at* 2003 WLNR 17714381.

[114] State Bar of Michigan, Client Protection Fund History, http://www.michbar.org/client/history.cfm#1(last visited Dec. 28, 2009).

[115] *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1687 (1994). *See generally* Mignone, *supra* note 18, at 1102 ("[I]f lawyers wish to maintain a self-regulatory status and privileges in society, they must collectively address the current issues and develop appropriately responsive reforms.").

[116] Robert Elder, *Task Force Rejects Plan for Lawyers to Disclose Insurance*, AUSTIN AM.-STATESMAN, May 22, 2008, at B6.

[117] *See* Tex. H.B. 2825, 81st Leg., R.S. (2009).

[118] *Id.*

experience with mandatory-disclosure rules.[119] Disclosure rules have been on the books for ten years in some states and none of the negative consequences alleged by opponents have materialized.[120] Even in the states like Ohio that require more aggressive disclosure directly to clients, there have been no problems.[121]

And while just because an attorney has coverage today does not mean that the attorney will continue to carry malpractice insurance in the future, the ABA Client Protection Committee found that from experience in Alaska, most attorneys who have malpractice insurance will most likely continue to carry it in the future.[122] Thus, the value in making the information available outweighed the potential to mislead clients.[123] Further, the Model Rule's solution was to have attorneys disclose not only that they had coverage, but also that the attorneys intended to maintain their coverage while practicing law.[124] This addition offers some additional protections against misleading information that opponents claim as a problem.

Additionally, the Supreme Court of Texas Grievance Oversight Committee investigated whether requiring disclosure would harm attorneys.[125] After a review of professional liability policies already on the market and the prospect of the State Bar procuring a preferred provider for professional liability insurance, the Grievance Oversight Committee "challenge[d] that the mere addition of a disclosure requirement would force lawyers out of business."[126]

In fact, far from experiencing any negative side effects, many states

---

[119] *See* Carole J. Buckner, *Malpractice Insurance Disclosure Lurches Toward Approval*, ORANGE COUNTY LAW., Apr. 2008, at 50, 51–52.

[120] *Id.*; *see also* Dick Dahl, *Legal Malpractice Coverage Disclosure Controversial in California*, MINN. LAW., Oct. 16, 2006, *available at* 2006 WLNR 24573546.

[121] *See* Jane Pribek, *American Bar Association's House of Delegates Adopts Rule on Insurance Disclosure*, MINN. LAW., Aug. 16, 2004, *available at* WLNR 22296410.

[122] *See* ABA Model Court Rule on Insurance Disclosure, *supra* note 62, at 5.

[123] *Id.*

[124] *See* Pribek, *supra* note 121.

[125] *See* GRIEVANCE OVERSIGHT COMM. REPORT, *supra* note 69.

[126] *Id.* The Committee noted that the Texas Lawyers Insurance Exchange (TLIE) offers special rates to first-year attorneys with premiums at $500 yearly for $100,000 per claim and $300,000 aggregate coverage. *Id.* at 5. This rate increases over time so that by the fourth year of practice, the premium is up to $1,750. *Id.* at 5–6. The Committee also noted that lawyers who are employed full-time by legal aid organizations are covered for free under the State Bar's insurance plan. *Id.* at 6.

report a positive response to their mandatory-disclosure rule. In Alaska, South Dakota, and Virginia, the percentage of attorneys carrying malpractice insurance has risen after the adoption of a mandatory-disclosure rule.[127]

Further, the clear trend among the states is for adoption of a mandatory-disclosure rule. To date, only four states have decided against mandatory disclosure.[128] In contrast, twenty-four states over the past ten years have adopted some form of a mandatory-disclosure rule.[129]

The form that a mandatory-disclosure rule takes can address the rest of the arguments against disclosure. Most states require disclosure only if the attorney does not carry malpractice insurance.[130] There is no disclosure to the client that the attorney does carry malpractice insurance.[131] Thus, concerns about encouragement of litigation are not valid concerns since they are predicated on an affirmative disclosure of coverage that would not exist under the proposed mandatory disclosure rule. To avoid having attorneys buy any policy to avoid disclosure, some states also require a certain minimum amount of coverage, usually at least $100,000 per claim and $300,000 in aggregate.[132] This minimum amount of coverage is chosen in most state rules for two reasons: it is usually the minimum amount of coverage that most professional liability carriers offer and such limits would cover more than ninety percent of malpractice claims.[133]

---

[127] GRIEVANCE OVERSIGHT COMM. REPORT, *supra* note 69 (noting an increase in the percentage of attorneys who carried malpractice insurance from eighty percent before the rule to ninety-six percent after the adoption of the rule); *see also* Betty Shaw, *A Look at Reporting Malpractice Insurance Coverage*, MINN. LAW., Apr. 5, 2004, *available at* http://www.mncourts.gov/lprb/fc04/fc040504.html (noting a decrease in Virginia in the number of uninsured attorneys from forty percent to ten percent); *see also* Yvette Donosso Diaz, *Why the Bar Might Mandate Disclosure of Uninsured Practice*, UTAH B.J., Sept.–Oct. 2005, at 8, 10 (citing anecdotal evidence of a "significant number" of attorneys who obtained malpractice insurance in light of the adoption of mandatory-disclosure rules in Alaska and South Dakota).

[128] *See* ABA Chart, *supra* note 56.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] ALA. R. PROF'L CONDUCT 1.4(c); N.H. R. PROF'L CONDUCT 1.19; PA. R. PROF'L CONDUCT 1.4(c); S.D. MODEL R. PROF'L CONDUCT 1.4(c); UTAH R. PROF'L CONDUCT 1.4(c) (proposed).

[133] *See* Mason, *supra* note 96; *see also* Michael Dayton, *N.C. State Bar Adopts Rule on Disclosure of Malpractice Insurance*, N.C. LAW. WKLY., Aug. 4, 2003, *available at* 2003 WLNR 17711833.

While it is true that mandatory-disclosure rules are no panacea, they have been lauded as a good middle ground that does not mandate that attorneys obtain insurance, but does encourage coverage and lets clients have the information they need to make an informed choice.[134]

B. What Type of Disclosure?

Given both the compelling reasons for adopting a disclosure rule and the lack of consequences in states that have already adopted disclosure rules, the question then turns to what form disclosure should take. As discussed above, the most common types of mandatory disclosure rules are disclosure to the state bar and disclosure directly to the client.[135]

Both forms of disclosure have their strong and weak points. Disclosure to the state bar is easily enforceable, gives the state bar accurate statistical information relating to the prevalence of malpractice insurance coverage, and allows clients to know the status of an attorney's malpractice insurance coverage even before the initial meeting with the attorney.[136] However, disclosure to the state bar does not ensure that the information gets to potential clients. Only the informed clients who know enough to affirmatively ask will seek that information out. If most clients do not know that attorneys are not required to carry malpractice insurance, then they will not know enough to look for that information. It would not occur to a client to attempt to look up this information on a website.[137] And that would not protect the type of client most in need of a mandatory-disclosure rule, that being the uninformed client. Sophisticated clients like banks, insurance companies, and corporations usually require proof of insurance before retaining an attorney, leaving at risk the unsophisticated clients who assume their attorney already has coverage.[138]

On the other hand, disclosure to the client directly addresses the main argument in favor of a disclosure rule: that all clients be fully informed if their attorney does not carry malpractice insurance. But this method of disclosure is not easily enforceable as the only way that the state bar will

---

[134] Editorial, *Financial Responsibility for Malpractice*, 175 N.J. L.J. 22, 22 (2004).

[135] *See* ABA Chart, *supra* note 56.

[136] *See* Felsch, *supra* note 80.

[137] Lisa K. Bruno, *A Proposal Requiring Boston Attorneys That Lack Liability Insurance to Reveal That to Their Clients*, MASS. LAW. WKLY., Feb. 2, 2004, *available at* 2004 WLNR 22689784.

[138] *See* Ramos, *supra* note 115, at 1719; ABA Chart, *supra* note 67.

know if disclosure is occurring is if a client is aware enough to report a violation. Further, without the state bar knowing who is and is not covered, it makes it difficult to determine the impact of a disclosure rule on the number of uninsured attorneys. [139] Finally, direct to client disclosure only occurs once the client is at the attorney's office. There is no way for the client to find out the attorney's malpractice insurance status before the visit.

Given that each form of disclosure has its problems, I believe that both disclosure to the bar and disclosure to clients are inadequate, by themselves, to fully insure that clients are getting the maximum benefit of required disclosure. After all, the key in crafting a mandatory disclosure rule is to tie the disclosure to the harm. If we really are concerned about giving clients the information necessary to make an informed decision, then the rule should require written disclosure directly to the client to ensure all clients are informed. To do otherwise would undercut the best argument in favor of a mandatory disclosure rule.

However, direct client disclosure should not be the only means of disclosure. Disclosure to the state bar is not a wholly inadequate solution, just an incomplete one.[140] If disclosure to the state bar is coupled with direct disclosure to the client, it can be a strong two-pronged approach to client protection. All of the benefits of disclosure to the state Bar (statistical purposes, savvy consumers who want to know ahead of time, and to ensure compliance with the rules) will be realized without the downside of leaving most clients in the dark. The two approaches can even build on one another.

For example, the notice given directly to the client can include on it the website address that includes the searchable database. Similar to what was proposed in Minnesota, the website can be much more than just a searchable database. Instead, it can be expanded into an educational resource to do such things as explain why an attorney might not carry malpractice insurance, more fully develop what professional liability insurance is and is not, and suggest questions for potential clients to ask their attorneys to more fully flesh out the malpractice insurance issue.[141] Thus, both types of disclosure could work hand in glove to emphasize the best part of both models, while at the same time eliminating their respective

[139] Johnston & Simpson, *supra* note 2, at 28.

[140] *Id.* at 32.

[141] Michelle Lore, *MN State Bar Association Committee Seeks Reporting of Legal Malpractice Coverage*, MINN. LAW., Apr. 11, 2005, *available at* 2005 WLNR 25815235.

negative aspects.

This type of dual-disclosure mechanism was recently under consideration by the California State Bar.[142] In that discussion, a special Task Force did not want to choose between disclosure to the state bar or direct disclosure to the client.[143] In recommending a model that encompassed both, the Task Force cited the need for the information to get directly to the client and not burdening consumers of legal services by making them hunt for that information.[144] At the same time, the Task Force wanted to make the information publicly available through the California State Bar, giving potential clients the ability to ascertain the attorney's malpractice insurance status before contacting him about potential representation.[145] Ultimately, the Task Force concluded that a dual-disclosure rule best maximized consumer protection and a client's right to know.[146]

VI. CONCLUSION

Texas faces a thorny issue that inspires passionate debate on both sides. Those in favor of mandatory disclosure of malpractice insurance argue it's the right thing to do and will give clients the information they need to make informed decisions. Opponents counter there is no demonstrated need for mandatory disclosure, and such a rule will spark harmful side effects.

In looking at how anti-disclosure objections have played out in other jurisdictions, twenty-four out of twenty-eight states that have considered mandatory disclosure have adopted some form of that rule. The earliest such adoptions took place roughly a decade ago, so a data set exists that reveals the real-world impact of mandatory disclosure. On the whole, those twenty-four states have had a positive experience with mandatory disclosure, with none experiencing the adverse effects predicted by opponents.

---

[142] *See* Buckner, *supra* note 119, at 50–51. While the Task Force recommended a dual-disclosure rule, the California State Bar's Board of Governors voted 16–4 for a disclosure rule that only mandated disclosure to the client and only if the total amount of the attorney's work on the matter would be more than four hours. *See* ABA Chart, *supra* note 56.

[143] ST. BAR OF CAL. INS. DISCLOSURE TASK FORCE, STATE BAR OF CALIFORNIA INSURANCE DISCLOSURE PROPOSAL—JUNE 2006 REPORT (2006), *reprinted in* 752 PLI/LIT 255, 266 (2006).

[144] *Id.*

[145] *Id.*

[146] *Id.*

If mandatory disclosure is warranted, the best form for such a rule is to require dual-disclosure: directly to the client and also to the State Bar of Texas. Such a dual-disclosure requirement meets the need of adequately informing the client and the State Bar of Texas and best marries the arguments in favor of mandatory disclosure with a rule that effectuates those arguments.

APPENDIX K

University of Cincinnati Law Review

Volume 79 | Issue 2 Article 9

10-17-2011

ATTORNEY SELF-DISCLOSURE

Benjamin Cooper

ATTORNEY SELF-DISCLOSURE

*Benjamin P. Cooper**

How do people with legal problems find an appropriate lawyer? For unsophisticated users of legal services—lower- and middle-income individuals and small businesses—it is a longstanding and vexing problem. Before hiring a lawyer, consumers want to know the answers to a variety of questions. Has the lawyer ever been disciplined? Has the lawyer ever been sued for malpractice? Does the lawyer carry malpractice insurance? Does the lawyer have the appropriate experience and expertise to handle this matter? In this information age, a "Google" search should yield answers to these questions, but, surprisingly, this critical information is difficult and sometimes impossible for consumers to find. Moreover, lawyers have no legal obligation to provide this information to prospective clients. As a result, many consumers settle for a lawyer who does not fit their needs or choose not to hire a lawyer at all.

This Article proposes a novel approach to solving this problem. It argues that the professional duty of communication that is applicable to the lawyer–client relationship should be extended to the lawyer–prospective client relationship. Thus, the lawyer should owe the prospective client a duty to provide sufficient information about himself—what I call "lawyer-specific information"—so that the consumer can make an informed decision about whether to hire the lawyer. At a minimum, this disclosure should answer the questions posed above.

Part I of this Article describes the lack of lawyer-specific information available to consumers. Part II explores the current legal obligations of lawyers to prospective clients. Although lawyers owe prospective

* Assistant Professor of Law, University of Mississippi School of Law. J.D. University of Chicago Law School, B.A. Amherst College. I would like to thank the Lamar Order of the University of Mississippi School of Law for its financial support. I am also grateful to the organizers of the New Scholars Panel at the 2009 meeting of the Southeastern Association of Law Schools for giving me an opportunity to present this paper and to those who attended my presentation and gave me very helpful feedback. I would also like to express my gratitude to Leslie Levin for giving me early guidance on this project. Kate Bogard and Brooke Bullard provided helpful research assistance.

clients a variety of quasi-fiduciary duties, they have no obligation to provide lawyer-specific information. Part III sets forth the theoretical, moral, and public policy justifications for requiring lawyers to disclose lawyer-specific information: (1) closing the information gap; (2) consumer protection; (3) the moral and philosophical concept of informed consent; (4) fulfilling prospective clients' expectations; and (5) improving public confidence in the legal profession. Part IV compares a doctor's obligation to disclose physician-specific information to consumers with the lawyer's obligation. Although it is easier for consumers to find out information about prospective doctors than prospective lawyers, some courts have nevertheless held doctors liable for failing to disclose such information. This comparison to doctors makes the case for attorney self-disclosure even stronger. Part V sets forth a proposed amendment to the rules of professional conduct that would require lawyers to disclose lawyer-specific information to prospective clients.

INTRODUCTION

How do people with legal problems find a lawyer? Most do so through word-of-mouth.[1] For sophisticated users of legal services, such as large companies and wealthy individuals, a few phone calls to their "wide network of contacts" generally yield good results.[2] Moreover, once they have some leads, these sophisticated legal consumers know where to look to find additional information—for example on Westlaw or Lexis—about what kind of cases their prospective lawyers have handled and what results they have achieved.[3] Their experience and

1. Michael S. Harris et al., *Local and Specialized Outside Counsel*, in 1 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 20:12 (Robert L. Haig ed., 2010) ("The most obvious, the most traditional, and (frequently) the most productive source of attorney referrals is word-of-mouth."); Steven K. Berenson, *Is It Time For Lawyer Profiles?*, 70 FORDHAM L. REV. 645, 648 (2001) (citing a Martindale-Hubbell survey).

2. Harris et al., *supra* note 1, § 20:12 (noting that sophisticated corporate counsel generally can contact: "(1) other attorneys within the company itself; (2) existing outside counsel for the company who has a vested interest in satisfying the company in hope of obtaining repeat business; and (3) personal friends who presumably do not want you to lose your job").

3. *Id. See also* Fred C. Zacharias, *The Preemployment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?*, 49 WM. & MARY L. REV. 569, 581 (2007) ("[S]ophisticated clients are capable of determining each lawyer's education and experience, requesting references . . . and comparing the fees of multiple lawyers they consult."); Benjamin Barton, *Why do We Regulate Lawyers? An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 439–40 (2001).

background also give them the ability to understand the data that they uncover.

But for the rest of Americans without good contacts in the legal community—infrequent users of legal services such as small business owners and lower- and middle-income individuals—the problem of finding a good lawyer is a longstanding and vexing one.[4] Some look in the phone book or rely on attorney advertising,[5] which are "haphazard, shot-in-the-dark methods" for picking a lawyer.[6] Others rely on "Google" searches, but these tend to yield relatively little information.[7]

Not surprisingly, consumers report that they seek highly skilled lawyers who have integrity.[8] What kind of information would help consumers choose a lawyer possessing those qualities? Certainly, consumers want to know whether their prospective lawyers have ever been disciplined[9] or sued for malpractice;[10] yet, a lawyer has no legal obligation to disclose this information to prospective clients,[11] and, in many states, this information is difficult for the public to access or is not available at all.[12] Consumers also want to know if the lawyer carries malpractice insurance[13] so that they will be able to recover if their

4. Berenson, *supra* note 1, at 648 ("The problem of how middle-income persons go about finding an appropriate lawyer for their legal needs has been much discussed. The consensus seems to be that there is no clear or easy way for a person to find an appropriate lawyer for his or her particular legal needs."). *See also* Judith L. Maute, *Pre-Paid and Group Legal Services: Thirty Years After The Storm*, 70 FORDHAM L. REV. 915, 916 (2001) ("For over thirty years, the organized bar has studied, squabbled and lamented over how to address the unmet legal needs of the middle class."); Linda Morton, *Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. DAVIS L. REV. 283 (1992).

5. Morton, *supra* note 4, at 284; CONSORTIUM ON LEGAL SERV. & THE PUB., AM. BAR ASS'N, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994).

6. Maute, *supra* note 4, at 936 ("As one reporter noted, '[L]eafing through the Yellow Pages and muttering "eeny meeny miney mo"' is a haphazard and unreliable method of selecting a lawyer." (quoting David Segal, *Legal HMOs: Defense Against High Fees; Consumers Embracing Prepaid Plans*, WASH. POST, Mar. 14, 1988, at D1)).

7. *See infra* Part I.A.2.

8. Morton, *supra* note 4, at 287.

9. Sandra L. DeGraw & Bruce W. Burton, *Lawyer Discipline and "Disclosure Advertising": Towards A New Ethos*, 72 N.C. L. REV. 351, 376–77 (1994); Morton, *supra* note 4, at 288.

10. Berenson, *supra* note 1, at 684.

11. *See infra* Part I.B. In at least one state, a lawyer who is suspended must disclose this to current clients, though not to prospective clients. DeGraw & Burton, *supra* note 9, at 375 n.121 (citation omitted) ("The impetus for this amendment seems to come from lawyer abuses in which suspended attorneys would notify their clients in a manner suggesting that the attorney was merely going on a vacation or leave of absence rather than being disciplined for a breach of professional responsibility standards.").

12. Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1 (2007); DeGraw & Burton, *supra* note 9, at 379 ("Disciplinary information is largely not available in a form useful to the client–consumer.").

13. Berenson, *supra* note 1, at 684–85.

4. Information Regarding Malpractice Insurance

As previously discussed,[260] consumers naturally want to know "whether or not the attorney who they are considering retaining carries malpractice insurance,"[261] so that the consumer will be able to recover if his lawyer commits malpractice. Despite the ABA's recognition of this issue's importance—via its model rule on the subject[262]—most states currently do not require lawyers to disclose this information.[263] If plumbers advertise that they are "insured and bonded"—presumably because customers want to know this information before they hire them in case something goes wrong—surely legal consumers are entitled to know the same information about their lawyer.

5. Malpractice Payments

Just as consumers want to know whether a prospective lawyer has ever been disciplined because it may make that lawyer more likely to engage in misconduct in the future, consumers also want to know if a prospective lawyer has ever made a malpractice payment because that might indicate that the lawyer is more likely to commit malpractice in the future.[264] Professor Berenson wisely suggests that disclosure of malpractice payments be limited to those above a "nuisance value" of $5,000.[265] To be sure, malpractice payments are not necessarily proof of anything—in some cases the lawyer decides to settle because it is easier and less expensive than fighting—but the lawyer is entitled to provide the appropriate context to the consumer when he makes the disclosure. For example, if appropriate, the lawyer can explain that the lawyer's practice involves "cases that generate [a high] proportion of malpractice claims."[266]

C. Anticipating the Critics

Imposing a requirement on lawyers to disclose lawyer-specific information is not a perfect solution. It is also not likely to be a popular idea among lawyers, who will resist a rule that requires them to reveal

260. *See supra* Part I.C.2.
261. Berenson, *supra* note 1, at 684–85.
262. *See supra* note 83 and accompanying text.
263. *See supra* note 14 and accompanying text.
264. *See supra* Part I.C.1.
265. Berenson, *supra* note 1, at 684.
266. *Id.*

negative information about themselves.[267] But will it really hurt lawyers?

As an initial matter, the context in which this information will be disclosed is important. The proposed rule would allow a lawyer to make the required disclosures in whatever way he wants. If, for example, the lawyer discloses a limited amount of negative information in the context of a sales pitch in which the lawyer is touting his many positive qualities, it is hard to see how the lawyer will be particularly damaged.

Further, a self-disclosure regime might hurt lawyers who have damaging information to reveal, but a regime of self-disclosure will actually help those attorneys who have no negative information to reveal. They can even tout this by telling prospective clients, for example: "the rules of professional conduct require lawyers to reveal whether they have ever been disciplined, and I am proud to tell you that I have never had a single complaint filed against me."

A self-disclosure regime will hurt lawyers who try to take on cases that they are not equipped to handle because they will be compelled to disclose their lack of relevant experience and expertise. But again, to the extent that self-disclosure drives consumers to lawyers with more relevant experience and expertise, this is a reason to praise the rule, not condemn it.[268]

Certainly, at the beginning of a self-disclosure regime, the legal profession's reputation as a whole might take a hit as the market is flooded with negative information about lawyers that was previously kept private. But, in the long run, a self-disclosure regime might actually have a positive economic benefit for lawyers and the legal profession: "Even the most cynical, business-driven lawyer . . . should recognize that restoring consumer confidence in our legal institutions also has positive long-term business benefits."[269]

Another likely criticism is that this issue should be left to the free market. In other words, some will argue that the burden should be on the consumer to investigate prospective lawyers and discover this

267. DeGraw & Burton, *supra* note 9, at 362 ("A move toward requiring greater visibility of lawyer discipline or trial court sanctions would be controversial, however, because it might be seen as a threatening departure from the status quo."). *Id.* at 380 ("The long history of invisible discipline suggests that attorneys, as business-generating professionals, resist the publication of negative information.").

268. One relevant concern is that a self-disclosure regime will have a disproportionately negative effect on junior lawyers who are trying to get a foothold in a competitive market. Junior lawyers can, however, tout other desirable qualities: "I will work harder;" "I will be more communicative;" "My rates are lower;" *etc.* Moreover, to the extent that a self-disclosure regime moves the legal profession even a little bit toward the kind of apprenticeships we see in the medical profession, it may be beneficial.

269. DeGraw & Burton, *supra* note 9, at 397.

information themselves. After all, there are a number of helpful guides produced by bar associations and consumer protection groups,[270] and at least some information is publicly available on the Internet and through other means. Perhaps most importantly, the client can simply ask the prospective lawyer for information, and the lawyer must provide truthful answers.[271] There are several strong counter-arguments. This Article already addressed the shortcomings of consumer guides. Even if consumers find them and follow them, they do not provide the kind of information necessary for consumers to make an informed decision because not all of the necessary information is publicly available.[272]

Moreover, relying on consumers to ask questions is a heavy burden for consumers to bear for a variety of reasons. First, consumers, particularly unsophisticated consumers, may not know what questions to ask. Second, "the usual marketplace ethos does not control" the attorney–prospective client relationship.[273] Lawyers promote themselves as "professionals," not "profit-maximizing businessmen," and use the cover of the professional code "to induce clients to use and trust" them.[274] While people might question the qualifications of the general contractor renovating their house or expect their auto mechanic to try to rip them off, prospective clients see their prospective lawyers as zealous advocates—"aggressive and relentless in pursuing each client's goals"—and trusted confidants even before the representation has begun.[275] Indeed, "only the most sophisticated and experienced clients, such as corporations represented by in-house counsel, are likely to undertake [the] form of investigation"[276] that would yield the lawyer-specific information that prospective clients need to make an informed choice about the selection of a lawyer. Third, in the absence of regulation, lawyers have no incentive to provide this information to prospective clients and might not be completely forthcoming even when asked direct questions.[277] Thus, although lawyers must answer prospective clients' questions truthfully, they do not necessarily have to answer them fully. Without a disclosure requirement, the lawyer might answer questions truthfully but not provide the full information that the

270. *See supra* Part I.

271. *See supra* Part II.B.

272. *See supra* Part I.

273. DeGraw & Burton, *supra* note 9, at 396 n.222.

274. Zacharias, *supra* note 3, at 585–86.

275. *Id.*

276. *Id.* at 595.

277. *Id.* at 577 ("A consulted lawyer often will have personal incentives not to address a prospective client's lack of information because the client's focus on the information may cause her to seek representation elsewhere or not to seek legal representation at all.").

client needs to make an informed decision.[278]

Another argument that will be raised against this proposal is that it constitutes a violation of lawyers' privacy.[279] While some of the required disclosures proposed in this Article might prove embarrassing to lawyers, it is difficult to see how the disclosures compromise their privacy. First, much of the information is already publicly available (albeit difficult for consumers to find). For example, most state bars will disclose disciplinary information to those who ask.[280] Likewise, malpractice judgments are public records accessible to those who know where to look.[281] Similarly, state bars are increasingly requiring lawyers to provide them (but not prospective clients) with information regarding their malpractice insurance.[282] Moreover, because the information that lawyers would disclose relates to their professional lives as opposed to their personal lives, it is difficult to see how they have a significant expectation of privacy. That expectation of privacy is reduced to the extent that the information is already public. In short, because much of this information is publicly available already and lawyers have little or no expectation of privacy in the information, any "marginal reduction in lawyer privacy that would result . . . is greatly outweighed by the benefit that would be provided to consumers."[283]

CONCLUSION

This Article attempted to describe and ameliorate a longstanding and vexing problem: the inability of consumers to learn critical information about prospective lawyers. This lawyer-specific information is surprisingly difficult to find even with a diligent search, and lawyers have no obligation under current law to reveal this information to consumers. This scarcity of information makes it difficult for consumers to find an appropriate lawyer to handle their case.

This Article proposed a novel approach to solving this problem. The rules of professional conduct should be amended to require a lawyer to disclose sufficient "lawyer-specific information" to enable prospective clients to make an informed decision about which lawyer to hire. At a minimum, this disclosure should include: (1) basic biographical,

278. *See* Brigid McMenamin, *10 Things Your Lawyer Won't Tell You*, SMART MONEY, Sept. 18, 2003, http://www.smartmoney.com/spending/deals/10-things-your-lawyer-wont-tell-you-14764/.

279. Johnson & Lovorn, *supra* note 88, at 560–61 (arguing for privacy rights).

280. *See supra* Part I.B.

281. *See supra* Part I.C.1.

282. *See supra* Part I.C.2.

283. Berenson, *supra* note 1, at 682.

licensing and certification information; (2) disciplinary history; (3) information about the lawyer's malpractice insurance; (4) malpractice payments; and (5) the lawyer's specific experience and expertise relevant to this matter as well as an explanation of the relationship between the lawyer's prior experience and the work that will be necessary in the proposed new matter.

Several arguments support this proposed amendment. First, lawyers already owe prospective clients a variety of quasi-fiduciary duties. Indeed, the only significant duty that they do not owe prospective clients is the duty to communicate, which is arguably the most important duty. Imposing this duty on lawyers would be consistent with the quasi-fiduciary nature of the lawyer–prospective client relationship.

Second, this Article identified five theoretical, moral, and public policy justifications supporting this proposed amendment. This requirement would help solve the problem of information asymmetry that plagues the market for legal services. Additionally, a self-disclosure requirement would provide important protection for consumers. Disclosing lawyer-specific information to the prospective clients so that they can make an informed decision is also consistent with the moral and philosophical notion of informed consent, which serves the twin goals of supporting clients' individual autonomy by giving them information concerning their rights so that they can "effectively exercise those rights" and respecting clients' human dignity by treating them as equals in the lawyer–client relationship. Further, an affirmative disclosure requirement is consistent with what consumers expect from prospective lawyers. Finally, this self-disclosure requirement would improve public confidence in the legal profession.

A comparison with doctors and their disclosure obligations provides a further argument in favor of requiring lawyers to disclose lawyer-specific information. There is no reason that it should be easier for consumers to find information about prospective doctors than prospective lawyers. Moreover, by voluntarily disclosing lawyer-specific information, lawyers can avoid the kinds of claims that doctors are now facing for failing to disclose physician-specific information.

APPENDIX L

Pennsylvania Lawyer
May-June, 2002
Feature

O BROTHERS, O SISTERS, ART THOU INSURED?

The Case for Mandatory Disclosure of Malpractice Insurance Coverage

Robert I. Johnston [FNa1]
Kathryn Lease Simpson [FNa2]

In response to a debate begun more than 25 years ago, several states and the American Bar Association are addressing the issue of financial responsibility in the legal profession. The supreme courts of South Dakota, Ohio and Alaska have joined Virginia in requiring attorneys to disclose whether they carry malpractice insurance. The ABA House of Delegates is expected to consider such a recommendation by its Standing Committee on Client Protection at its annual meeting in August in Washington, D.C. The State Bar of Illinois is currently developing a proposal for presentation to its supreme court recommending that Illinois join Oregon as the only states that require every attorney in private practice to carry malpractice insurance.

The PBA's Professional Liability Committee studied and debated mandatory insurance in the 1980s and early 1990s but concluded mandatory coverage was not feasible in Pennsylvania. That committee has now voted to bring a proposal to the PBA House of Delegates asking the Pennsylvania Supreme Court to join the states mentioned above by adopting a rule requiring mandatory disclosure concerning malpractice insurance.

What follows is a report on how other states have dealt with the issue and why the PBA Professional Liability Committee believes such a rule is important.

HOW MANY ARE NOT INSURED?

The degree to which lawyers in private practice are insured for malpractice has been the subject of much speculation and debate since the 1970s. An article published in the May 1978 issue of the Hastings Law Journal, "Legal Malpractice and Compulsory Client Protection," claimed that "nationwide, approximately one- third of the active bar is not covered by any professional liability insurance" and cited an estimate that 40 percent of the Oregon bar was not insured. That same year, the Wisconsin State Bar petitioned its state supreme court for a rule requiring all attorneys in private practice to participate in a professional liability protection plan, although no rule was implemented. More recently, an article, "Covered," published in the November 2001 ABA Journal cites insurance industry and bar official estimates that between 20 percent and 50 percent of all lawyers in the country are uninsured at any given time.

Hard data has been difficult to come by. Although attorneys in every state have been subject to some form of annual registration for years, which would seem to make a survey of such information easy to implement, there has been almost no effort by state supreme courts to find out. The PBA House of Delegates adopted a resolution requesting that the Pennsylvania Supreme Court add an inquiry to the annual registration questionnaire in order to obtain that information. The request was forwarded to the court in 1994 and again in 1998, but there has been no formal response to date.

Just last year, a subcommittee of the Professional Liability Committee, headed by co-author and then-chair, Kathryn Lease Simpson, conducted an informal survey of carriers writing malpractice insurance in Pennsylvania. After adjusting for the fact that not all carriers responded, the subcommittee estimated that perhaps 20 percent of all lawyers in private practice are not currently insured and that among solo practitioners and those in very small firms, as many as one in three do not have coverage.

*29 The subcommittee's estimates were recently confirmed by a study reported by the Illinois State Bar Association. Similar to Pennsylvania in demographics and size of bar, Illinois is in the midst of attempting to implement its own response to the malpractice insurance issue. The Illinois Supreme Court directed the state bar to conduct a mandatory survey of attorneys to determine how many are not insured. Published in December 2001, the survey indicated that among the approximately 15,000 lawyers in private practice in Illinois, 83 percent claim to be insured, with only 63 percent of solo practitioners reporting coverage.

The results surprised many in Illinois. "We had been predicting 20 percent in private practice and 40 percent of solo

practitioners were not covered, but many were skeptical," says Dennis Rendleman, chief counsel to the Illinois State Bar Association, who was interviewed for this article. "Although the numbers came in slightly better than we projected, they have still caused a general feeling within the bar that something needs to be done." That something will be a proposal by the association later this year to the Illinois Supreme Court that all attorneys in private practice be required to carry malpractice insurance with minimum limits of $100,000/$300,000 (the smallest policy available in Illinois) or to set up a fund with a minimum balance of $50,000 to cover adverse judgments.

*30 WHY NOT MANDATORY INSURANCE?

If it adopts the proposal, Illinois will be only the second state to implement a mandatory insurance requirement. Oregon has required its lawyers to carry malpractice insurance for years with little problem. Many, if not most, members of the PBA Professional Liability Committee would prefer to see all attorneys covered by liability insurance. Why not recommend mandatory insurance for Pennsylvania?

Well, the simple answer is Oregon isn't Pennsylvania. As anyone who has been there will tell you, there aren't a lot of people in Oregon, which means there aren't a lot of lawyers either. The ABA Journal article "Covered" cited the combination of a small, unified bar (membership is mandatory) and the creation of its own insurance fund, from which all lawyers must purchase malpractice coverage, as conditions that made a mandatory insurance program economically feasible in Oregon. Neither of these conditions is present in Pennsylvania.

"Such a program would be virtually impossible to implement in a state with a large and more heterogeneous bar, such as California, New York or Texas, where some lawyers pose such a high degree of risk they can't get insurance from a commercial carrier at any price," says James Towery, immediate past chair of the ABA's Standing Committee on Client Protection. "It would be prohibitively expensive."

The PBA Professional Liability Committee reached a similar conclusion several years ago. Vincent J. Grogan, former PBA president and chair of the committee from 1985 to 1991, belonged to subcommittees that gave serious consideration to a mandatory insurance proposal and to the creation of a captive company to underwrite professional liability insurance for Pennsylvania lawyers. Conducted with what Grogan described as "real care," the studies concluded that neither proposal was realistic in a state with a bar the size of Pennsylvania.

According to Grogan, the bar, without an insurance carrier of its own, would be unable to guarantee coverage for all lawyers, a prerequisite to mandatory coverage (and one factor Illinois has not yet resolved, according to Dennis Rendleman). In addition, by sweeping in the bottom level -- the assigned-risk lawyers -- premiums were going to be higher, a problem made worse by private carriers "cherry-picking" the best risks. "We looked at it long and hard," Grogan says, "but it just wasn't going to work."

MANDATORY DISCLOSURE

Virginia, Ohio, Alaska and South Dakota have each enacted a disciplinary rule to require attorneys in private practice to disclose whether they carry *31 malpractice insurance. Their rules differ substantially, however, with respect to who must be advised and how, as well as in the impact each has on the number of uninsured attorneys.

THE VIRGINIA RULE

Virginia has arguably the simplest and least intrusive requirement. Implemented more than 10 years ago, the Virginia rule requires that every attorney who is not insured against professional liability must provide a certification of that fact to the state bar as part of his or her annual attorney registration.

Until very recently, the bar association provided that information over the telephone to anyone who made a specific request. Now anyone may go online and determine if a particular attorney has filed such a certification. Mary Yancey Spencer, deputy executive director of the Virginia state bar, indicates that approximately 1,600 of the state's 18,000 active, private practitioners have so certified this year. According to Spencer, there appears to be no information available as to the number of insured lawyers before mandatory disclosure, but the percentages have consistently ranged between 89 and 91 percent since.

SOUTH DAKOTA

South Dakota has the most stringent requirements regarding liability insurance disclosure. Since 1999, when the ethics rules were amended, lawyers in South Dakota have been required to certify to the state bar each year, as part of the membership renewal process, whether they carry malpractice insurance, the name of their carrier, the policy number and the limits of their coverage. In addition, attorneys who do not carry professional liability insurance must post a message on their letterhead, in print no smaller than their name, and in all advertisements, stating that "this lawyer (or this firm) is not covered by professional liability insurance."

Like Virginia, there are no statistics indicating how many South Dakota lawyers were uninsured before the new rule

went into effect. Last year, 98 percent of the state's estimated 1,600 lawyers in private practice reported being insured, according to Thomas C. Barnett Jr., executive director of the state bar, as quoted in the ABA Journal.

OHIO AND ALASKA

The Ohio Supreme Court adopted an amendment to its disciplinary rules that falls somewhere between Virginia and South Dakota. Similar to a rule imposed by the Alaska Supreme Court, the new rule requires all Ohio attorneys to advise clients in writing at the beginning of the representation if they do not carry malpractice insurance in a minimum amount of $100,000/$300,000 and also requires that the client sign a *32 form acknowledging receipt of the required notice.

Unlike both Virginia and South Dakota, lawyers in Ohio and Alaska are not required to report to the court or the bar, which raises questions regarding enforcement and makes it virtually impossible to determine the impact of such a rule on the number of uninsured attorneys.

WHY DO WE NEED SUCH A RULE?

Most of the members of the PBA Professional Liability Committee are actively involved in either the prosecution or defense of legal malpractice cases. While not all claims are meritorious, there are cases where clients suffer the double injury of having been harmed by the attorney they thought would help them. These clients are without recourse if the attorney has no coverage. And we see responsible attorneys who are drawn into malpractice suits because another attorney involved in the matter proved to be uninsured. Whether you prosecute or defend, it is difficult to imagine a persuasive argument in favor of failing to provide financial responsibility in the event we make a mistake that injures our client.

On the other hand, the problems inherent in implementing a mandatory insurance requirement in a state like Pennsylvania make that an impractical remedy. And the other choice -- that we continue to do nothing, that we simply ignore a situation we know causes harm to some who depend upon us in matters of great importance -- seems hard to justify.

Mandatory disclosure may not be the perfect solution, but it represents the best of the available choices. Only 9 to 11 percent of Virginia attorneys remain uninsured now that the public can conveniently determine if they carry insurance. Only 2 percent of lawyers in South Dakota have been willing to forego insurance since they have been required to advertise the fact on their letterhead and disclose to their supreme court. And although a few uninsured attorneys in Ohio and Alaska will no doubt fail to disclose as required by their supreme courts, it is hard to imagine that having to disclose to clients in writing will not encourage more to become covered.

[FNa1]. Robert I. Johnston is chair of the PBA Professional Liability Committee and a partner in Belden Law, Greensburg.

[FNa2]. Kathryn Lease Simpson is immediate past chair of the PBA Professional Liability Committee and a shareholder in the law firm of Mette, Evans & Woodside, Harrisburg.

To comment on this article for publication in our next issue, please e-mail us at editor@pabar.org.

END OF DOCUMENT

APPENDIX M

WHAT WE DON'T DO

By
Martin A. Cole, Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (November 2006)

We have an effective lawyer discipline and client security system here in Minnesota. As part of that healthy process, there are in place several programs that assist in regulating the practice of law. The trust account overdraft notification program[Ftn 1] is an excellent example of a mechanism for both detecting possible misconduct and for educating lawyers about their fiduciary obligations. Fee arbitration programs, while not mandatory in Minnesota, are available to help resolve lawyer-client fee issues. Other programs in use in Minnesota include the use of probation as a disciplinary option, the telephone advisory opinion service provided by the Office of Lawyers Professional Responsibility (OLPR, or Director's Office) and the trust account brochures and information available on the Lawyers Board and MSBA websites.[Ftn 2]

There are other programs and ideas that Minnesota has chosen not to have as part of our disciplinary system. Each of these programs is in use in some other state or states, or is recommended by the American Bar Association Model Rules for Disciplinary Enforcement. What are some of them and why don't we have them?

Random Audits

Several states have a random audit program by which attorney trust accounts are selected and audited by professional staff to determine whether the attorney is maintaining proper records and that the account is properly in trust. States that maintain such a program seem convinced that it, much like the overdraft notification program, both detects misconduct and helps educate attorneys on their recordkeeping duties. Iowa is a nearby state that has such a program.

Several committees in Minnesota have studied the possibility of instituting a random audit program and consistently recommended against it, usually based on the considerable expense of hiring professional auditors to conduct such a program as compared to the anticipated benefits. In addition, major attorney misappropriation often occurs outside of a trust account. Thus, the actual number of lawyer-thieves detected may not be significant. Another perceived limitation on the effectiveness of a random audit is that is in fact "random," unlike the overdraft notification program, which is triggered only upon an actual "for cause" basis.

Insurance Check Notification

A second program or rule intended to detect misappropriation is what is known as an insurance eck notification or insurance payee notification program, which was first used in New York and now exists in a small number of states. Whenever an insurance company issues a settlement check to an attorney, principally in personal injury matters, the insurer must copy the attorney's client on the letter transmitting the payment. This puts the client on notice that their attorney is receiving funds so that the client can monitor the distribution of the funds by their lawyer. This requirement was established in response to several instances of lawyers forging client endorsements on settlement checks and misappropriating the funds, sometimes without the client ever knowing that their case had even been settled.

While an insurance notification rule may have caught a small number of Minnesota's lawyer thieves, there have been concerns about and opposition to such a program in many states. First, it appears to single out a particular group of lawyers and one industry for additional regulation. In most states, it also would require action beyond a court rule to implement, such as legislative action or new insurance regulations. Liability concerns for insurers have also been raised should a payee be missed.

Central Intake

A group of programs that several states have in some combination involve what are known as ntral intake offices, diversion programs, and ethics schools. Central intake is an idea that grew out of ABA proposals in the 1990s. The idea is that all complaints are submitted to a central intake office, a sort of clearinghouse, which reviews a complaint and determines to whom or to what agency it should be referred. In the ABA model, there would be lawyer discipline, fee arbitration, attorney-client mediation, and other separate entities each with their own function to which the matter may be referred for handling. The central intake office itself also may act in an ombudsman capacity and handle some "minor" misconduct allegations such as noncommunication by simply contacting the lawyer and requesting they contact their client. Some offices accept complaints by telephone.

The supporters of such a program believe it is especially consumer-friendly and, as part of an overall program that includes the alternative methods of resolution mentioned above, better meets the real concerns of most client-consumers and complainants than treating all matters as disciplinary complaints. Wisconsin adopted such a program in 2001. In Minnesota, without all of the mandatory entities to which a matter could be referred, central intake would be a needless extra step. Further, the Director's Office already refers simple fee disputes to voluntary fee arbitration.

Ethics Schools

Along with central intake, diversion and ethics schools also are becoming more common as a means of dealing with "minor" misconduct. California is an example of a state employing diversion to an ethics

school, which is somewhat akin to criminal diversion programs. An attorney who has had a complaint filed against her, particularly one involving "minor" neglect or noncommunication, is offered the opportunity to attend classes on professional responsibility or take other law office management-type classes; if the attorney takes up this offer, the complaint does not result in a disciplinary decision or record. As long as the attorney then has no further complaints for some period of time, no permanent record is maintained.

In addition to concern for the logistical challenges of creating and running such a "school," an argument raised in Minnesota against such a program is that Minnesota has always treated violations of rules involving diligence and communication as disciplinary matters; just like the violation of any other rule of professional conduct, they are not considered "minor" matters. In addition, the mandatory ethics CLE requirement has helped fulfill some of the same goals in Minnesota.

Advertising Regulations

One area of conduct that some other states regulate to a far greater degree than does Minnesota is lawyer advertising. In particular, several states, including Florida and Missouri, require preapproval of advertisements by an agency of the disciplinary system. To accomplish this purpose, Florida employs an office roughly the size of the entire Director's Office in Minnesota. Perhaps these states have experienced egregious examples of improper lawyer advertising that established the need for such an entity; fortunately that has never been the case in Minnesota. Very few instances of false or misleading advertisements are brought to the Director's attention, and just as few that, even while not in violation of any disciplinary rule, exhibit particularly poor taste.

Some states also attempt to regulate advertising content in a manner unlikely to be duplicated in Minnesota. For example, a New Jersey ethics opinion recently prohibited New Jersey lawyers from advertising that they have been named a "Super Lawyer" by a publication because it was considered inherently misleading.Ftn 3 The opinion went on to further prohibit lawyers from participating in any survey or poll that produces the basis for such designations. The opinion has been stayed and is under consideration by the New Jersey Supreme Court as this is written. Even if that court upholds the opinion, the Lawyers Board and Director's Office have no intention of taking a similar position in Minnesota. Lawyers may continue to truthfully advertise their designation as a "Super Lawyer" if it is factually true and the publication is identified.

Mandatory Malpractice

Finally, one state, Oregon, and several Canadian provinces require lawyers to maintain malpractice insurance. Minnesota, like almost all states, has not followed suit, and it does not appear likely that mandatory malpractice insurance is on the horizon in the foreseeable future.

Minnesota has joined a growing number of states in adopting one malpractice program, however. The idea of a malpractice disclosure requirement has existed for several years, but was slow to catch on. It

was tabled by the ABA initially and rejected by most states. Slowly the national trend has shifted, however, and such a requirement is now in force in several states, including Minnesota. Since October 1, 2006, Minnesota lawyers who represent private clients must indicate whether they maintain malpractice insurance, with what company, and whether they intend to continue to maintain insurance in the upcoming year.Ftn 4 The information will be available to the public through the Attorney Registration Office. Again, insurance is not required; merely disclosure of whether there is insurance is mandated.

One possible aspect of such a rule was not adopted. South Dakota's malpractice disclosure rule creates an affirmative duty on attorneys to inform clients at the commencement of representation whether or not they maintain insurance. Such an obligation was not included in Minnesota's new rule.

There is no perfect set of programs that every state disciplinary system must or should follow. Variation between states is healthy in allowing new programs to be tested to determine their value. Some programs, such as random audits, will resonate and work in some states, but not in others. The Director's Office, the Lawyers Board, and the Client Security Board regularly review the alternatives that are available, and will recommend any of them if it appears that protection of the public can be significantly increased. For some other programs, they'll remain something that we don't do.

NOTES

1 *See* Shaw, "Overdraft Notification," *Bench & Bar of Minnesota* (April 2006). Copies of all articles written by members of the Director's Office are available on the LPRB/OLPR website at *www.courts.state.mn.us/lprb*.

2 The MSBA website offers a guide to using *QuickBooks* for lawyer trust accounting, which is not available on the LPRB/OLPR website. *www2.mnbar.org/qbguide/qbguide1.htm*.

3 New Jersey Ethics Opinion 39, August 2006.

4 Rule 6, Minnesota Rules for Attorney Registration.

APPENDIX N

THE CASE IN FAVOR OF MANDATORY DISCLOSURE OF LACK OF MALPRACTICE INSURANCE

James E. Towery[1]

If you apply to the state where you live for a driver's license, virtually every state will require that you show proof of financial responsibility, usually in the form of proof of insurance. Similarly, apply to your state for a contractor's license, and again, you will be required to show proof of insurance. The reason for these requirements is simple and common sense—to obtain a state license, you must demonstrate that you have the ability to protect the public if anyone is injured by your negligence in your use of that license.

However, if you apply to your state for a license to practice law, you will have to pass a bar exam and demonstrate good moral character, but you will not be required to prove that you have malpractice insurance. And if you are negligent in using your license to practice law, and as a result one of your clients is injured, well, that's the client's tough luck.

This is one of the dirty little secrets of the legal profession: the fact that no state (except for Oregon, more on that later) requires that lawyers in private practice demonstrate proof of financial responsibility. One of the ironies of the situation is that many clients no doubt presume that all lawyers are required to carry malpractice insurance. The clients often discover the fallacy of that assumption for the first time when they attempt to sue their uninsured lawyers.

[1] Mr. Towery is a past chair of the ABA Standing Committee on Client Protection, and past president of the State Bar of California. He is a shareholder of the firm of Hoge, Fenton, Jones & Appel in San Jose, CA.

However, there has been an encouraging trend recently, led by state supreme courts rather than by bar associations. That trend is the adoption in several states of rules of professional conduct that require a lawyer who lacks professional liability insurance to disclose that fact to every client.

Although the organized bar has taken an ostrich-like approach to this issue, the problem of uninsured lawyers is a real one. Estimates vary, but most experts in legal malpractice insurance believe that one third or more of American lawyers in private practice are uninsured. The question then becomes: is this a problem that needs to be addressed? Surprisingly, the response from the organized bar has largely been that the problem should be ignored.

The Oregon Model of Mandatory Insurance

Of all the jurisdictions, only Oregon has squarely addressed the issue. Since 1978, Oregon has had mandatory malpractice coverage for all lawyers in private practice, through the Oregon State Bar Professional Liability Fund. This Fund affords minimal levels of $300,000 coverage per occurrence, at a current premium of slightly more than $2,000 per year. Oregon's fund has worked well, and protected clients of all Oregon lawyers from the risk of uninsured losses.

However, there are sound reasons to question whether Oregon's model would work well in other jurisdictions. The Oregon fund was established at a time when the insurance markets were far more favorable than they are today. There are approximately 7,000 lawyers in private practice covered by the Oregon Fund. It is unlikely that this model would work as well in a state like California, which has over 120,000 lawyers in private practice, and a far greater diversity in

types of practice and risk levels. The concern is that if proper insurance underwriting were used in a mandatory plan in a state like California, that premium levels would be prohibitive for many practitioners, especially those in solo or small firms and/or those with limited incomes from their legal practice.

Mandatory Disclosure of Lack of Insurance

An alternative approach to the issue of uninsured lawyers is to require such lawyers to disclose to their clients if in fact the lawyer is uninsured. California first adopted this approach in 1988, by including such a disclosure in written fee contracts, as required by California Business & Professions Code Sections 6147 (contingent fee contracts) and 6148 (hourly and other fee contracts). As originally enacted, the California statute required an affirmative disclosure by all attorneys as to whether they carried malpractice insurance. In the early 1990's, this was amended to require a written disclosure only by those attorneys who lacked insurance. The California statute worked well, with a minimum of complaints from lawyers. However, that statutory requirement sunsetted at the end of 2000, and has not yet been reenacted.

In 1999, the Supreme Courts of Alaska and South Dakota broke new ground in this area. Both courts adopted modifications of their Model Rules of Professional Conduct that mandated disclosure of the lack of malpractice insurance. In Alaska, for example, Model Rule 1.4 regarding communications was amended to require that a lawyer notify a client in writing if the lawyer has no insurance or insurance of less than $100,000 per claim or $300,000 annual aggregate, or if the lawyer's insurance was terminated. The South Dakota rule

amended Rule 1.4 to require a similar communication to clients as a component of a lawyer's letterhead.

Anecdotally, after the adoption of these rules in Alaska and South Dakota, the lawyers reacted in a predictable fashion. A significant number of lawyers who had previously been uninsured obtained malpractice insurance shortly before the effective date of the new rules. In other words, the new rules provided a positive incentive for uninsured lawyers to obtain insurance, so that they would not be required to make the disclosure to clients of lack of insurance.

In April of 2001, Ohio joined this trend. The Supreme Court of Ohio voted (in a 5-2 decision) to amend the Code of Professional Responsibility to require lawyers who lack malpractice insurance to notify their clients of that fact using a standard form. The New Hampshire Supreme Court adopted a similar rule, which becomes effective on March 1, 2003, requiring disclosure to clients of lack of insurance. The Nebraska Supreme Court is also studying a proposed rule. In addition, the Virginia Bar has had a rule requiring that lawyers report to the State Bar whether they have malpractice insurance. In 2002 the Virginia Bar decided to put that information online, to make it more accessible to the public. Over 25,000 hits were received on the bar's website within the first week after the information was posted on the website.

As a result of the movement of these various courts to require mandatory reporting, in 2000 the ABA Standing Committee on Client Protection decided to propose a similar amendment to the ABA Model Rules. The Standing Committee requested that the Commission on Evaluation of the Rules of Professional

Conduct (Ethics 2000) to include such a provision in the Ethics 2000's general overhaul of the ABA Model Rules, but Ethics 2000 declined the invitation. After encountering some opposition from other ABA entities and a general lack of support, the Standing Committee on Client Protection has elected not to forward any such proposal to the ABA House of Delegates at present.

Objections to Mandatory Reporting

As the debate on this issue of mandatory reporting has spread over the past several years, opponents have voiced a variety of objections to the concept. Some objections are philosophical, others are technical in nature.

One of the most frequent objections is to question the need for such a rule. In other words, where is the evidence that uninsured lawyers are currently harming clients? Where is the evidence, opponents ask, of malpractice judgments against lawyers that are uncollectible due to lack of insurance?

It is a fair criticism that no study exists that provides data on these points. The entity within the ABA that most logically could conduct such a study, the Standing Committee on Lawyer's Professional Liability, has never conducted such a study.

However, a study is hardly necessary to demonstrate that client harm results from uninsured lawyers. Without question, lawyers who lack insurance commit malpractice, just as do those with insurance (and likely with greater frequency). And no one can seriously question that claims against uninsured lawyers are often abandoned, precisely because there is no available insurance. If you doubt this, simply ask any lawyer in your community who handles plaintiff's

legal malpractice claims about the subject. Such a lawyer will tell you that in evaluating whether to file such a claim, a threshold issue is whether the lawyer is insured. If the claim is modest (i.e., with potential damages of $100,000 or less), many plaintiff's malpractice lawyers will elect not to file suit, because the risk that any judgment will prove to be uncollectible, in light of how difficult these claims are in other respects, simply makes such claims not worth pursuing. It is difficult to count claims never pursued due to lack of insurance.

Another objection to mandatory reporting is the suggestion that client security funds already address the issue. That is simply not the case. Client security funds have a more limited purpose—to reimburse clients when lawyers steal money. The rules of client security funds do not permit reimbursement for simple acts of negligence by a lawyer. Malpractice claims are the only manner by which a client can seek redress for simple acts of negligence.

Some of the technical objections include that mandatory disclosures don't include the nuances of the adequacy of the legal malpractice carrier, or the issue of when a diminishing limits policy (where liability coverage diminishes as expenses of defense are incurred) causes coverage to fall below a certain level. It is true that such nuances are not covered by many of the mandatory disclosure rules. Certainly such considerations should be considered in drafting disclosure rules. However, these are not compelling arguments for failing to address the problem at all. An imperfect solution to the problem of uninsured lawyers is better for the public than no solution at all.

Conclusion

An apocryphal story from law school is the professor who says: "Allow me to frame the question, and I will dictate the answer." In the debate over mandatory reporting rules for uninsured lawyers, much depends on how the question is framed.

Supporters of mandatory disclosure frame the question as follows: when a client hires a lawyer, is the lawyer's lack of insurance a material fact that the client is entitled to know? It is hard to fashion a persuasive argument that clients are not entitled to that information. Lawyers operate under a state license, and have a monopoly on "practicing law." With that monopoly go certain obligations. Full disclosure to clients of material information regarding the representation is certainly one of those obligations. And if you don't believe that most clients would consider information about lack of insurance to be material, I suggest that you put that question to a cross-section of your own clients. You may be surprised by the response.

APPENDIX O

2016
ANNUAL REPORT

OSB Professional Liability Fund

INTRODUCTION

Welcome to our reformatted Annual Report. Although the PLF has been providing Oregon lawyers with a year in review for over 30 years, we concluded that the format was dated and we were missing an opportunity to provide more information in a more inviting format. We hope you agree. As always, I welcome your feedback about this or any other questions or concerns you may have about the PLF.

Thanks to lower-than-anticipated claim costs and a continued general slowdown in total claims, the PLF ended 2016 in a strong financial position. For the seventh year in a row, the assessment remained unchanged. Our net position at year end was just over $10.5 million. Our net position helps ensure that we maintain a stable assessment because we can absorb higher-than-projected losses, as occurred in 2015. Despite the near $1 million loss at the close of 2015, we did not raise the assessment. We do not anticipate raising the assessment for 2018, although it is still early enough in the year that no decision can be made. Last year at this time, we projected a claim count of 885 for the year. The pace of new claims slowed considerably in the second half of the year, however. This change in predicted claim count contributed to our positive year-end results.

PLF STATISTICS
2001–2016

	Assessments	Claims
2012	$3,500	1,030
2013	$3,500	902
2014	$3,500	911
2015	$3,500	808
2016	$3,500	839
2017	$3,500	850*

**Projected*

We spent significant time in 2016 rewriting all of our Coverage Plans. While both the PLF staff and the Board of Directors review the Plans every year, we had not done a major overhaul for over 10 years. While there were a few substantive changes, discussed below, the significant change was to the order and flow of the Plans. We believe the new Plans now flow more naturally and allow the reader to more easily read and understand the Plans without having to refer back and forth to different sections. The Primary and Excess Plans are available online, and we urge you to read them. Although many people put in a lot of time to this effort, special thanks go to Madeleine Campbell, one of our Claims Attorneys, for her significant efforts to ensure the success of the rewrite.

You will notice throughout our Annual Report that some of the statistics we have traditionally reported have changed. For the last 18 months, we have updated the way we track information about every claim that is filed. We believe this information will give us an increased ability to understand how claims develop and to better target both our loss prevention and claims handling efforts to ensure maximum value and best outcomes.

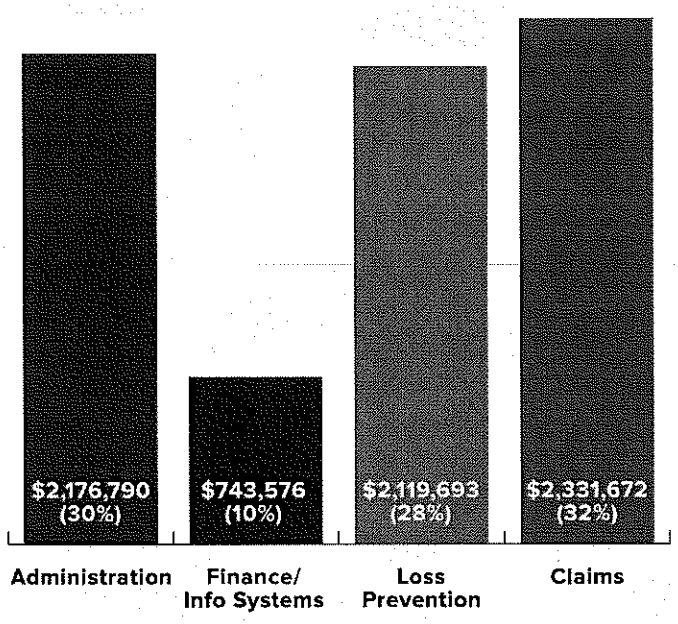
While there was much to celebrate in 2016, we have to acknowledge the loss of our senior Claims Attorney and friend, Steve Carpenter. His humor, warmth, and commitment to Oregon lawyers are missed both in the office and across the state.

Finally, the recent events during the new president's administration highlighted the benefits of the PLF. In response to some of the immigration enforcement efforts, many lawyers wanted to volunteer to provide pro bono legal services to impact individuals. The PLF quickly gathered information – which we published on our website – to ensure that lawyers who wanted to donate their time in this highly specialized area had the necessary resources to do so in a way that minimized risk. Our Board Chair, Teresa Statler, an immigration attorney with 25 years of experience, was invaluable in helping us get this information available so quickly. The PLF spends 28% of its operating budget on loss prevention efforts, and we believe this benefits both Oregon lawyers and the clients they serve.

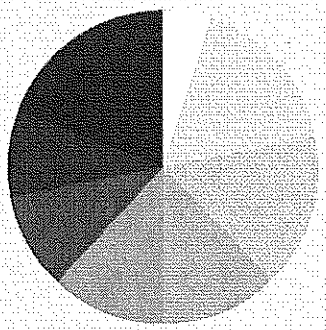
Carol J. Bernick
PLF Chief Executive Officer

Operating Costs by Department

2016

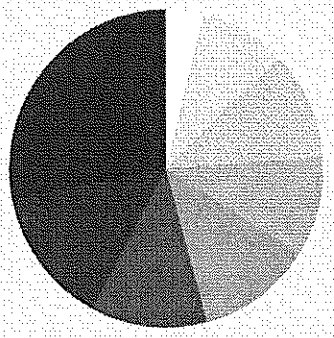


Claims Frequency by Years in Practice since 2012



0-5 YEARS	5%
6-10 YEARS	17%
11-15 YEARS	16%
16-20 YEARS	12%
21-25 YEARS	12%
26-30 YEARS	10%
31-35 YEARS	9%
36-40 YEARS	19%

Claims Severity by Years in Practice since 2012



0-5 YEARS	4%
6-10 YEARS	9%
11-15 YEARS	11%
16-20 YEARS	10%
21-25 YEARS	12%
26-30 YEARS	12%
31-35 YEARS	14%
36-40 YEARS	28%

TABLE OF CONTENTS

How Is the PLF Doing With Claims Handling?

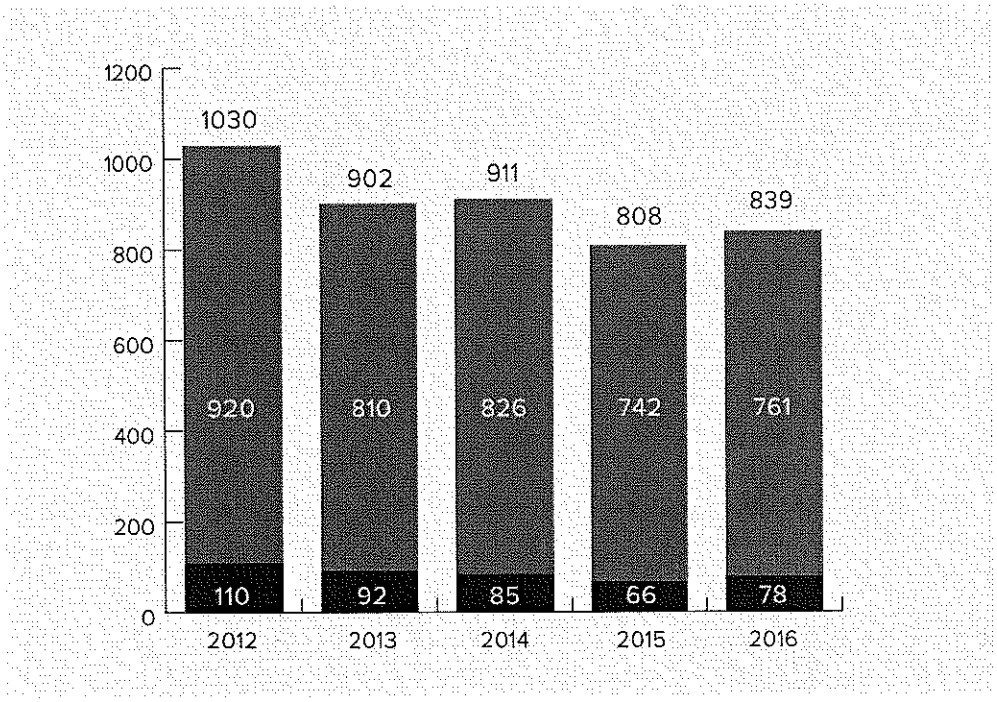
492 successful repairs from January 1, 2012 through December 31, 2016

"Repair" has been part of PLF terminology going way back. A "repair," in PLF-ese, is where the PLF agrees to pay for a lawyer to represent the claimant in an effort to reverse, cure, or mitigate the consequences of an error by a covered party (lawyer covered by the PLF). The most common repairs are those that can put a matter back on track in the same condition it was before the lawyer's error, such as setting aside defaults and fixing other missed deadlines.

Whether the PLF will embark on a repair is completely within the discretion of the PLF. See, Section I.B.2. of the 2017 PLF Primary Coverage Plan and PLF Policy 4.300 (PLF Policies and Bylaws Manual).

New Claims

By Calendar Year 2012–2016



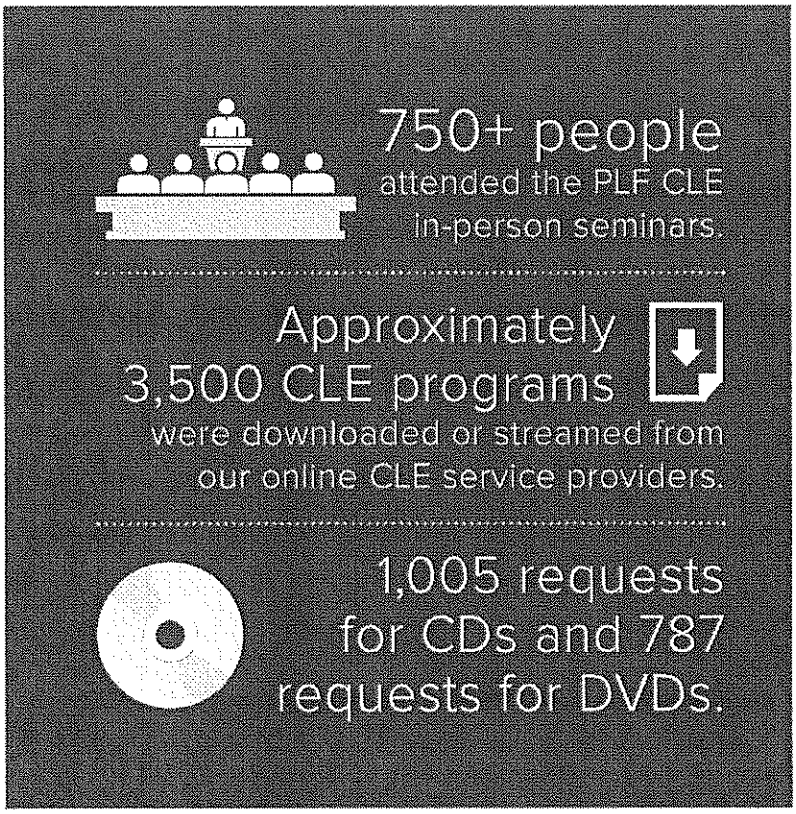
Cost of Closed Claims by Area of Law

January 1, 2012 to December 31, 2016

AREA OF LAW	NUMBER OF CLAIMS	INDEMNITY PAID	EXPENSES PAID	TOTAL PAID	AVG COST PER CLAIM BY AOL
Appellate	63 (1%)	$411,130 (40%)	$606,964 (60%)	$1,018,094	$16,160
Bankruptcy & Debtor-Creditor	611 (13%)	$4,693,584 (47%)	$5,361,443 (53%)	$10,055,027	$16,457
Business Transactions/Banking & Finance/Commerical Law	315 (7%)	$5,388,043 (40%)	$7,952,276 (60%)	$13,340,319	$42,350
Construction/Liens	8 (.17%)	$32,900 (40%)	$50,155 (60%)	$83,055	$10,382
Criminal	300 (6%)	$349,367 (20%)	$1,416,100 (80%)	$1,765,466	$5,885
Domestic Relations/Family Law/ Parental Rights/Juvenile Law	780 (17%)	$4,426,602 (51%)	$4,280,280 (49%)	$8,706,881	$11,163
Employment/Employee Benefits/ Labor	9 (.19%)	$0 (0%)	$31,394 (100%)	$31,394	$3,488
Estate Planning/Probate/Trust/Gift Tax	408 (9%)	$4,151,093 (50%)	$4,133,132 (50%)	$8,284,225	$20,304
Immigration	12 (.26.%)	$0 (0%)	$20,460 (100%)	$20,460	$1,705
Intellectual Property	5 (.11%)	$0 (0%)	$24,879 (100%)	$24,879	$4,976
Other	808 (17%)	$6,131,551 (45%)	$7,617,138 (55%)	$13,748,690	$17,016
Personal Injury	581 (13%)	$7,658,668 (58%)	$5,497,136 (42%)	$13,155,805	$22,643
Personal Injury; Tort/Personal Injury (Plaintiff)	3 (.06%)	$21,531 (83%)	$4,416 (17%)	$25,947	$8,649
Public Body Claims/Government/ Municipal	1 (0%)	$4,471 (100%)	$0 (0%)	$4,471	$4,471
Real Estate/Land Use/Zoning	401 (9%)	$5,055,605 (45%)	$6,207,260 (55%)	$11,262,864	$28,087
Securities/Investments	24 (1%)	$395,000 (25%)	$1,209,859 (75%)	$1,604,859	$66,869
Tax/Non-Profit	31 (1%)	$350,347 (48%)	$383,064 (52%)	$733,411	$23,658
Tort/Personal Injury (Plaintiff)	32 (1%)	$164,295 (40%)	$244,328 (60%)	$408,623	$12,769
Tort/Personal Injury (Plaintiff); Tort/ Personal Injury (Plaintiff)	35 (1%)	$877,486 (70%)	$367,712 (30%)	$1,245,198	$35,577
Tort/Personal Injury (Plaintiff); Other Civil Litigation	45 (1%)	$270,560 (28%)	$707,357 (72%)	$977,917	$21,731
Workers Compensation	122 (3%)	$1,512,895 (67%)	$737,935 (33%)	$2,250,830	$18,449
No Area of Law Given	26 (1%)	$43,914 (14%)	$275,268 (86%)	$319,181	$12,276
	4,620 (100%)	**$41,939,041.23**	**$47,128,554.80**	**$89,067,596.03**	

What Is the PLF Doing in the Areas of Personal and Practice Management Assistance?

The PLF continues to provide free and confidential personal and practice management assistance to Oregon lawyers. These services include legal education, on-site practice management assistance (through the PLF's Practice Management Advisor Program), and personal assistance (through the Oregon Attorney Assistance Program).



Personal and practice management assistance seminars in 2016 included our annual practice skills program for new admittees, Learning The Ropes, programs on various law practice management software products, technology updates, how to avoid ethics violations and malpractice claims, practicing law with ADD/ADHD, retirement planning, and career workshops.

In addition, the PLF continues to offer free audio and video programs that are available as CDs, DVDs, or by downloading or streaming from our website:

- **91 free audio and video programs available**
- ***In Brief* and *In Sight* publications**
- **over 400 practice aids**
- **4 handbooks:**
  Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death (2015); A Guide to Setting Up and Running Your Law Office (2016); A Guide to Setting Up and Using Your Lawyer Trust Account (2016); and Oregon Statutory Time Limitations (2014).

Our practice aids and handbooks are all available free of charge. You can download them at **www.osbplf.org**, or call the Professional Liability Fund at 503.639.6911 or 800.452.1639.

Practice Management Advisor Program

Our practice management advisors (PMAs), Sheila Blackford, Hong Dao, Jennifer Meisberger, and Rachel Edwards answer practice management questions and provide information about effective systems for conflicts of interest, mail handling, billing, trust accounting, general accounting, time management, client relations, file management, and software. In 2016, the PMAs presented seminars all over the state on practice management. In addition to these presentations, the PMAs also provide in-house CLEs for law firms.

100% of the people who returned surveys were "very satisfied" or "satisfied" with the following areas: (1) reaching a PMA by telephone; (2) the promptness within which the lawyer received a return phone call; (3) the amount of time between calling for an appointment and when the appointment took place; (4) practice management advisor's ability to explain information clearly; (5) how the lawyer was treated by the practice management advisor (patience, courtesy, etc.); (6) receiving information that was helpful; (7) follow-up; and (8) overall level of satisfaction with service.

100% of the people who returned surveys were "very satisfied" or "satisfied" with eight aspects of the PMA program.

Oregon Attorney Assistance Program

The Oregon Attorney Assistance Program (OAAP) attorney counselors, Shari R. Gregory, Mike Long, Douglas Querin, Kyra Hazilla and Bryan Welch, provide assistance with alcohol and chemical dependency; burnout; career change and satisfaction; depression, anxiety, and other mental health issues; stress management; and time management. In 2016, the OAAP sponsored addiction support groups, lawyers-in-transition meetings, career workshops, a depression support group, a support group for lawyers with ADD, a women's wellness retreat, a men's work/life balance support group, a *trans support group, a resiliency building group, a support group for minority lawyers, a mindfulness group, creating healthy habits support group.

744 lawyers assisted with personal issues in 2016, including alcoholism, drug addiction, career satisfaction, retirement, and mental health issues.

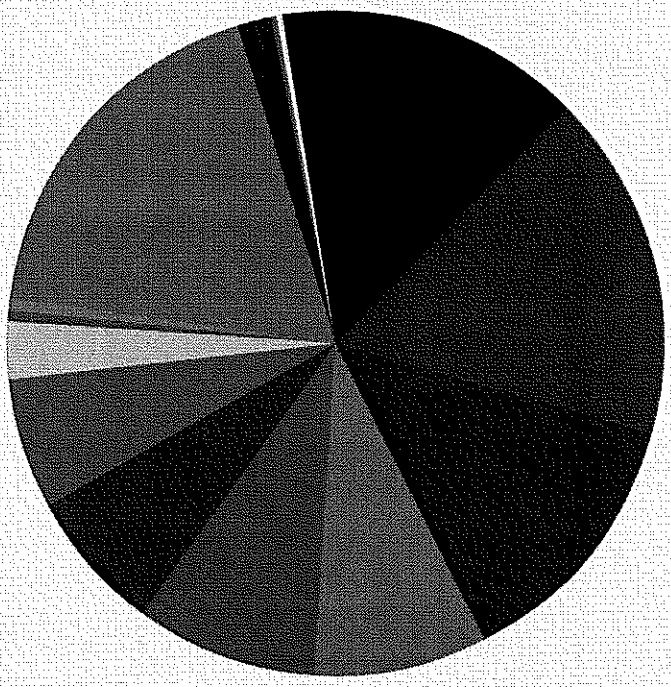
What Are the Changes to the Coverage Plan?

Last year, the PLF completely overhauled the Primary and Excess Coverage Plans. The Plans were significantly reorganized and reformatted, but the substantive changes were limited. Some, but not all, of the revisions are discussed below. In order to understand the scope of coverage under the 2017 Plans, it is important to read them in their entirety.

The revised Primary and Excess Plans are reorganized to eliminate unnecessary or repetitive language and to make it easier to find and identify related provisions. For instance, all Plan language relating to who qualifies as a Covered Party is integrated into Section II of the revised Primary Plan. By making this change, we were able to eliminate current Plan Exclusion 14 (Government Lawyers) and Exclusion 15 (Other Lawyers Not in Private Practice). Under the new language,

Frequency of Closed Claims

By Area of Law – January 1, 2012 to December 31, 2016



Personal Injury	12.58%
Domestic Relations / Family Law	16.88%
Bankruptcy & Debtor-Creditor	13.23%
Real Estate/Land Use/Zoning	8.68%
Estate Planning & Estate Tax	8.83%
Business Transactions / Commercial Law	6.82%
Criminal	6.49%
Workers Compensation / Admiralty	2.64%
Tax/Non Profit	0.67%
Securities	0.52%
Other	18.05%
Appellate	1.36%
Construction Liens	0.17%
Employment/Benefits/Labor	0.19%
Immigration	0.26%
Intellectual Property	0.11%
Public Body Claims/Government/Municipal	0.02%
Tort Personal Injury Plaintiff	2.49%

an attorney is simply not a Covered Party regarding work that was within the scope of these previous exclusions. Similarly, everything relating to covered activities under the Plan, including language that previously appeared only in Comments and Examples, is integrated into Section III of the revised Primary Plan, Covered Activity. We believe these changes make the Plan clearer and eliminate the need for extensive explanations in the form of Comments or Examples.

1. Legally Obligated.

The Primary Plan has long included language that coverage is provided only for Damages that the Covered Party is "legally obligated" to pay. The new Plan includes, for the first time, a definition of "Legally Obligated." This definition is added to the 2017 Plan in response to a ruling in *Brownstone Homes Condominium Association v. Brownstone Forrest Heights, LLC*, 358 Or 223 (2015). In *Brownstone*, the Court ruled that the words "legally obligated," as used in a liability policy, are ambiguous. The new definition in the Plan is intended to remove any ambiguity as to the PLF's intended meaning of these words. Under the definition of Legally Obligated, the PLF has no obligation to pay a settlement or Stipulated Judgment where the attorney has no actual obligation to pay money Damages and/or is protected or absolved from actual payment of Damages by reason of any covenant not to execute, a contractual agreement, or a court order, preventing the ability of the claimant to collect such Damages directly from the attorney. However, the bankruptcy of a Covered Party, standing alone, does not affect the PLF's duties under the Plan.

2. Damages Definition.

The 2017 Plan revises the Damages definition and clarifies, but does not change, the PLF's intent as to what types of damages are covered under the Plan. The Plan applies only to monetary damages arising from a legal malpractice claim. Under the Damages definition, the Plan does not apply to fines; penalties; punitive or exemplary damages; statutorily enhanced damages; rescission; injunctions; accountings; equitable relief; restitution; disgorgement; set-off of any fees, costs, or consideration paid to or charged by a Covered Party; or any personal profit or advantage to a Covered Party.

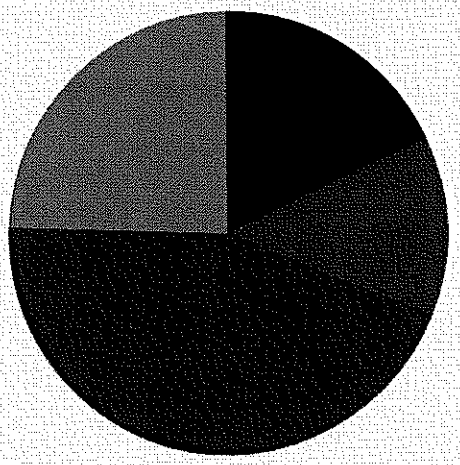
3. Defense Provisions.

A. Arbitration Agreements.

The revised Plan Section I.B.1 adds language to make clear that the PLF is not bound by fee agreements entered into by any Covered Party that call for arbitration of malpractice claims. The PLF does not want to be restricted by the terms of these agreements.

Payment Allocation of Closed Claims

January 1, 2012 to December 31, 2016



B. Nature and Scope of Defense.

The PLF has long had a practice of attempting to repair "mistakes" before they become claims. Repair efforts by the PLF are not a right or duty under the Plan. Section I.B.2. makes clear that the PLF has sole discretion to decide whether to undertake a repair.

C. Defense Regarding Certain Excluded Claims.

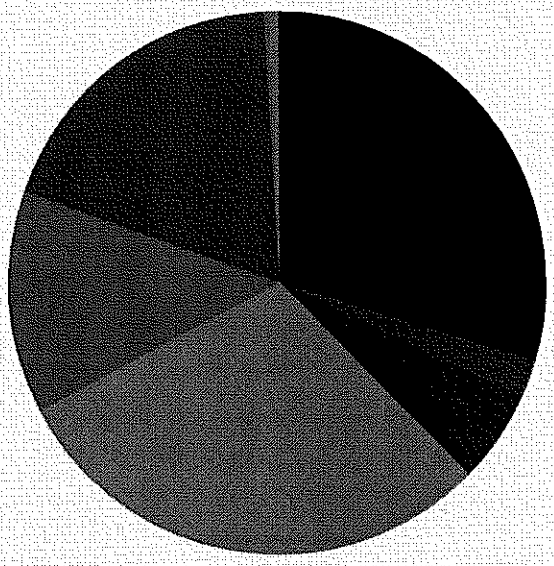
The revised Plan adds a specific defense provision stating that the PLF will defend, but not indemnify, claims for malicious prosecution, abuse of process, wrongful initiation of legal proceedings, and sanctions claims subject to Exclusion 4 of the Plan. The Plan language reflecting this policy and practice is relocated and clarified.

4. Addition of Definitions for "Private Practice" and "Principal Office."

The revised Plan adds two new definitions, one for Private Practice and one for Principal Office. These definitions clarify the PLF's meaning and are now stated as qualifications for who is a Covered Party, rather than being in the Covered Activity section, as in the previous Plan.

Disposition of Closed Claims

January 1, 2012 to December 31, 2016



Settled - Agreement of Parties	1382 (29.91%)
Coverage Denied	106 (2.29%)
Disposed of By A Court	253 (5.48%)
Claim Abandoned	1373 (29.72%)
Claim Denied	616 (13.33%)
Claim Repaired	861 (18.64%)
Other	8 (0.17%)
Disposed Binding Arbitration	4 (0.09%)
Referred to Prior Carrier	2 (0.04%)
Consolidated for Trial	1 (0.02%)
Limits Exhausted-referred to Excess	14 (0.30%)

5. Related Claims.

The concept of "Same or Related" has been renamed Related Claims, and clarifying language has been added. The revised Plan also contains examples that demonstrate how limits work when there are Related Claims against multiple Covered Parties.

6. Exclusions.

There are some substantive changes to exclusions in the Plan. These include, but are not limited to, Exclusion 4 relating to punitive damages and sanctions, and Exclusion 11 relating to family members.

In the 2016 Plan, Exclusion 4 excluded coverage for all amounts awarded as sanctions "intended to penalize" certain types of conduct, but provided for a defense regarding such claims. The previous Plan Exclusion applied whether or not the sanction was awarded against the Covered Party or the Client. There are, however, numerous kinds of sanctions, not all of which necessarily require bad faith, malicious or dishonest conduct, or misrepresentation on the part of an attorney. Moreover, it is not always clear whether a sanction awarded is "intended to penalize" because the court may or may not include findings or other language to allow the Fund to assess the intent of the sanction.

The 2017 Revised Plan excludes imposition of attorney fees, costs, fines, penalties, or remedies imposed as sanctions against the attorney regardless of whether there was an allegation or a finding of bad faith by the attorney or a finding of such by a court. Under the new language, vicarious liability for the sanction against the Covered Party is also excluded. However, if a sanction is imposed against a Client, there is coverage for a resulting claim against the Covered Party or those vicariously liable for the Covered Party, but only if the Covered Party establishes that the sanction was caused by mere negligence. The burden of proof is therefore on the Covered Party.

The Family Member Exclusion is expanded to include additional family members and to exclude work done by family members of those who reside in the household in a spousal equivalent relationship with the Covered Party.

A chart showing changes to the exclusions between the 2016 Primary Plan and the Revised 2017 Primary Plan is available at **www.osbplf.org**.

Some of the exclusions described above also apply to the Excess Plan. The primary change to the Excess Plan is to eliminate redundant provisions. A new Section IV regarding when a claim is First Made has been added to the Excess Plan. The new language clarifies that when a claim is First Made under the Excess Plan may not be the same plan year as when the claim is First Made for the Primary Plan. There is also a new Section V clarifying which claims are Related and subject to the same Claim Year Limit. The intent is to clarify the distinction between when Claims are Related for Primary purposes versus Excess purposes.

Finally, we have made relevant exclusions identical in both Plans.

A chart showing changes between the 2016 Excess Plan and the Revised 2017 Excess Plan is available at **www.osbplf.org**.

What is the Status of the Excess Program?

Participation in the PLF Excess Program remains stable. In large part due to the new underwriting and rating model, 2016 was the first year in many years that the excess program saw an increase in firm and attorney participants over the prior year. This increase included adding back midsized firms to PLF Excess coverage that were lost to the commercial market over the past five years.

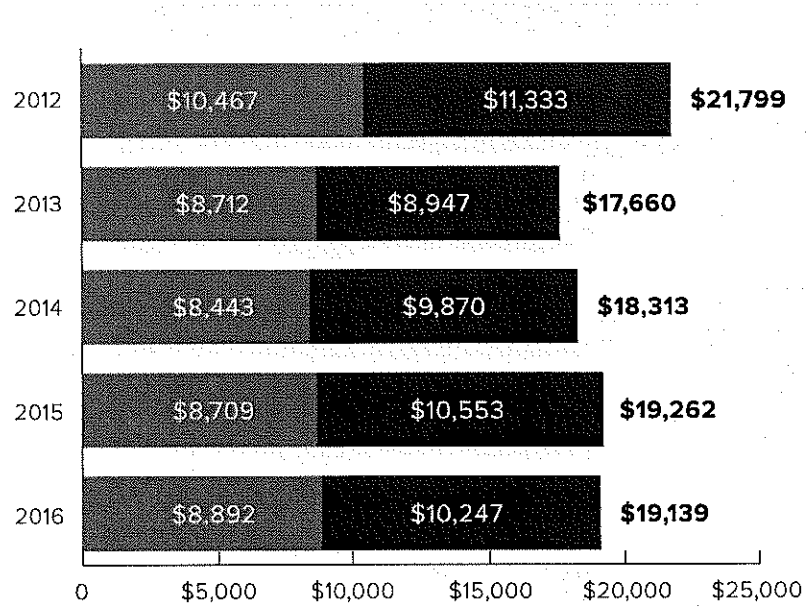
For the 2016 plan year, 720 firms with a total of 2,126 attorneys purchased excess coverage from the PLF.

The modest growth in the size of the excess book is primarily due to the use of a new rate sheet and underwriting model. Unlike in prior years, the excess program now prices law firms using a variety of factors including: area of practice, attorney CLE attendance, use of practice management systems, firm size, use of an office manager, claims history, desired coverage limits, etc. The resulting premium charged to a firm based on the new rate sheet now more accurately reflects the risk presented by that particular firm.

The 2016 year was not without its challenges, however. A spike in the number and severity of excess claims in mid to late 2016 required an increase in premium for the 2017 coverage year as well as a reexamination of how the excess program underwrites law firms engaged in practices that generate exposure under ORS Chapter 59 (Oregon Securities).

Average Cost Per Closed Claim

By Year of Reporting 2012–2016



Many of the large and expensive claims experienced by the excess program over the years have related to ORS 59 exposure ($9 million in claims in the past five years). To address this issue, the PLF engaged a consultant to review and rewrite the Securities Law Supplemental application and develop a new Business Law Supplement. For firms that completed either supplement, underwriting review is enhanced and occasionally requires additional review by an outside securities consultant. Because of this process, we were better able to review and underwrite law firms that presented this additional risk under the Oregon Securities laws.

The PLF Excess Program continues to be entirely re-insured and financially independent from the mandatory PLF Primary Coverage Program. Limits available range from $700,000 to $9.7 million. All excess coverage sold also includes an endorsement for Cyber Liability and Data Breach response. In 2016, three claims were reported under this Endorsement. Higher limits for Cyber Liability coverage are now available upon request.

Summary Financial Statements

(Unaudited, Primary and Excess Programs Combined)

	12/31/2016	12/31/2015
ASSETS		
Cash and Investments at Market	$57,314,337	$52,663,201
Other Assets	$1,768,367	$3,582,586
Capital Assets	$743,576	$740,183
TOTAL ASSETS	**$59,826,280**	**$56,985,970**
LIABILTIES AND FUND EQUITY		
Estimated Liabilities For Claim Settlements and Defense Costs	$34,300,000	$35,300,000
Deferred Revenues	$10,771,503	$10,847,994
Other Liabilities	$750,353	$666,585
PERS Pension Liabilities	$2,948,600	$2,255,126
Net Position	$11,055,824	$7,916,265
TOTAL LIABLITIES AND NET POSITION	**$59,826,280**	**$56,985,970**
REVENUE		
Assessments	$24,299,773	$25,461,021
Investment and Other Income	$3,806,737	$91,920
TOTAL REVENUE	**$28,106,510**	**$25,552,941**
EXPENSE		
Administrative	$7,510,264	$8,768,450
Provision for Settlements	$7,668,773	$10,362,499
Provision for Defense Costs	$9,017,791	$7,323,794
TOTAL EXPENSE	**$24,196,828**	**$26,454,743**
NET INCOME	**$3,909,682**	**-$901,802**

OSB Professional Liability Fund

PHYSICAL ADDRESS
16037 SW Upper Boones Ferry Road, Suite 300
Tigard, OR 97224

MAILING ADDRESS
PO Box 231600 | Tigard, OR 97281-1600

p: 503.639.6911 | *www.osbplf.org*

APPENDIX P

Georgetown Journal of Legal Ethics

Summer, 2009

Georgetown Journal of Legal Ethics

22 Geo. J. Legal Ethics 1029

LENGTH: 13587 words

CURRENT DEVELOPMENT 2008-2009: Modeling Optimal Mandates: A Case Study on the Controversy over Mandatory Professional Liability Coverage and Its Disclosure

NAME: DEVIN S. MILLS * & GALINA PETROVA **

BIO:

* J.D., Georgetown University Law Center (expected May 2010); B.A., Michigan State University.

** J.D., Georgetown University Law Center (expected May 2010); B.S., Greensboro College.

LEXISNEXIS SUMMARY:
... Part III will compare the processes followed, the issues considered, and the rules ultimately proposed by each state in light of the issues presented in Part I; it will also consider whether the proposed rules effectively serve the chief goals of mandatory disclosure and mandatory coverage rules while simultaneously addressing the concerns of malpractice insurance regulation opponents. ... The Task Force first examined the ABA Model Rule, the status of the disclosure requirement in other states, existent remedies to address harm to clients, and the history of the insurance disclosure obligation and nature of attorney malpractice claims in California. ... In June 2006, the Task Force recommended to the Bar's Board of Governors to adopt two rules: Rule of Professional Conduct on Disclosure of Professional Liability Insurance ("Rule of Professional Conduct"), requiring direct disclosure to clients though only when attorneys did not carry any malpractice insurance coverage, and Rule of Court, requiring attorneys to certify to the California Bar whether they carry professional liability coverage and allowing the Bar to make the identity of uninsured lawyers publicly available. ... States must decide: how hard to work to make sure their in-state legal clients are actually informed; what classes of lawyers the rule should and should not cover; how to mitigate possible negative side effects from mandatory disclosure; how to enforce disclosure rules; and, how strictly to punish specific lapses in disclosure. ... CONCLUSION The experiences of California and Virginia demonstrate the similar goals and challenges that state bars across the country face when drafting and attempting to pass malpractice insurance rules.

HIGHLIGHT:

"If knowledge can create problems, it is not through ignorance that we can solve them."

Isaac Asimov n1

TEXT:

[*1029] INTRODUCTION

In the controversy over mandatory disclosure of malpractice insurance and mandatory insurance coverage rules, 2008 marked a rather eventful year. First, in May, in culmination of its several attempts over three years, the California State Bar passed a mandatory disclosure rule. n2 Second, in October, the Virginia State Bar's Council voted down a proposed mandatory malpractice insurance coverage rule n3 that had been percolating through a Bar committee for three years. n4 In both cases, the efforts to pass mandatory disclosure and coverage rules were met with heated debates.

These debates have centered on the practicality and necessity of such rules. Proponents of malpractice insurance regulation, both in mandatory insurance and disclosure of coverage, claim that malpractice insurance rules are necessary to protect the public. n5 Their opponents see no real necessity for the rules and portend that such rules would have disastrous effects on the legal profession. n6 This fervent debate is interesting because the issues surrounding legal malpractice [*1030] insurance regulation are not new. n7 Despite the existence of many established mandatory disclosure regimes, no one has thoroughly assessed the empirical effects of mandatory disclosure and mandatory coverage ("malpractice insurance rules") in judging the validity of these arguments. The legal community must evaluate the practical concerns that impede passage of malpractice insurance rules in light of the actual effects that already have occurred in existing regimes.

This Note will look to California's and Virginia's recent attempts to pass malpractice insurance rules, examining the considerations, challenges, successes, and failures of both state bars. The Note will use the forthcoming analysis to make recommendations to guide states currently debating malpractice insurance rules and states that will face this issue in the future. Part I will briefly provide a historical context of malpractice insurance regulation, as well as a general description of the normative debate over mandatory coverage and mandatory disclosure ethics rules. Part II will examine the recent, protracted attempts to pass malpractice insurance rules in California and Virginia. Part III will compare the processes followed, the issues considered, and the rules ultimately proposed by each state in light of the issues presented in Part I; it will also consider whether the proposed rules effectively serve the chief goals of mandatory disclosure and mandatory coverage rules while simultaneously addressing the concerns of malpractice insurance regulation opponents. Finally, Part IV will extrapolate from the case studies of California and Virginia to make recommendations for other state bars going forward. n8

I. THE CURRENT STATE OF DEBATE

The debate over legal malpractice insurance rules extends back many years. n9 Since the courts first acknowledged plaintiffs' right to collect damages resulting from legal malpractice, n10 the threat of substantial malpractice claims has loomed over practicing lawyers. Mandatory disclosure rules are the latest attempt by state bars to guard against this threat. n11

[*1031] Malpractice insurance can have an effect on any profession. Thus, the inclusion of malpractice insurance rules in a discussion of legal ethics is quite appropriate. Internal regulation historically defines professions, n12 and the profession of law is no exception. n13 Over time, regulations in the legal profession, such as the regulation of ethical attorney conduct, have only become more cemented and more pervasive. n14 Other professions that operate under the threat of malpractice lawsuit, such as the medical profession, have enacted internal controls to limit the financial consequences of uninsured professionals practicing in their field. n15 Considering the similar financial threats that malpractice poses in the legal profession, the call for internal control of attorneys' malpractice insurance coverage is not only understandable, but also logical.

The most straightforward and exacting manner to address these dangers is to require all practicing lawyers to carry a reasonable amount of malpractice insurance. n16 The legal community has fervently debated this approach. n17 Despite some support, legal practitioners have widely rejected mandatory insurance coverage requirements. n18 Virginia's recent failed attempt to pass a mandatory coverage rule demonstrates this rejection. n19

In response to the widespread rejection of mandatory coverage schemes, less [*1032] restrictive mandatory disclosure requirements n20 have largely replaced the mandatory coverage requirements at the forefront of the debate. In 2004, the American Bar Association ("ABA") passed a model rule n21 requiring all non-exempt attorneys to disclose the status of their malpractice insurance coverage to the highest courts in their states. n22 Mandatory disclosure rules appear to pose less severe potential risks to legal practitioners and the legal profession than mandatory coverage rules do. Yet, attempts to pass mandatory disclosure rules have roused considerable contention in the legal community.

A. ARGUMENTS FOR MALPRACTICE INSURANCE RULES

Both mandatory coverage and mandatory disclosure rules are intended to ultimately serve the same end. The goal of each is to provide mechanisms to protect uninformed members of the public from paying the price when their uninsured lawyers commit malpractice. Proponents describe two main arguments in favor of malpractice insurance rules: 1) that these are necessary to protect the public, and 2) that, with regard to mandatory insurance disclosure, an attorney's liability coverage is material to a client's contract with such client's lawyer. n23

First, proponents defend malpractice insurance rules as necessary to protect the public. They argue that, like all professionals, lawyers owe a duty of care to their clients. n24 Proponents argue that lawyers violate this duty when they do not carry malpractice insurance and do not disclose to clients that they are uninsured. n25 This is because of the substantial financial stakes in the outcome of their cases. Lawyers who commit malpractice could cause considerably more financial damage to their clients than they are able to cover monetarily. Not requiring malpractice insurance, and not requiring attorneys to disclose any lack of coverage, unfairly forces legal clients to bear the burden of risk of loss. n26 Other professions regulate themselves to minimize risk to the public. Arguably, lawyers should not be in a unique position in regard to other professions that self-regulate. n27 [*1033] Furthermore, when lawyers are the causal agents of malpractice damages, and their clients are the victims, it seems incongruous that potential victims should be the ones to carry the risk of malpractice resulting in financial loss. n28 And, such risk does exist. Proponents of malpractice regulation rules point to the recent ascent in occurrences of malpractice claims, the increase in claim amounts, n29 and the recent upward trend of uninsured lawyers. n30 More malpractice and more uninsured lawyers lead to more uncompensated clients. Mandatory disclosure proponents argue that lawyers should be required to disclose the status of their malpractice insurance policies in client contracts because most potential clients would consider this information to be material to the formation of their business relationships and the formation of their reliance interests. n31 This argument is persuasive. Studies show that most clients assume that their attorneys are covered, n32 and that an overwhelming percentage of the public call for mandatory disclosure of malpractice insurance status. n33

This argument reflects a reason why mandatory disclosure rules might be more attractive than mandatory coverage rules. Disclosure rules are defensible in purely free market terms. n34 Like mandatory coverage rules, disclosure rules have the potential to limit the danger to unsuspecting clients by allowing clients to enter any legal agreement fully informed. Unlike mandatory coverage rules, disclosure rules do so without substantially compromising the free choice of lawyers or clients. Thus,

> [a] disclosure rule allows lawyers to practice as they wish, knowing that their insurance coverage, while within their own control, may be considered by prospective clients. Individual lawyers [can] make a personal decision about [*1034] the costs and benefits of purchasing coverage while offering clients the right to choose to disregard or insist on insurance. n35

Providing the public with this information allows clients to make their own informed choices. Denying the public materially relevant information, necessary to make an efficient risk assessment, reflects poorly on a profession already saddled with negative image problems. n36

Proponents of mandatory coverage and disclosure rules advance reasonable and convincing arguments in favor of such rules. Regardless, many lawyers still strongly oppose regulatory malpractice insurance rules.

B. ARGUMENTS AGAINST MALPRACTICE INSURANCE RULES

Opponents of malpractice insurance rules present arguments that are primarily practical in nature. Opponents have two predominant and interrelated concerns. They argue that: 1) these rules are not necessary, and 2) that such requirements place undue burden on both individual practitioners and the legal profession.

First, opponents argue that malpractice insurance rules are not necessary, as there is little, if any, evidence of widespread occurrences of legal malpractice committed by uninsured lawyers that result in financial detriment to clients. n37 This argument is true; scant hard evidence of such occurrences exists. n38 However, as the truism goes, "the absence of proof is not the proof of absence." n39 The problem could well be widespread but simply not widely reported. Also, even if these occurrences are not widespread just yet, risk to a limited number of legal clients is still worth considering. The possibility that such cases could potentially become widespread in the future is certainly a valid concern -- a concern that this line of attack does not controvert. n40 Given the sizable number of uninsured lawyers and rising amounts of legal awards, n41 the potential for economic harm does exist. Thus, the potential need for malpractice insurance rules exists so long as the potential for malpractice harm does.

[*1035] Second, opponents of malpractice insurance rules argue that related requirements will cause a host of negative economic side effects on legal practitioners. First, they argue that disclosure rules will have a negative economic impact because disclosure of a lack of insurance coverage could negatively brand uninsured lawyers. n42 The negative stigma of non-coverage could effectively force all lawyers to obtain malpractice insurance. n43 Opponents also claim that instituting malpractice insurance rules will result in a rise in frivolous lawsuits, and a rise in malpractice insurance fees. n44 Such results would have a disparate impact; n45 Uninsured lawyers often practice part-time or for public interest organizations and, opponents claim, these two classes of lawyers cannot afford malpractice insurance. Pressure to obtain insurance, coupled with rising insurance costs could drive many of these lawyers out of business. n46

These arguments are subject to possible empirical verification. If true, the arguments are troublesome and certainly justify the hesitancy many legal professionals feel towards malpractice insurance rules. However, before state rule-makers reject such rules wholesale, opponents' concerns need to be evaluated in light of the actual effects that existing mandatory disclosure and coverage regimes have had on attorneys.

The greatest opposition to the passage of malpractice insurance rules has come not from philosophical objectors, but from lawyers who oppose the economic effects that they fear these laws will have on them and their fellow practitioners. Thus, states wishing to pass such requirements must carefully consider how their malpractice insurance rules address these practical concerns. Mandatory disclosure is a fairly open canvass, and states have taken a variety of approaches to drafting disclosure rules. An effective rule should be carefully tailored to best accomplish the goals of disclosure proponents while addressing the concerns of its opponents.

These debates were played out as lawyers in California and Virginia debated adopting such rules. The following Part examines the recent experiences of California and Virginia in drafting malpractice insurance rules. Addressing the ways in which each state's proposed rules effectively balance the concerns of the two sides of the debate will provide insight into how other states can draft effective rules in the current, conflicted legal community.

[*1036] II. VARIED APPROACHES TO MALPRACTICE INSURANCE REGULATION

In August 2004, upon the recommendation of the ABA Standing Committee on Client Protection ("ABA Committee"), n47 the ABA House of Delegates adopted the Model Court Rule on Insurance Disclosure ("Model Rule"), a rule requiring lawyers to disclose individually their financial responsibility statuses. n48 The rule demanded that lawyers state in their annual registration statements whether they are covered by professional liability insurance. n49 The rule mandated attorneys to disclose malpractice coverage with a minimum of $ 100,000 per claim and $ 300,000 policy aggregate. n50 After receiving a number of comments critical of the specific policy limits, the ABA Committee decided to eliminate the limits, shape the rule as a guideline, and rename it the Model Rule on Insurance Disclosure. n51 According to the Model Rule, discretion to determine how to convey to the public specific information on coverage lies with the highest court in each state. n52

The Model Rule has been met with some criticism. Help Abolish Legal Tyranny ("HALT") n53 advocates that the ABA Committee should modify this current version of the ABA Model Rule to mandate insurance coverage instead of mandating mere disclosure of coverage. n54 HALT argues that the institution of mandatory disclosure is less desirable than the institution of state-mandated malpractice coverage. n55 HALT argues that should the ABA only wish to advocate mandated disclosure of insurance coverage, the Model Rule should mandate disclosure both directly to clients and to the state's highest court. However, the HALT argument has gained little traction in the mainstream legal community.

States' approaches to enacting mandatory disclosure rules have varied by their level of implementation of the recommended guidelines conveyed by the ABA [*1037] Model Rule. n56 These varied approaches often reflect a level of political compromise between state bar rule-makers on both sides of the debate, but the choices made can fundamentally alter the efficacy of the proposed rules. n57 Recent attempts of California and Virginia to pass malpractice insurance rules illustrate this tension.

A. CALIFORNIA CASE STUDY

As of March 21, 2009, California had approximately 164,132 active attorneys, making the California State Bar n58 the largest integrated state bar in the nation. n59 Recent estimates show that approximately 20% of California Bar's members are uninsured. n60 According to John Van de Kamp, former president of the California State Bar, clients of California lawyers turn to the Bar's Client Security Fund in order to collect awards from disciplinary infractions because many such attorneys do not carry professional liability insurance. n61 The Fund protects legal consumers and

can reimburse them up to $ 50,000 for losses of money and property that result from an attorney's dishonest conduct. n62 The Fund, however, does not reimburse for losses due to attorney incompetence or malpractice. n63

California state law previously required attorneys who failed to carry malpractice insurance to disclose such deficiencies in their attorney fee contracts with clients. n64 In 2000, the statute mandating this requirement expired due to a legislative "sunset" provision. n65 Thus, in May 2005, the Bar's president and the California Supreme Court created an Insurance Disclosure Task Force ("Task Force"). n66 The objective of the Task Force was to study whether attorneys [*1038] practicing in the state should be required to disclose whether they maintained professional liability insurance. n67 If the Task Force found disclosure necessary, it was to propose an ideal structure and enforcement method for the State's mandatory disclosure rule. n68

The Task Force first examined the ABA Model Rule, the status of the disclosure requirement in other states, existent remedies to address harm to clients, and the history of the insurance disclosure obligation and nature of attorney malpractice claims in California. n69 In June 2006, the Task Force recommended to the Bar's Board of Governors to adopt two rules: Rule of Professional Conduct on Disclosure of Professional Liability Insurance ("Rule of Professional Conduct"), n70 requiring direct disclosure to clients though only when attorneys did not carry any malpractice insurance coverage, n71 and Rule of Court, n72 requiring attorneys to certify to the California Bar whether they carry [*1039] professional liability coverage and allowing the Bar to make the identity of uninsured lawyers publicly available. n73 Failure to comply with the latter Rule would lead to an attorney's administrative suspension and if the attorney supplied false information, that attorney would subject to disciplinary action. n74 Attorneys employed in strictly in-house counsel or governmental capacity would be exempt from the requirements. n75

The Bar released the proposed rules to the California legal community for commentary. n76 Most comments opposed the rules, in whole or in part. n77 Many comments expressed concern that a disclosure requirement would be unfair, unless affordable insurance were made available to all attorneys. n78 In February 2007, the Task Force convened again to consider the public comments. n79 It concluded that malpractice insurance disclosure rules should be adopted, despite the criticism, mainly because a disclosure requirement would advance the goal of client protection. n80 The Task Force recommended that the Bar's Board of Governors study methods of making professional liability insurance more affordable and more widely available to its members, and to investigate additional means for compensating clients harmed by uninsured attorneys. n81

Keeping the basic structure of its original proposal, the Task Force suggested certain modifications and offered the revised rules for another round of comments in May 2007. n82 After this second round, the Task Force made new changes that applied only prospectively, to new clients and to new engagements with returning clients. n83 The revised proposal required attorneys to notify clients in writing, as was first proposed, but it eliminated the requirement that clients sign an [*1040] acknowledgement of disclosure. n84 The Task Force also suggested administrative costs would be reduced if attorneys reported their coverage on their online member profiles on the Bar's Web site because this would eliminate the need to manually process forms and record results. n85

The modified rule also limited the disclosure obligation to attorneys who did not "have" insurance as opposed to attorneys "covered by" insurance. n86 With this modification, the Task Force recognized that the "covered by [an insurance policy]" language represented a legal conclusion about the certainty of applicable, effective coverage. n87 Coverage of potential claims, however, is dependent on the nature of the claims, a spectrum of relevant facts and circumstances, and a host of additional factors that may affect the outcome of such legal conclusion. n88 Thus, an insured attorney's own representation about coverage may be at best uncertain ex ante, before claims have arisen, and become certain only ex post, when claims have been submitted to an insurer. n89

Initially, the Insurance Disclosure Task Force intended to require disclosure by any attorney lacking insurance coverage. n90 In its revised proposal, however, the Task Force asked that an attorney disclose one's insurance status to a client only if the attorney "knows or should know that he or she does not have professional liability insurance." n91 By adding this scienter-like knowledge requirement, the updated rule lowered the standard of disclosure to clients. Attorneys could now claim that they would have reported lack of coverage in good faith, but they were unaware that their policies had expired. To counter this concern, the Task Force argued that without this change the rule might penalize innocent attorneys who believed in good faith to be in compliance. n92 According to HALT, without a signed acknowledgement requirement, lawyers can subvert disclosure by simply burying a brief clause about being uninsured in lengthy documents that lawyers provide to clients when initiating representation. n93 Thus, these new modifications provided some leeway for attorneys to effectively avoid disclosure of their insurance lapses.

[*1041] The Task Force provided clarification in the comments to the Rule instead of creating a special exemption for any group. n94 It reasoned that part (C) of Rule 3-410 n95 could appropriately provide for exemptions from disclosure only for attorneys who would otherwise be covered by the scope of the rule; n96 attorneys not representing or providing legal advice to clients on a regular basis, such as governmental attorneys and in-house counsel, were already excluded. n97

Another well-reasoned modification was that Rule 3-410 would not apply to legal services rendered in emergency situations where clients' rights or interests may suffer if clients would not receive legal services. n98 The Bar decided to limit and circumscribe disclosure only to those client matters in which a written retainer agreement was mandated by law. n99 The Rule now contains exceptions for returning clients who have hired an attorney to provide counsel similar to counsel provided in a previous engagement; such exception may lead some clients to presume insured status when in fact an attorney's policy has lapsed. n100 An additional exemption in part (C) of the Rule was proposed for representation of pro bono clients, n101 but such exception would arguably not be constitutionally permissible under current California law, so it was abandoned. n102

The Rule of Court, Rule 9-7(a), required all active non-exempt bar members to certify their professional liability coverage whether or not they represented clients in the first draft. n103 The proposed revision limited the certification requirement to attorneys who actively represented or provided advice to clients. n104 The Task Force admitted that the phrase "represent clients" might misleadingly appear to apply to a limited class of attorneys. n105 The phrase could be read to imply inclusion only of attorneys serving as counsel in litigation or [*1042] administrative proceedings. n106 In response, the Task Force expanded the phrase to "represents or provides legal advice to clients." n107

In November 2007, after the Task Force had completed a second round of modifications on the two proposed Rules, the California Bar's top executive body, the Board of Governors, suggested a final amendment of the proposed Rule of Professional Conduct. n108 The proposal clarified that disclosure to clients was mandatory only when legal work was reasonably expected to exceed four hours. n109 In December 2007, the Bar released this Rule for a third round of comments. n110

In the final version of the proposal, having received more comments, the Task Force abandoned the Rule of Court and proposed that only the revised version of the Rule of Professional Conduct would take effect. n111 In May 2008, after series of debates, which led to compromises and revisions, the Board of Governors accepted the Rule of Professional Conduct by a vote 16-4. n112

B. VIRGINIA CASE STUDY

Unlike California, Virginia already had a Rule of Court requiring mandatory disclosure of coverage in place when the Virginia State Bar commenced deliberations on adoption of mandatory malpractice insurance regulation in 2005. n113 The Rule requires Virginia lawyers to report, essentially in good faith, [*1043] on their annual dues statements, whether they carry legal malpractice insurance coverage. n114 This requirement applies only to lawyers in private practice who represent clients drawn from the public. n115 In turn, legal clients in Virginia can obtain information about the status of an attorney by contacting the Bar or searching a public database online. n116 The Bar's Web site allows the public to view the full registration information of every lawyer licensed in the state. n117

To determine the state's need for mandatory insurance coverage, the Virginia State Bar began surveying financial responsibility statuses of its 25,182 active members. n118 While almost 11% of all Virginia lawyers self-reported that they did not carry malpractice insurance, only .05% admitted carrying unsatisfied malpractice judgments. n119 Upon review of the collected data, the Bar determined that solo practitioners and lawyers in firms of two or three practitioners statistically carried the lowest limits of coverage. n120 According to the Bar's Client Protection Subcommittee, the empirical data on insurance coverage did not indicate that most of these uninsured attorneys in private practice failed to carry insurance because insurers viewed them as "bad risks" or they had negative claims history. n121

Also, evidence showed that most attorneys who were covered were insured well beyond the recommended minimum. Attorney Liability Protection Society ("ALPS"), the Bar-endorsed insurance provider, reported that only 6% of ALPS-insured attorneys carried the bare minimum of coverage recommended by the ABA Model Rule; in fact, most ALPS-insured attorneys carried more than ten times the recommended limit. n122 Minnesota Mutual ("MM"), another major carrier in Virginia, reported that most of its policies had limits fifteen times the ABA recommended limit. n123 Only 1% of 2005 claims paid by these two primary insurance carriers had costs totaling between $ 100,001 and $ 250,000, and just [*1044] 1% had costs exceeding $ 250,000. n124 More than half of all 2005 claims did not lead to any payment. n125 In addition, based on data collected from insurance carriers, the Bar's Client Protection Subcom-

mittee concluded that uninsured lawyers did not necessarily commit malpractice any more frequently than insured lawyers did. n126

Despite these findings, in the spring of 2005, the Bar started a process of study and rule-making on a mandatory insurance coverage and enhancement of its existing disclosure requirement. n127 The Supreme Court of Virginia requested that the Bar's Lawyer Malpractice Insurance Committee review the Bar's current program, which encouraged members to acquire malpractice insurance and to consider alternative approaches toward client protection. n128

The Committee suggested that the Bar ensure the availability of affordable malpractice insurance by endorsing an insurance carrier that could provide high-quality insurance at fair prices. n129 The Committee also recommended requiring all active Bar members to certify to the Bar their malpractice insurance coverage status and any existing unsatisfied judgments against them. n130 Under the Committee's recommendation, the public could obtain access to such certified information by contacting the Bar, or from its Web site. n131 The Committee affirmed that such a disclosure effort would require collection of specific policy information and for attorneys' certificates of insurance to be provided to the Bar. n132 It also proposed an implementation model going beyond disclosure to protect the public: an "Uninsured Lawyer Malpractice Claims Fund." n133 This rule would mandate malpractice coverage either through a Bar-funded compensation pool under the Bar's control or privately through the [*1045] commercial insurance market. n134 Moreover, in February 2006, the Virginia House of Delegates passed a resolution n135 encouraging the Bar and the state Supreme Court to consider implementation of an uninsured attorneys' fund or some form of mandatory insurance coverage that would compensate malpractice victims directly. n136

After debating for two years whether to mandate malpractice insurance coverage, the Bar's Council voted down the proposal in October 2008. n137 The Chairman of the Committee on Lawyer Malpractice Insurance commented that such regulatory initiative would discourage retired attorneys from helping pro bono clients and would give insurance companies the upper hand in deciding whether an attorney would be licensed in the state n138 by letting them determine who gets affordable coverage or any coverage at all. Of all practicing Virginia lawyers who represent the pubic, 92% are already insured, thus many Virginia lawyers see mandatory coverage as "a cure for a non-existent problem." n139 Although the proposal in Virginia was ultimately rejected, the related rulemaking process presents other states with valuable lessons.

III. LESSONS FROM CALIFORNIA AND VIRGINIA'S EXPERIENCES

The issues discussed in California and Virginia shed light on the general nationwide malpractice insurance debate in a number of ways. First, Virginia's experience in attempting to pass a mandatory coverage rule indicates that unless opinions change drastically, mandatory coverage rules are not politically realistic options for bars in attempting to prevent client harm from uninsured lawyers. Proponents of mandatory coverage rules, such as HALT, strongly believe that mandatory coverage rules are better for the public than mandatory disclosure rules. n140 Considering the current regulatory environment, however, no degree of concessions in rule-making procedures is enough to pass mandatory coverage rules. n141 Virginia is a relatively supportive state in regards to mandatory disclosure. n142 Further, although Virginia's Committee rule-makers agreed to a [*1046] number of limiting concessions in their proposed insurance coverage rule. Yet, Virginia's Council members voted decidedly against the proposed rule. n143 Thus, with little chance of passing mandatory coverage rules, state bars would better serve the public by focusing their attention on drafting and passing mandatory disclosure rules.

Second, the final versions of the proposed rules and the changes made to them during the rule-drafting periods highlight the similarity of issues faced by the rule-making committees in California and Virginia. Drafting committees in different states approaching the issue of malpractice regulation often face similar pressures from practitioners. These concerns include many issues at the heart of the nationwide debate on malpractice insurance rules, such as possible negative stigma toward uninsured lawyers and the potentially disproportionate effects on certain classes of attorneys. n144 All rule-makers face the task of balancing such concerns against the goal of effectively informing the public.

One key reoccurring question is to whom precisely the proposed rules should apply. Defining the class of attorneys covered by a proposed rule is an essential decision for rule-makers faced with balancing the interests of concerned attorneys and their prospective clients. The proposed mandatory coverage rule in Virginia was changed from applying to all active members engaged in the private practice of law representing clients drawn from the general public to only those who regularly engage in such practice. n145 This change targeted a specific class of attorneys who would be most likely to commit malpractice based on the volume of legal work they perform for clients drawn from the general public. n146 The Virginia State Bar exempted government, corporate, and other attorneys who only occasionally represented such clients in order to avoid presenting pro bono attorneys with a dilemma over whether to decline representa-

tion or maintain mandated insurance policies. n147 In California, rule-makers began by requiring disclosure only by attorneys who did not carry malpractice insurance, and California's rule did not include attorneys who worked only as in-house counsel or in a governmental capacity. n148 Amendments based on subsequent comments limited further this class of excluded attorneys by applying the rule only to lawyers who render services to clients from the public on projects exceeding four [*1047] hours. n149

Although the outcome in the two states differed, n150 the rule-makers in both cases seemed forced by opponents of malpractice insurance rules to make a series of changes in order to accommodate these opponents' concerns over such rules. n151 Many of these changes seem to fundamentally alter the efficacy of the rules. n152 However, such compromises may be inevitable when passing malpractice insurance rules. In California, for example, it took three years and numerous amendments, limiting the scope of the proposed disclosure rule, to ensure its pas sage. n153

The troubling aspect is that these changes made to the drafts of the rules in response to oppositional pressure look more like potential loopholes than constructive protection of important practitioner interests. n154 In many cases the amendments to the proposed rules serve to restrict the effectiveness and scope of the regimes, as opposed to attempting to directly address the legitimate concerns of opponents of disclosure rules. n155 Practitioners have a legitimate concern that certain classes of lawyers will be forced by stigma to choose between insurance plans they cannot afford and not representing clients. These concerns can be dealt with in other ways than merely writing loopholes and exceptions into rules. For example, both California and Virginia genuinely considered developing programs that would provide affordable insurance for practitioners who could not afford insurance otherwise. n156 By accompanying mandatory disclosure schemes with subsidized insurance options for qualifying attorneys, many of these [*1048] concerns could by allayed. Subsidized insurance options seem to be a sensible solution to one of the main potential side effects of mandatory disclosure regimes, yet neither state has put this idea into practice. State bars should consider practical solutions to possible adverse effects, in the same vein as subsidized insurance, rather than responding to opponents' concerns by making rule amendments that could limit the effectiveness of the proposed rules.

Third, Virginia's preexisting mandatory disclosure rule can help in evaluating the effectiveness of California's mandatory disclosure rule. In its final form, the California rule requires lawyers who do not carry malpractice insurance to "disclose [this] to a client (a) in writing, (b) at the time of engagement . . . (c) if the representation exceeds four hours." n157 If a lawyer ceases to carry insurance, that lawyer must similarly inform one's clients within thirty days. This requirement does not cover in-counsel lawyers or government lawyers, and does not apply when legal services are provided in emergency circumstances. n158 Conversely, Virginia's mandatory disclosure rule requires every practicing attorney in the state to certify each year whether the attorney is covered by malpractice insurance. The rule requires notification to the Bar if coverage lapses, and excuses this duty only in limited cases of good cause. n159

California's rule is less than perfect. In comparison to Virginia's disclosure regime, California's rule is limited in the number of attorneys to which it applies; the rule limits the class of lawyers covered and the number of hours lawyers must work on a case before disclosure is necessary. Ultimately, many of the California rule's limitations seem defensible. The majority of large malpractice cases will likely come from lawyers working more than four hours. n160 Also, disclosure rules are created in order to protect the public, and the attorneys exempted are ones who are less likely to work for general members of the public.

The chief merit of California's rule is that unlike Virginia's rule, it requires disclosure directly to clients. n161 Rules requiring direct disclosure to clients, when well crafted, will more effectively ensure the public is sufficiently informed than rules requiring disclosure to state bars. n162 California's rule, however, will not necessarily guarantee that clients are actually informed. The absence of a signed acknowledgment requirement allows dishonest lawyers to hide their disclosure [*1049] statements in the middle of fine print contracts with numerous clauses. n163 The danger of attorneys circumventing disclosure in this manner is exacerbated because California's rule does not include any requirements on textual formatting or comprehensiveness of the disclosure. n164 Thus, although the California rule is potentially strong on its face, the choices made in drafting the rule could result in an ineffective disclosure regime in practice.

The practical effects of the California regime remain to be seen. Yet, by considering and passing an insurance disclosure rule, California addressed the need for client protection in this area. n165 In that regard, any rule that will effectuate at least some degree of disclosure is better than no rule at all.

IV. DRAFTING RULES MOVING FORWARD

A. GENERAL OBSERVATIONS ON DRAFTING RULES

So, what general conclusions can one draw from the experience of California and Virginia? First, their experiences exemplify that disclosure rules can be crafted in many different ways; there is no single blueprint. n166 In their broad form, disclosure rules can be highly restrictive and demand formalized direct disclosure to clients and acknowledged receipt of notification from clients. The [*1050] rules can also be much more relaxed, requiring disclosure only to the state bar, with the state bar subsequently making that information public on state web sites. Rule-makers can lessen this requirement further by making insurance status information known to clients only when they personally inquire with state bars. n167

Within this range of forms, more particularized decisions must be made in drafting rules. States must decide: how hard to work to make sure their in-state legal clients are actually informed; what classes of lawyers the rule should and should not cover; how to mitigate possible negative side effects from mandatory disclosure; how to enforce disclosure rules; and, how strictly to punish specific lapses in disclosure. In many cases these decisions are made by balancing the general aims of mandatory disclosure rules with the concerns of rule opponents. The experiences of California and Virginia show that drafters must be deliberate in ensuring that the rules being written are good policy, as opposed to knee-jerk reactions to political forces.

B. CONSIDERING AN OPTIMAL RULE

Decisions made while drafting rules are not merely a matter of political wheeling and dealing, but are essential decisions that can drastically alter the operation of disclosure regimes for better or worse; every decision made can be vital. These decisions must be made with respect to specific real-world circumstances in each respective state. For this reason, no single rule fits every state. Each state must carefully craft a rule that makes sense to its attorneys. States must work to create rules that will be effective in informing clients, while still making the compromises necessary to pass disclosure rules under intense debate.

California's and Virginia's experiences with this debate provide some guidance in making these tough decisions. First, disclosure to clients is generally seen as more effective than disclosure to state bars. n168 Still, the more important issue is not to whom the information is disclosed to, but how available such disclosure is subsequently made to the public. Disclosure to the state bar along with a well-maintained online database may better inform the public than direct disclosure to clients if lawyers may hide their insurance status in a sea of contractual legal jargon. State bars must not fixate on one particular rule, but must carefully balance, examining how all their choices work together, and design systems that do the most optimal job of effectuating disclosure.

[*1051] C. EMPIRICAL DATA: THE MISSING LINK

The need for detailed analysis when formulating insurance rules demonstrates one final lesson. The experiences of California and Virginia demonstrate that proponents and opponents of insurance regulation simply may not know enough to make reliable conclusions. Mandatory disclosure regime debates are based on assumptions without much data to support them. In many cases, the decisions the state bars made were dependent on empirical questions left unanswered. Are the various modes of disclosure successful in actually informing clients? Are unprotected lawyers stigmatized, consequently, are disclosure rules effectively forcing all lawyers to obtain insurance? n169 If so, could this increase in quasi-required malpractice coverage drive public-interest and part-time attorneys out of business? The answers are unknown.

The lack of data in this area is surprising: a number of states already have well-established malpractice insurance rules. n170 The empirical effects of the rules in these states need to be studied. One cannot know conclusively how these regimes are working, and how they will work in the future, without empirical data. Such data is scarce. n171 Until an organization adequately researches and reports on existing regimes, we are left clutching at theoretical straws. The need for empirical verification is important to remember going forward. State bars need to make informed decisions about mandatory disclosure, and they need empirical data to be fully informed.

Ultimately, no controversy has come out of states with established malpractice insurance rules. This absence is rather damning for such rules' opponents. The fact that malpractice insurance regulation regimes have operated soundly may suggest that fears over the disastrous effects of disclosure regimes are overblown. For a topic fraught with intense debate, it is dubious that existing malpractice insurance rules could have major negative effects without noticeable scrutiny.

[*1052] CONCLUSION

The experiences of California and Virginia demonstrate the similar goals and challenges that state bars across the country face when drafting and attempting to pass malpractice insurance rules. Perhaps the most interesting observation is that although both states were faced with similar concerns and used similar approaches, the two states had different results. This outcome suggests that a good deal of the success and failure of mandatory disclosure rules will depend not on the particular choices made, but rather by the legal attitudes in each individual state. Some suggest that states may be better off if all states institute identical rules. n172 However, rules may have a much better chance of passage when drafted to fit the particular needs of each respective state. And, empirical data desperately needs to be gathered to best assess these choices.

In absence of data that can directly support or nullify the concerns of either side of the debate, the legal community should remember that both opponents and proponents have valid arguments to be considered, arguments that are not necessarily mutually exclusive. Rule-drafting committees need to consider new ways to create effective disclosure regimes that insulate vulnerable practitioners from damaging side effects.

Finally, the current state of the economy could make mandatory malpractice disclosure rules even more significant than they would be otherwise. Claims for attorney malpractice have been escalating recently as financially distressed legal clients get more desperate to recoup losses. n173 This rise in malpractice claims could have varied effects. Costs associated with being sued, regardless of the outcome of suit, could drive many uninsured lawyers to obtain insurance, eliminating the necessity for disclosure rules. Contrarily, these trends may result in an increased number of uncompensated victims of legal malpractice, thus making mandatory disclosure rules even more necessary. Whether or not this rise in malpractice claims has either of these effects, the ability to recoup losses when client bring legal malpractice suits, and consequently, the status of attorney's insurance coverage, should be an important matter of consideration to both clients and attorneys. States would do well in the future to consider the lessons learned from the experiences of California and Virginia in attempting to draft and pass viable solutions to the current shortcomings of attorney malpractice insurance coverage.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMalpractice InsuranceAttorneysInsurance LawMalpractice InsuranceDisclosure ObligationsLegal EthicsGeneral Overview

FOOTNOTES:

n1 QuotationsPage.com & Michael Moncur, *Quotations by Subject: Knowledge*, http://www.quotationspage.com/subjects/knowledge/ (last visited Apr. 17, 2009).

n2 State Bar of California, *Finally, Board Approves an Insurance Disclosure Rule*, CALIFORNIA B.J., June 2008, http://calbar.ca.gov/state/calbar/calbar_cbj.jsp (follow "Archived Issues" hyperlink; then follow "June 2008" hyperlink) (last visited Apr. 17, 2009 Nov. 20, 2008).

n3 Virginia State Bar, *Council Rejects Mandatory Insurance, Raises Assessments, Endorses Opt-Out Member Directory*, VIRGINIA STATE BAR NEWS, Oct. 29, 2008, http://www.vsb.org/site/news/item/council-101708/ (last visited Apr. 17, 2009).

n4 Darrel Tillar Mason, *Mandatory Malpractice Insurance--It's Time To Call The Question*, VIRGINIA ST. B. E-NEWS, Aug. 4, 2008, http://www.vsb.org/site/news/item/mandatory-malp-ins-080408/.

n5 James E. Towery, *Should Disclosure of Malpractice Insurance Be Mandatory?--Pro*, 20 GP Solo 36, 39 (Apr.-May 2003).

n6 *See, e.g.*, Edward C. Mendrzycki, *Should Disclosure of Malpractice Insurance be Mandatory?--Con*, 20 GPSOLO 37, 41 (Apr.-May 2003); *Charles Wood, Few Fans of Mandatory Disclosure: On the Road Show, Malpractice Insurance Idea Gets the Heave-Ho*, 27 MONT. LAW. 11, 11-12 (2002).

n7 Prior to California State Bar's passage of a mandatory disclosure rule, twenty-four states had adopted some form of mandatory disclosure rule. American Bar Ass'n Standing Comm'n on Client Protection, State Implementation of ABA Model Court Rule on Insurance Disclosure, Jan. 29, 2009, http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf (last visited Apr. 17, 2009) [hereinafter *State Implementation of ABA Rule*].

n8 This Note presents this examination in hope that the findings presented will help guide states that will consider mandatory disclosure rules in their future.

n9 For detailed background on mandatory malpractice insurance coverage rules, see generally Nicole A. Cunitz, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?, 8 GEO. J. LEGAL ETHICS 637 (1995).* For more information on the debate over mandatory insurance disclosure rules, see generally Farbod Solaimani, Current Development, *Watching the Client's Back: A Defense of Mandatory Insurance Disclosure Laws, 19 GEO. J. LEGAL ETHICS 963 (2006).*

n10 *Stephens v. White, 2 Va. 203 (1796)* (recognizing a common-law right for clients to collect damages in cases of negligent representation).

n11 Attempts to institute mandatory malpractice insurance coverage rules have been largely unsuccessful. *See infra* note 18. Mandatory disclosure rules are widely seen as a compromised solution to the threat of uninsured lawyers. *See, e.g.*, Comments from HALT -- An Organization of Americans for Legal Reform to the American Bar Association Standing Committee on Client Protection regarding Proposed Model Rule on Financial Responsibility, at 6, http://www.halt.org/reform_projects/lawyer_accountability/pdf/Commentsfrom_HALT_to_ABA.pdf (last visited Apr. 17, 2009) [hereinafter *Comments from HALT to the ABA*]; *see also* Solaimani, *supra* note 9, at 974 (stating that mandatory disclosure is seen by many as a political compromise with opponents of mandatory coverage rules).

n12 Richard K. Greenstein, *Against Professionalism*, 22 GEO. J. LEGAL ETHICS (Forthcoming 2009) (manuscript at 5 n.9, on file with author).

n13 *Id.* (manuscript at 8-26, on file with author).

n14 Legal ethics rules began as a loosely articulated, and somewhat loosely enforced, short set of norms with their passage as *1908 Canons of Professional Ethics*. Changes in their subsequent version, *Model Code of Professional Responsibility* and, the current one, *Model Rules of Professional Conduct*, have reflected a paradigm shift in the norms from general standards to expansive and strictly enforced rules. *See* MODEL RULES OF PROF'L CONDUCT PREFACE (1983).

n15 *See Mandatory Malpractice Insurance, 192 N.J. L.J. 186* (April 21, 2008). Threats of medical malpractice are dire and perhaps more conducive to arguments for mandatory malpractice coverage than the threats of legal

malpractice. *See* Solaimani, *supra* note 9, at 972-973. However, as most legal claims are substantial, it stands to reason that the economic effects of a blown case can still be quite disastrous to wronged clients.

n16 This is an approach that has been taken in the medical profession. *See, e.g.*, N.J.STAT.ANN. § 45.9-19.17 (West 2004).

n17 *See, e.g.*, Solaimani, *supra* note 9, at 967-974.

n18 *See, e.g.*, Solaimani, *supra* note 9, at 968-974; John Schlegelmilch, *Insufficient Evidence to Support Mandatory Malpractice Insurance Requirements*, 8 Nev. Law. 9 (2000). Numerous states have passed mandatory disclosure rules. *See State Implementation of ABA Rule, supra* note 7. In contrast, only Oregon has passed a mandatory coverage rule. *See Or. REV. STAT. § 9.080(2)* (2001). Effectiveness of the Oregon rule is a matter of debate.

n19 *See infra* Part II-B.

n20 *See, e.g.*, Solaimani, *supra* note 9, at 974 (arguing that "in reality disclosure may represent a more purposeful balance between the . . . interests of lawyers . . . on one side and the rights of the consuming public on the other").

n21 American Bar Association, *ABA Model Court Rule on Insurance Disclosure*, http://www.abanet.org/cpr/clientpro/malprac_disc_rule.pdf (last visited Apr. 17, 2009) [hereinafter *ABA Model Court Rule*].

n22 *Id.* at Part A. Although the ABA proposes model rules, the organization does not have administrative power to enact those rules in individual states. Rather, it acts as an entity of influence and provides guidance to state bar associations. States are free to enact the model rules verbatim, modify them, or not enact them at all, as the states see fit.

n23 *E.g.*, *State Bar of California, supra* note 2; *see also* Solaimani, *supra* note 9, at 974.

n24 *E.g.*, Towery, *supra* note 5, at 39 (arguing that lawyers owe their clients obligations, one being full disclosure of material information such as the status of the lawyers malpractice insurance coverage).

n25 *Id.*

n26 *See, e.g.*, Towery, *supra* note 5, at 36 (lawyers are not required to show they have malpractice insurance, and if they "are negligent in using [their] license to practice law, and, as a result, one of [their] clients is injured, well, that's the client's tough luck").

n27 *Mandatory Malpractice Insurance, supra* note 15. *But see* Solaimani, *supra* note 9, at 972-973; *cf.* Cunitz, *supra* note 9, at 660-62 (arguing that although courts have found the regulation of medical malpractice insurance

"well within the state's police power," failure of regulation to deter medical malpractice indicates regulation of malpractice insurance will not deter malpractice).

n28 This incongruity is compounded by the fact that the clients harmed most often by malpractice are the most economically disadvantaged and least informed members of a populace. *See* Mike McKee, *Calif. Bar Mulls Requiring Malpractice Insurance Disclosure*, THE RECORDER (June 21, 2006).

n29 *See* Ronald E. Mallen, *Cutting Through the Malpractice Maze*, THE BRIEF, at 10, 12-13 (Summer 1986) (describing the "increase in frequency and severity" of legal malpractice claims).

n30 *See also* Mary Alice Robbins, *Bar Task Force Studies Insurance Disclosure Rule*, TEX. LAW., Nov. 19, 2007, at 1 (noting that "legal malpractice insurance carriers estimate that more than 50 percent . . . of Texas lawyers do not carry legal malpractice insurance).

n31 *See* Towery, *supra* note 5 (stating that most clients would consider insurance coverage material information).

n32 *See* Towery, *supra* note 5, at 36 (noting that "many clients . . . presume that all lawyers are required to carry malpractice insurance").

n33 *See, e.g.*, Mary Alice Robbins, *Survey: Public Wants to Know if Lawyer's Insured*, TEX. LAW. May 5, 2008, at 1.

n34 Mandatory disclosure rules, unlike coverage requirements, do not limit lawyers' freedom to choose not to carry insurance; instead, they merely allow clients to make fully informed decisions when hiring a lawyer. Solaimani, *supra* note 9, at 975 ("Individual lawyers could make a personal decision about the costs and benefits of purchasing coverage while offering clients the right to choose to disregard or insist on insurance.").

n35 *Id.* at 975.

n36 *See* Greenstein, *supra* note 12 (manuscript at 9, on file with author) (describing the legal profession as being both historically and contemporarily disliked by the public).

n37 *See* Mendrzycki *supra* note 6, at 41.

n38 Although this attack is certainly valid, there is some irony in the fact that opponents who rely on empirically unsubstantiated fears to fuel their fervor against malpractice insurance rules object to such rules because proponents cannot provide empirical proof of their claims. There is a definitive need for empirical support on both sides of this debate.

n39 ThinkExist.com, Proof Quotes: William Cowper, http://en.thinkexist.com/quotations/proof/ (last visited Apr. 17, 2009).

n40 Lack of evidence *could* bar passage of mandatory coverage rules. Scholars have noted that in the absence of substantial evidence of public harm from uninsured lawyers, a due process challenge to mandatory coverage rules may be "insurmountable." Solaimani, *supra* note 9, at 973-974; *see also* Nicholas A. Marsh, *"Bonded and Insured?": The Future of Mandatory Insurance Coverage and Disclosure Rules for Kentucky Attorneys, 92 KY. L.J. 793, 802-03 (2004).*

n41 *See* Mallen, *supra* note 29, at 12-13.

n42 *See, e.g.*, Douglass S. Malan, *Is There Any Assurance in Insurance? Proposed Rule Would' Require Disclosure of Malpractice Policy*, 34 CONN. L. TRIB. 3 (2008) (arguing that non-insured lawyers likely will be negatively branded in the public eye, but that "an attorney who carries malpractice insurance should not necessarily be judged by the public as preferable to one who does not").

n43 *See, e.g.*, Mendrzycki *supra* note 6, at 41; Mason, *supra* note 3.

n44 Solaimani, *supra* note 9, at 968-975.

n45 *Id.*

n46 *See, e.g.*, Mendrzycki *supra* note 6, at 41; Mason, *supra* note 3.

n47 Five states required attorneys to disclose insurance status in their annual registration statements when the ABA Committee proposed the Rule on Insurance Disclosure. These were Michigan, Nebraska, Delaware, North Carolina, and Virginia. ABA Standing Committee on Client Protection, REPORT TO THE HOUSE OF DELEGATES 4 (Aug. 2004), http://www.cobar.org/docs/ACFC2D1.pdf?ID=935.

n48 *Id.* at 3.

n49 *Id.*; Mark Hansen, *Disclosure Rules. More States Require Lawyers to Say Whether They Carry Malpractice Insurance*, A.B.A. J., May 2006, http://www.abajournal.com/magazine/disclosure_rules/.

n50 *Id.*

n51 *Id.* at 3-4.

n52 *See* ABA Standing Committee on Client Protection, *supra* note 47, at 8; ABA Model Court Rule on Insurance Disclosure, Part B. ("The information submitted pursuant to this Rule will be made available to the public by such means as may be designated by the [highest court of the jurisdiction].").

n53 HALT, Inc. (Help Abolish Legal Tyranny) is a national non-profit legal reform group. HALT seeks to "challenge the legal establishment to improve access and reduce costs in our civil justice system at both the state and federal levels." HALT, Inc., About HALT, http://www.halt.org/about_halt/ (last visited Apr. 17, 2009).

n54 Comments from HALT to the ABA, *supra* note 11, at 1.

n55 *See id.* at 1. HALT notes that the ABA rule does not guarantee that attorney disclosure in annual registration forms will be made easily accessible, or even public. *Id.* at 4. They argue that direct disclosure to clients is essential in order to ensure clients are actually informed. *Id.*

n56 *See infra* notes 170, 172, & 175.

n57 *See infra* Part III.

n58 State Bar of California, About the Bar: Member Demographics, http://members.calbar.ca.gov/search/ demographics.aspx (last visited Apr. 17, 2009). The State Bar is an extension of the California Supreme Court and all lawyers practicing in California must be members. *Id.*

n59 State Bar of California, 2007 REPORT ON THE STATE BAR OF CALIFORNIA DISCIPLINE SYSTEM 1 (2008), http://calbar.ca.gov/calbar/pdfs/reports/2007_Annual-Discipline-Report.pdf.

n60 California State Bar, CAL. ST. B. INS. DISCLOSURE TASK FORCE - FINAL REPORT AND RECOMMENDATIONS 4 (2007).
http://calban.ca.gov/calbar/pdfs/public-conunent/2007/Insurance-Dis_BOG-Oct24.pdf.

n61 *Calif. State Bar Considers Malpractice Insurance Disclosure*, INS. J., July 23, 2007, http://www. insurancejoumal.com/news/west/2007/07/23/81965.htm.

n62 Dishonest conduct includes theft of client's property, embezzlement of client's money, act of intentional dishonesty that directly leads to loss of client's money or property, attorney's refusal to return unearned fees, or borrowing client's money without intention or ability to repay. *See* California State Bar, Client Security Fund, http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10177&id=1379 (last visited Apr. 17, 2009) [hereinafter California State Bar].

n63 *Id.*

n64 *See California State Bar, supra* note 62.

n65 *Id.* The original legislation included an expiration "sunset" provision. The California legislature did not renew these statutes, and they expired in 2000. *Id.*

n66 California State Bar, Background to the Public Comment to the Insurance Disclosure Rules in California, available at http://www.calsb.org/state/calbar/calbar_generic.jsp?cid=10145&n=85601 (last visited Apr. 17, 2009) [hereinafter *Public Comment*].

n67 *Id.*

n68 *Id.*

n69 Insurance Disclosure Task Force at the State Bar of California, INSURANCE DISCLOSURE TASK FORCE - REPORT AND RECOMMENDATIONS UPON RETURN FROM PUBLIC COMMENT 2 (Apr. 12, 2007), http://calbar.ca.gov/ calbar/pdfs/public-comment/2007/Insurance-disclosure_Retum-from-public-conunent.pdf [hereinafter TASK FORCE REPORT AND RECOMMENDATIONS].

n70 Insurance Disclosure Task Force, FINAL REPORT AND RECOMMENDATIONS OF THE INSURANCE DISCLOSURE TASK FORCE OF OCTOBER 24, 2007, Attachment B (Nov. 9, 2007), http://calbar.ca.gov/calbar/pdfs/public-comment/ 2007/Insurance-Dis_BOG-Oct24.pdf [hereinafter FINAL REPORT AND RECOMMENDATIONS]. Rule 3-410, Proposed New Rule of the California Rules of Professional Conduct on Disclosure of Professional Liability Insurance:

> (A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client at the time of the client's engagement of the member . . . . The notice required by this paragraph shall be provided to the client in writing.
> (B) If a member does not provide the notice . . . at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days . . . .
> (C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel and does not represent or provide legal advice to clients outside that capacity.

The Rule was adopted by the California Board of Governors on May 16, 2008; now the Rule is subject to approval by the California Supreme Court. Steven M Ellis, State Bar Approves Proposal for Malpractice Insurance Disclosure, Metropolitan News-Enterprise 3 (May 22, 2008), *available at* http://www.metnews.com/ articles/2008/rule052208.htm.

n71 *Id.*

n72 Rule 9.7, Proposed Rule of Court, on Disclosure of Professional Liability Insurance:

> (a) Each active member who is not exempt under subdivision (b) must certify to the State Bar in the manner that the State Bar prescribes: (1) Whether the member represents or provides legal advice to clients; and (2) If the member represents or provides legal advice to clients, whether the member currently has professional liability insurance.
> (b) Each active member who is employed as a government lawyer or in-house counsel and does not represent or provide legal advice to clients outside that capacity must certify those facts to the State Bar . . . . Members who provide this certification are exempt from providing information under subdivision (a) . . . .
> . . . .

> (d) A member must notify the State Bar in writing of any change in the information provided under subdivision (a) or (b) within thirty days of that change.
> (e) The State Bar will identify each individual member who certifies under subdivision (a) that he or she does not have professional liability insurance by making that information publicly available upon inquiry and on the State Bar's website or by a similar method.
> (f) A member who fails to comply with this rule in a timely fashion may be suspended from the practice of law until the member complies. If a member knows or should know that the information supplied in response to this rule is false, the member will be subject to appropriate disciplinary action.

Id. at Attachment A.

n73 *Id.*

n74 *Id.*

n75 *Id.* at Attachment B.

n76 *Id.*; *Public Comment, supra* note 66.

n77 *See* FINAL REPORT AND RECOMMENDATIONS, *supra* note 70, at 3. Most of the comments came from individual attorneys; some were initiated by groups and organizations. Of all comments, 78.5% opposed the proposal in whole or in part and only 14% supported it. *Id.*

n78 *Id.* at 8.

n79 *Id.* at 4.

n80 *Id.* at 4.

n81 *Id.* at 8.

n82 *See Public Comment, supra* note 66 (90-day comment period with comment deadline of Aug. 6, 2007).

n83 FINAL REPORT AND RECOMMENDATIONS, *supra* note 70, Attachment B.

n84 *See Public Comment, supra* note 66.

n85 *See* TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 69, at 9.

n86 *Id.* at 4-5.

n87 *Id.*

n88 Some such factors are the nature of the claim, the timing of the claim, and the terms and conditions of the particular insurance policy at issue. *Id.* at 4-5.

n89 *See id.*

n90 HALT, Inc., Comments from HALT--An Organization of Americans for Legal Reform to the State Bar of California Insurance Disclosure Task Force Regarding California's Revised Proposed Rules Concerning Legal Malpractice Disclosure, at 1 (July 10, 2007), http://www.halt.org/reform_projects/lawyer_accountability/pdf/CA_Malpractice_Disclosure_Revised_Proposal.pdf [hereinafter *Comments from HALT to State Bar of California*].

n91 *Id.*

n92 *Id.* at 5.

n93 *Comments from HALT to State Bar of California, supra* note 90, at 1.

n94 *Id.*

n95 Rule 3-410(C): "This rule does not apply to a member who is employed as a government lawyer or in-house counsel and does not represent or provide legal advice to clients outside that capacity." *See* FINAL REPORT AND RECOMMENDATIONS, *supra* note 70, at Attachment B.

n96 *Id.* at 3.

n97 *See id.*

n98 *Id.*

n99 *California's Business & Profession Code sections 6147* and 6148 require written fee agreements for contingency fee contracts and for matters likely to generate attorney fees of more than $ 1,000. *Cal. Bus. & Prof. Code § 6147* (West 2005); *Cal. Bus. & Prof. Code § 6148* (West 2005); Nancy McCarthy, *Board Ducks Malpractice Disclosure*, CAL. B.J., Dec. 2007, http://calbar.ca.gov/state/calbar/calbar_cbj.jsp (follow "Archived Issues" hyperlink; then follow "December 2007" hyperlink). They include exceptions for corporations as clients and where an attorney was hired previously to provide similar counsel. *See id.*

n100 *Id.*

n101 *Malpractice Insurance Disclosure Lurches Toward Approval*, 50 ORANGE COUNTY LAW. 50, 53, Apr. 2008 [hereinafter *Toward Approval*].

n102 The California Supreme Court has previously held that an attorney's obligation to a pro bono client should be no less than that to any other client. *Id.*; *Segal v. State Bar of Cal., 44 Cal. 3d 1077, 1084 (1988).* Thus, an exemption for pro bono clients would be constitutionally impermissible.

n103 *See* TASK FORCE FINAL REPORT AND RECOMMENDATIONS, *supra* note 69.

n104 *Id.*

n105 *Id.* at 7.

n106 *Id.*

n107 *See id.* at 7, Attachment A, Rule 9.7(a)(2).

n108 State Bar of California, California Insurance Disclosure Task Force, Public Comment, Proposed New Insurance Disclosure Rule (Revised) (Mar. 17, 2008), http://www.calsb.org/state/calbar/calbar_ generic.jsp?cid = 10145&n =90024.

n109 *Id.*

n110 *Id.*

n111 *Toward Approval, supra* note 101, at 53; *see* FINAL REPORT AND RECOMMENDATIONS, *supra* note 70, Rule 3-410.

n112 *See* FINAL REPORT AND RECOMMENDATIONS, *supra* note 70.

n113 *See* Darrell T. Mason, REPORT OF STUDY UNDERTAKEN BY CLIENT PROTECTION SUBCOMMITTEE OF THE SPECIAL COMMITTEE ON LAWYERS MALPRACTICE INSURANCE 2005-2006 1, *available at* http://www.vsb.org/site/ news/item/committee-reports-on-malpractice-insurance/ (last visited Apr. 17, 2009); 6:4-18 Rule of the Supreme Court of Virginia on Financial Responsibility [hereinafter *6:4-18 Rule*]:

> [E]ach such member shall, upon admission to the Bar, and with each application for renewal thereof, submit the certification required herein or obtain a waiver for good cause shown. The active member shall certify to the Bar . . . a) whether or not such member is currently covered by professional liability insurance . . . ; b) whether or not such member is engaged in the private practice of law involving representation of clients drawn from the public, and, if so, whether the member intends to maintain professional liability insurance coverage during the period of time the member remains engaged in the private practice of law . . .

> The foregoing shall be . . . made available to the public by such means as may be designated by the Virginia State Bar.
>
> Each active member who certifies . . . cover[age] . . . shall notify the Bar in writing within thirty (30) days if the insurance policy . . . lapses, is no longer in effect or terminates for any reason, unless, the policy is replaced with another policy and no lapse in coverage occurs . . . .
>
> . . . 'Good cause shown' as used herein shall include illness, absence from the Commonwealth of Virginia, or such cause as may be determined by the Executive Committee of the Virginia State Bar. . . .

Id.

n114 *See 6:4-18 Rule, supra* note 113; Virginia State Bar, Clients' Protection Fund, http://www.vsb.org/site/public/public-protection-programs/ (last visited Apr. 17, 2009) [hereinafter Clients' Protection Fund].

n115 Virginia State Bar, Attorney Record Search, http://www.vsb.org/attorney/attSearch.asp?S=M (last visited Apr. 17, 2009) [hereinafter *Attorney Record Search*].

n116 Clients' Protection Fund, *supra* note 114.

n117 *Attorney Record Search, supra* note 115.

n118 *See* Mason, *supra* note 113, at 3.

n119 *Id.* at 3. The 19th Circuit of Virginia had the highest percentage of practicing uninsured lawyers (23%), followed by the 13th Circuit (13%). *Id.*

n120 *Id.* at 4.

n121 *See* Mason, *supra* note 113, at 7.

n122 *Id.* The ABA Model Rule recommended minimum coverage of $ 100,000; ALPS reported that in 2005 the coverage limits of 56% of their Virginia policies exceeded $ 1,000,000. *Id.*

n123 *Id.* MM reported that in 2005 almost 70% of its policies had limits of at least $ 1,500,000. *Id.* Furthermore, 8% of MM-insured attorneys had limits twice the ABA minimum. *Id.*

n124 *Id.* at 5.

n125 *Id.* at 5-6.

n126 *Id.* at 5 (finding Moreover, the Bar found that 58% of all claims closed between 2003 and 2005 did not lead to any payment).

n127 *Id.* at 1.

n128 When discussions were at their inception, Virginia did not mandate malpractice insurance but required minimum coverage for certain groups: attorneys who participated in the Virginia Lawyer Referral Service, those covered by the Virginia Consumer Real Estate Settlement Protection Act, and attorneys who had been previously disciplined. *Id.*

n129 *Id.* at 1. Other states have also followed such practice of endorsement of insurance carriers by state bars. Bars in the following states have endorsed insurance carriers: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin, http://www.abanet.org/legalservices/lpl/directory/ (follow hyperlink for each state).

n130 *See* Mason, *supra* note 113, at 1.

n131 *Id.*

n132 *Id.* at 1.

n133 *Id.* at 9. This fund is supplemental to the existing Clients' Protection Fund and also administered by the Virginia State Bar. *Id.*

n134 *Id.* at 2.

n135 Resolution 6 by vote 92-6. *Id.*

n136 *Id.*

n137 *See* Alan Cooper, VSB Sinks Mandatory Insurance, VA. LAW. WKLY., Oct. 27, 2008, http://www.valawyersweekly.com/weeklyedition/2008/10/27/vsb-sinks-mandatory-insurance/.

n138 *See id.*

n139 *See id.*

n140 *See, e.g., Comments from HALT to the ABA, supra* note 11, at 1.

n141 Because of the uniform rejection of mandatory coverage rules outside of Oregon, this Note treats the legal culture of Oregon as anomalous and not indicative of the culture within other states.

n142 Virginia has had an established disclosure rule for some time, and they require a comparatively wide class of attorneys to report. *6:4-18 Rule, supra* note 113. Also, Virginia has an exemplary malpractice disclosure online database. *See Comments from HALT to the ABA, supra* note 11, at 4. Unlike many states, Virginia makes insurance coverage information readily available to the public. *State Implementation of ABA Rule, supra* note 7. Currently, most states do not make registration statements available online and immediately accessible by the public. *Id.* Although most state bars claim that registration statements are a matter of public record, they do not facilitate such immediate access by the public. *Id.*

n143 *Virginia State Bar, supra* note 3. The proposal was voted against 60-11. *Id.*

n144 Some such potentially negatively affected attorneys are those in government, pro-bono, or part-time practices. See *infra* Part III.

n145 Darrel T. Mason, "Revisions to Mandatory Malpractice Proposal" Report to Virginia Bar Council, at 1-2 (June 3, 2008), http://www.vsb.org/docs/mtni-en12-080408.pdf.

n146 *See id.*

n147 *See id.*

n148 *See* FINAL REPORT AND RECOMMENDATIONS, *supra* note 70, at Attachment B.

n149 *State Bar of California, supra* note 108.

n150 For example, California rule-makers decided their mandatory disclosure rule would only exempt certain classes of lawyers who did not regularly work with public clients when those lawyers were in fact not representing public clients, whereas Virginia rule-makers exempted lawyers who did not regularly represent public clients entirely from having to carry malpractice coverage. *Compare* FINAL REPORT AND RECOMMENDATIONS, *supra* note 70, at Attachment B *with* Virginia State Bar, Virginia State Bar Seeks Comments to Proposed Amendments to Part 6, Section IV, Paragraphs 18 and 19 Rules of Supreme Court of Virginia, http://www.vsb.org/ docs/prop-para-18-19_071008.pdf (last visited Apr. 17, 2009).

n151 For example, California and Virginia both responded to concerns that malpractice regulation would have disproportionate negative effects on certain classes of lawyers by amending their respective rules to limit the attorneys covered. *See supra* note 150.

n152 This is not surprising considering mandatory disclosure rules are generally seen as a form of compromise. *See supra* note 11.

n153 *See supra* Part II.A.

n154 *See Comments from HALT to State Bar of California, supra* note 90, at 3 (arguing that without a client acknowledgement requirement, lawyers could bury brief unnoticed disclosure statements in "lengthy paperwork," effectively avoiding informing clients).

n155 For example, the original draft rule in California required written confirmation from clients that they had been informed that their lawyers did not carry malpractice insurance. *See* TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 69, at 6-7.

n156 *See, e.g.*, Insurance Disclosure Task Force, FINAL REPORT AND RECOMMENDATIONS OF THE INSURANCE DISCLOSURE TASK FORCE 4 (2007), Oct. 24, 2007, *available at* http://calbar.ca.gov/calbar/pdfs/public-comment/ 2007/Insurance-Dis_BOG-Oct24.pdf ("[T]hat the State Bar, as part of an expanded insurance related package, will study . . . methods of making professional liability insurance more affordable and widely available to attorneys."); Darrell T. Mason, *supra* note 113, at 14-15 (considering a plan whereby a fund is established through assessment of lawyers across the Bar in order to subsidize malpractice insurance for those lawyers who cannot afford insurance on the open market).

n157 *State Bar of California, supra* note 2.

n158 *Id.*

n159 *6:4-18 Rule, supra* note 113. Good cause is defined as including illness and absences from Virginia. *Id.*

n160 Based on the time commitment involved in modern legal representation, any work for a client consisting of less than four hours is likely to be uncomplicated and less essential to clients' interests; thus malpractice is less likely to occur, and claims are less likely to be substantial in this limited representation.

n161 This makes California one of only six states that require disclosure directly to clients. *See State Implementation of ABA Rule, supra* note 7.

n162 *See Comments from HALT to the ABA, supra* note 11, at 4.

n163 *See supra* notes 90, 154 and accompanying text.

n164 In South Dakota, the mandatory disclosure rule requires disclosure to be made on a template with a warning that the lawyer in question is uninsured in large type on the top of a standardized form. *See Comments from HALT to the ABA, supra* note 11, at 4. HALT has noted that this procedural safeguard has led to a particularly affective disclosure regime in South Dakota. *Id.* at 5.

n165 *See* TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 69, at 4 (concluding that "the important goal of client protection would be advanced by an insurance disclosure requirement, and that this goal outweighed the concerns expressed about imposing any such requirement").

n166 The twenty-four states that currently regulate insurance and disclosure reflect the wide range of choices available to rule-makers. Pennsylvania, New Hampshire, Ohio, Alaska, and South Dakota require attorneys to provide disclosure directly to clients. *See State Implementation of ABA Rule, supra* note 7, at 1, 5-7. Arizona, Delaware, Idaho, Illinois, Kansas, Massachusetts, Minnesota, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Rhode Island, Virginia, Washington, and West Virginia all require lawyers to disclose their insurance to their respective State Bars, and all of these states but New Mexico make this information available to the public. *Id.* at 1-6, 8-9. These States vary, however, in just how "available" they make this information, by choosing different methods of informing the public. Many states, such as Idaho, Nevada, and Rhode Island only release this information upon specific requests from potential clients, and a number of states only respond to requests by phone or email. *Id.* at 3, 5-6. Several states provide searchable online databases on their State Bar websites. *See, e.g., Attorney Record Search, supra* note 115. However, for many states, the information on these websites is neither posted in a timely manner, nor update regularly. *See infra* note 145. The availability of well managed online databases may be an indication that States have made disclosure easier, and consequently better informed the public. *But see* McKee, *supra* note 28 (noting that the clients harmed most often by malpractice are the "least sophisticated and the poorest," and thus not likely to have access to the internet to reach the State Bar web site and see whether a prospective attorney is insured). Arkansas, Kentucky, and Texas have deliberated and decided not to adopt the ABA Rule. *See State Implementation of ABA Rule, supra* note 7, at 1, 3, 7. Conversely, Oregon mandates malpractice insurance coverage by all, negating the need for disclosure. *Id.* at 6. The large and small scale decisions made in drafting malpractice insurance rules play a large part in controlling how effectively each State's regime operates.

n167 *See supra* note 166.

n168 *See, e.g.*, Comments from HALT to the ABA, *supra* note 11, at 3-5.

n169 Some data in South Dakota does suggest that an effective disclosure regime truly results in widespread assumption of malpractice insurance. *Comments from HALT to the ABA, supra* note 11, at 5 (noting "a marked increase in the number of insured attorneys" following implementation of South Dakota's mandatory disclosure rule).

n170 Illinois and Pennsylvania are two exemplar states out of many that have had operating disclosure rules in effect for several years. Illinois Amended SCR 756 in 2004 to require practicing attorneys to disclose to the State Bar their insurance coverage status as part of each attorney's annual registration. Helen W. Gunnarsson, *Rule 756 Requires Mandatory Disclosure of Malpractice Coverage, 92 ILL. B.J. 392, 392 (2004).* In 2005, Pennsylvania adopted Rule 1.4(c) into the Pennsylvania Rules of Professional Conduct, requiring attorneys who do not carry malpractice insurance to notify their clients by writing. Philadelphia Bar Association, PA Supreme Court Orders Written Disclosure from Attorneys Without Professional Liability Insurance, Jan. 5, 2006, http://www.philadelphiabar.org/page/NewsItem?appNum=1&newsItemID=1000469.

n171 By and large, state bars and insurance companies are fairly closemouthed in regards to any statistical data that may or may not exist.

n172 *See, e.g., Comments from HALT to the ABA, supra* note 11, at 4-5 (arguing that South Dakota's Rule is exemplary, and that therefore the ABA (and consequently other states) should model their rule after South Dakota).

n173 Rachel M. Zahorsky, *Clients, Law Firms Get 'Savage' As Legal Malpractice Claims Increase*, A.B.A. J., Feb. 17, 2009, http://www.abajournal.com/weekly/clients_law_firms_get_savage_as_legal_ malpractice_claims_increase.

APPENDIX Q

New Jersey Law Journal

VOL. CXCIX – NO. 2 - INDEX 58 JANUARY 14, 2010 ESTABLISHED 1878

Professional Malpractice

Mandatory Legal Malpractice Insurance: The Time Has Come

The state should enact legislation that supplements the court's rule

By Bennett J. Wasserman and Krishna J. Shah

In order to drive a car in New Jersey, you need a license and insurance. If your negligent driving injures someone, you have insurance not only to protect yourself, but to protect the person you injure.

In order to practice law in New Jersey, you also need a license, but not insurance. If your negligence damages a client and you have no insurance, then it's too bad for the client.

Is there something wrong with this picture? We think so. We lawyers are fiduciaries to our clients. That means that first and foremost we have to put our clients' interests ahead of our own. Even at our own cost.

Wasserman is Special Professor of Law at Hofstra Law School, where he teaches lawyer malpractice. He and Shah are editors of the Legal Malpractice Law Review, a Web-based blog. They are both affiliated with Stryker Tams & Dill in Newark. The firm represents Natural Energy Works in the Nagle v. Natural Energy Works, Inc. *case.*

For many years, Oregon has been the only state that requires all practicing lawyers to carry professional liability insurance that protects clients who are damaged by their lawyer's errors. The experience in Oregon has been a good one. Premiums are relatively low and affordable. Clients are protected. Lawyers are protected. Malpractice insurers are happy because, in Oregon, all lawyers have to share in the cost of insurance and thus insurance companies make more money and premiums are thus lower for all.

In New Jersey, we have a modified form of mandatory malpractice insurance coverage. Under Court Rule 1:21-1A, B and C, lawyers who practice as an entity — a professional corporation, limited liability company or limited liability partnership — must have at least $100,000 for each of its attorneys. Each year, the entity must file a certificate of insurance with the Clerk of the Supreme Court to that effect. This mandatory coverage, however, covers only a fraction of the attorneys and law firms practicing in New Jersey. Although many solos and small firms who are not covered by these Court Rules voluntarily choose to carry malpractice insurance, many don't. That leaves a lot of lawyers who are uninsured and even more clients unprotected from even the simplest professional error that most of us can make.

Even with this partial form of mandatory malpractice insurance coverage, New Jersey's legal malpractice insurance rates are eminently affordable. In fact, the head of the State Bar Association's legal malpractice insurance committee recently declared that premiums have remained level even in the face of our six-year legal malpractice statute of limitations and the Supreme Court's decision in *Saffer v. Willoughby.* Insurance industry professionals agree and also believe that we can expect our malpractice insurance premiums to go down even more.

One way to assure that our malpractice insurance premiums stay low is by extending the mandatory insurance rules that apply to law practice entities under Rule 1:21-1A through C to lawyers who practice as individuals or general partnerships. With increased competition in the insurance marketplace (there are currently more than 20 professional liability insurers in New Jersey vying for our premium dollars), the resulting revenue infusion to carriers by mandating insurance coverage would not only lower premiums, but it would extend protection to all clients — not just those who, by some happenstance, hire a lawyer who has decided to conduct his practice as an entity covered by Rule 1:21-1A-C.

The courts in New Jersey may be headed in this direction. In *Nagle v. Natural Energy Works, Inc.*, Judge Victor Ashrafi, sitting in the Law Division of the Superior Court, Somerset County, recently recognized the paradox of allowing a defendant attorney on the legal malpractice claim to defend himself pro se

and to refuse to notify his professional malpractice carrier of the claim, thus depriving the former client of the very coverage that the rule mandated. In support of his ruling — that Court Rule 1:21-1A-C requires all attorneys practicing under the umbrella of a professional corporation to notify their professional liability carrier of the claim — the judge noted:

> [T]here's a reason we have a rule that says we have to carry insurance, and that's to make sure that there is coverage for clients who have claims. [It may be that] the claim is frivolous...but you got to be insured.

The court thus ordered the malpractice defendant to put his carrier on notice of the claim and to cooperate with the carrier in defending it. In that way, coverage for the benefit of an allegedly wronged client — and thus the very reason for the rule — would be vindicated.

The result in suits where attorneys are not required to have malpractice insurance coverage is especially disturbing in those cases where municipalities are represented by uninsured lawyers and the cost of their professional negligence must be borne by innocent taxpayers. In *Township of Manalapan v. Moskowitz*, MON-L-2893-07, the defendant attorney, a solo practitioner, not covered by Rule 1:21-1A-C, appeared pro se in a suit brought by the township alleging malpractice for his failure to secure a contingency clause that would have allowed the Township of Manalapan to back out of a contract to purchase and develop land for recreation, in the event the land was contaminated. The attorney argued that no matter what he did or did not do, the township had been required to buy the property by court order. Eventually, the township dropped the malpractice suit because it appeared that the defendant attorney may not have had malpractice insurance coverage and the township did not want to pursue him to satisfy any judgment from his personal assets.

The effect of such a dismissal, in the event the attorney was in fact found to be negligent, is that the municipality would be left holding the proverbial bag, with no recourse for the malpractice that allegedly cost $100,000 to remedy. Assuming the case had not been voluntarily dismissed by the township, and the court or jury hearing the malpractice case had found that the defendant attorney should have included a contingency clause to protect the municipality against contamination clean-up costs on the subject property, the township's inability to compel a solo attorney to file a notice of claim with his carrier, given the current structure of Rule 1:21-1A-C, would mean but one thing: the $100,000 expenditure for remediation would be unjustly borne by Manalapan taxpayers.

There is simply no way to reconcile the results of these two cases. In the event the client alleging malpractice can prove that the lawyer was negligent in his representation and that negligence caused the client damage, the client ought to be able to collect on a resulting judgment or settlement, whether the attorney practices as a solo, a general partner or one of the three covered entities. The rationale behind the Supreme Court's Rule 1:21-1A-C, that lawyers are fiduciaries who cannot hide behind an entity form of practice and are bound by a higher duty to ensure that their former clients have the ability to vindicate their rights even against them for professional negligence, is frustrated by a limited application of that principle to professional corporations, limited liability companies, and limited liability partnerships alone. It must apply to all practicing lawyers who represent clients regardless of the business form by which the lawyer chooses to practice.

If for some reason our Supreme Court would choose not to extend the rule, then the Legislature should proceed to enact legislation that supplements the Court's rule and extends the coverage of Rule 1:21-1A to C to all practicing lawyers — not so much to affect the practice of law — an area constitutionally reserved to the Supreme Court, but in order to afford all New Jersey citizens the same protection that they would get if they choose to retain lawyers who practice under the statutory entity form. The legislature would be entirely within its constitutional right to do so because it augments the Court's efforts. Moreover, more lawyers covered by insurance would mean more premium dollars to the insurance industry and thus lower premiums overall. If ever there were a "win-win" situation, this is it. The legislature should enact mandatory insurance coverage for all those practicing lawyers that the court's rule does not cover. ■

APPENDIX R

New Jersey Law Journal

VOL. 215 - NO 3 MONDAY, JANUARY 20, 2014 ESTABLISHED 1878

Professional Malpractice

All Clients Deserve Protection From Professional Negligence

A call for universal mandatory legal malpractice insurance in New Jersey

By Bennett J. Wasserman

New Jersey is now ready to complete the journey it started in 1970, when our Supreme Court took the historic step of adopting Court Rule 1:21-1A, which required all lawyers who practice as a professional corporation to carry legal malpractice insurance. By 1997, the court extended the rule to cover lawyers practicing as LLCs and LLPs as well. The notion of mandatory liability insurance in the professions and other walks of life was not unique at the time the court rule was first adopted. If one wanted the privilege of a license from the State of New Jersey—whether to drive a car, build a house, be a barber, a surgeon or a multitude of other service providers (professional and otherwise)—one needed to show financial responsibility through the purchase of liability insurance. Strangely, though, the court never applied the same concept of linking a license to securing liability insurance to the legal profession.

Court Rule 1:21-1A was therefore something of a vanguard. In the context of the attorney-client relationship, the rule's central purpose and the definitive public policy enunciated by the court was to assure that clients would be compensated if they suffered actual damage as a result of their lawyer›s professional negligence. Such a rule is entirely consistent with the lawyer's fiduciary duty to the client, which requires that when the client's interests and the lawyer's interests diverge, the lawyer must place the client's interest ahead of his own, even at the lawyer's expense. But the shortcoming of the court's mandatory insurance rule was that it protected only those clients of a limited number of lawyers—those who practiced law through an entity—a PC, LLC or an LLP.

Success of Universal Mandatory Malpractice Insurance Outside N.J.

In 1978, following New Jersey's lead, Oregon also opted for mandatory legal malpractice insurance. But Oregon went further and mandated that *all* lawyers in private practice—not just entities who employ lawyers—carry legal malpractice insurance. Toward that end, the Oregon State Bar's Professional Liability Fund program provides malpractice insurance for every lawyer in private practice in Oregon. According to the American Bar Association, today there are over 12,000 practicing lawyers in Oregon. Insurance is a condition required of all lawyers in Oregon to obtain and to renew a license to practice law. The Oregon experience over the past quarter century has made it a perfect model for our own state to follow. No client is left unprotected. No lawyer is left uninsured. Lawyers are guaranteed affordable and stable insurance premiums. There are abundant and accessible CLE courses on malpractice avoidance and risk reduction which give lawyers further discounts on their premiums. All 12,000 practicing lawyers in Oregon pay into the Professional Liability Fund, making malpractice insurance affordable for all. Today, every practicing lawyer and every client in Oregon is protected with, at minimum, $300,000 of malpractice insurance. Lawyers also have the option to buy affordable excess coverage.

The successful Oregon model of universal mandatory legal malpractice insurance has not yet taken hold in New Jersey. That may be because the Oregon State Bar is an integrated bar association, meaning, it is part of that state's judiciary. Every lawyer in Oregon is a member of the State Bar, and every practicing lawyer contributes to its Professional Liability Fund.

Wasserman is vice president and general counsel of LegalMalpractice.com. He is chairman of the legal malpractice law group of Davis, Saperstein & Salomon in Teaneck, and serves on the faculty of Hofstra University Law School.

Not so in New Jersey, where our State Bar Association is a voluntary association serving first and foremost the interests of its more than 17,500 members. While our judiciary lists more than 80,000 lawyers in New Jersey, the American Bar Association cuts that figure to about 41,000 lawyers who are "active and resident." This figure does not take into account numerous out-of-state lawyers who, in these days of multistate law practice, have secured limited law licenses under RPC 5.5. Nevertheless, by any measure, New Jersey has more lawyers per capita than most other states. And, thus, the state has more lawyers who the court, in the exercise of its constitutional power to regulate lawyers and the practice of law, could require to contribute to a mandated insurance pool, thus spreading the risk and reducing premium costs of legal malpractice insurance for the entire profession. Such a step would give real meaning to New Jersey's public policy to protect the consumers of legal services.

The Oregon model has been enthusiastically adopted by our neighbor to the north—Canada, through its version of integrated bar associations called provincial law societies. According to one such law society's website: "Professional liability insurance ensures that lawyers are protected for negligence and ensures that clients receive the compensation they are entitled to." Like Oregon, Canada's law societies offer affordable universal mandatory malpractice insurance coverage to all lawyers and their clients—whether or not the practice is in the form of an entity.

Because Oregon and Canada's mandatory legal malpractice insurance programs are administered by associations that are integrated within their respective judiciaries, they bear strong resemblance to New Jersey's court-promulgated brand of mandatory, albeit limited, legal malpractice insurance coverage. Also like New Jersey, the Oregon and Canadian systems provide a Client Protection Fund, administered by court-appointed officials, to address recompense to victims of dishonest lawyers. All lawyers contribute to that fund. Also like New Jersey, Oregon and Canada offer attorney-fee dispute resolution committees. One can only wonder why, with so many more licensed attorneys in New Jersey than either Oregon or any Canadian province, our New Jersey Supreme Court has not yet expanded Rules 1:21A, 1B and 1C to include all practicing lawyers within their reach.

One thing seems clear, however: Our State Bar Association is not designed to play a role in New Jersey's mandatory legal malpractice insurance program, nor should it. On the issues that separate lawyers and clients, such as legal malpractice, the State Bar, perhaps appropriately and because it is a voluntary trade association, must put the interests of its members ahead of the interests of its members' clients. Our Supreme Court, on the other hand, consistently has come down on the side of client protection, as the public good, rather than the interests of members of the bar, is paramount to the court. Because of that, it makes good sense that if our Supreme Court is destined to move forward toward universal mandatory legal malpractice insurance coverage, the effort should derive from the court's own constitutional mandate to regulate lawyers and the practice of law in New Jersey.

Unequal Protection of N.J.'s Consumers of Legal Services

The reality of law practice in New Jersey calls for an expansion of the current mandatory insurance rule to all its lawyers. The majority of lawyers in New Jersey do not practice as an entity but rather as solos or in small general partnerships to which the court's mandatory insurance rules do not currently apply. According to the American Bar Association, more than 70 percent of all legal malpractice claims are brought against solos and small law firms. Thus, the overwhelming majority of New Jersey clients are represented by lawyers who are not required to have legal malpractice insurance. These lawyers' clients are thus deprived of the mandatory insurance protection that Court Rules 1:21-1A, 1B and 1C offer the clients of lawyers practicing as entities. This glaring inequity makes a compelling argument that now is the time for the New Jersey Supreme Court to address this problem by taking the next logical step and to extend its entity-limited mandatory insurance rule to *all* lawyers who practice law in this state and, thus, to all New Jersey consumers of legal services.

There are no statistics to show how many innocent clients who have bona fide malpractice claims against uninsured attorneys are left out in the cold with no insurance protection for losses caused by their lawyer's negligence. But one need go no further than the files marked "rejected" of those lawyers who will not prosecute a meritorious legal malpractice case because of the absence of insurance and the difficulties in collecting a judgment against a solo practitioner or a small firm of lawyers. These clients, believed to be far more numerous than those who are the victims of dishonest lawyers, cannot turn to the New Jersey Client Protection Fund to compensate for their lawyers' professional negligence. This leaves a sizeable group of New Jersey citizens with no effective recourse to cover the losses caused by their lawyers' professional negligence. At the end of the litigation trail, these clients are left with no effective remedy for their lawyers' negligence or breach of fiduciary duty which causes them actual harm.

Recognizing how inequitable this is to the clients damaged by their lawyer's malpractice, several states have adopted a "caveat emptor" type rule, which requires an uninsured lawyer to advise a prospective client either directly or through a hard-to-find public filing with a state disciplinary authority that he or she is not insured for any loss caused by his or her professional negligence. Thus, the organized bar in these states have effectively rid themselves of their fiduciary duty to put the clients' interest ahead of their own on the issue of client protection by dumping onto the client the risk of loss for the lawyer's prospective breach of duties. This "duty to warn" mentality is usually reserved for the sellers and buyers of defective products or hazardous activities; not for the fiduciary duty characteristic of the attorney-client relationship. It would be repugnant to our Supreme Court's legacy—known for its staunch support for protecting both the integrity of the legal profession and the rights of consumers of legal services—to ever adopt such an inappropriate and half-baked approach to the law governing the sacrosanct attorney-client relationship.

Under New Jersey's law of attorney fiduciary duty, the lawyer must place the interests of the client ahead of his or her own, even if it costs the attorney money. It is indisputable that, from time to time, we lawyers make mistakes. When that happens, *Olds v. Donnelly*, 150 N.J. 424 (1997), makes it clear that "The Rules of Professional Conduct still require an attor-

ney to notify the client that he or she *may* have a legal malpractice claim even if notification is against the attorney's own interest." Advisory Committee on Professional Ethics Opinion No. 684, as well as RPCs 1.7 (conflicts of interest) and 1.4 (communication), also require us to do so and to go so far as to counsel the client to secure independent counsel to determine whether the client should sue for legal malpractice.

The reason for this is that if we know we *may* have made a mistake on a client's matter, our tendency is to first protect our own interest before that of the client. Let's assume we so alert the client, and he or she seeks a second opinion. The client's new attorney determines that there is good cause to sue. If we do not carry legal malpractice insurance, not only have we breached our fiduciary duty to our client by failing to protect his legal rights against us as tortfeasors, we have also substantially limited our client's right to be compensated for the damage we have caused him.

N.J's Strong Public Policy of Protecting Consumers of Legal Services

Protecting the rights of consumers of legal services in New Jersey has been at the forefront of our Supreme Court's jurisprudence for decades and is a cardinal attribute of our state's current mandatory legal malpractice public policy. *First American Title Insurance Co. v. Lawson, Wheeler, Lawson & Snyder*, 177 N.J. 125 (2003), concerning a three-lawyer firm practicing as an LLP, illustrates the point. There, the managing partner and a second partner knowingly concealed on a malpractice insurance renewal application that they knew about potential claims against the law firm. The third partner knew nothing of them. Some of those claims materialized and the firm and all three of its partners were sued. The malpractice carrier disclaimed coverage and sought a declaration that the policy was void ab initio for failure to disclose the known potential claim, thus depriving the firm and all members—even the third innocent partner in the firm—of coverage for any claim that might otherwise be covered. The trial court found the policy was in effect as to the entity, but not as to the partners. The Appellate Division reversed, holding that the insurance policy was void for all purposes. The Supreme Court, however, limited the disclaimer of coverage to the "defalcating" partners and the firm entity, but afforded insurance coverage to protect the innocent partner and the clients he may have damaged in unrelated matters that would otherwise be covered.

The significance of the *Lawson* case cannot be overstated and speaks directly to our state's overarching public policy to protect innocent clients from negligent lawyers. Here's how the court approached this case:

> [W]e must analyze the interplay between two established bodies of law. The first set of rules, arising in the corporate field, establishes the parameters of liability for individual partners of a limited liability partnership. The second, arising under insurance law, permits an insurer to rescind coverage when an insured, in applying for that coverage, has misrepresented a material fact. Because the parties' dispute centers on the conduct of attorneys, we also must consider our Rules of Court that seek to protect consumers of legal services that New Jersey attorneys maintain adequate insurance in certain circumstances. This case ultimately requires us to strike an appropriate balance in applying those sometime competing tenets.

The insurance carrier urged the court to void the policy in its entirety, thus depriving the client of coverage, but the court stopped short of that drastic proposal and held:

> [A]pplying the rule of law advocated by [the carrier] could leave members of the public... unprotected even though the insured [attorney] himself committed no fraud. In our view, that harsh and sweeping result would be contrary to the public interest. More specifically, it would be inconsistent with the policies underlying our Rules of Court that seek to protect consumers of legal services by requiring attorneys to maintain adequate insurance in this setting.

This public policy statement articulating the importance of protecting consumers of legal services also points up the inequitable effect of the entity-limited mandatory insurance afforded by Court Rules 1:21-1A, 1B and 1C. Had the innocent lawyer in *Lawson* been a member of a general partnership, as opposed to a PC, LLP or LLC, neither he nor his clients would have gotten the same protection afforded by the public policy articulated by the *Lawson* decision and the court rule. To distinguish clients of entity law firms and nonentity law firms for purposes of insurance coverage is plainly illogical, unfair and even discriminatory. It presents a real issue of unequal protection and disparate treatment of one class of citizens as opposed to another. Why should clients who are represented by a solo or small general partnership have any less right to compensation for their lawyer's negligence than the clients of a lawyer who practices as part of a professional corporation, an LLC or an LLP? This dilemma alone should invite the court to eliminate the discriminatory effect on the clients of uninsured lawyers caused by Rules 1:21-1A,1B and 1C, by simply extending that same protection equally to *all* consumers of legal services.

Current Court Rules Can Facilitate the Benefits of Mandatory Insurance Coverage

In addition to the public policy imperative favoring an extension of the rules to cover all lawyers who provide legal services in New Jersey—whether they hold a plenary license or are admitted pro hac vice—there are already in place court-promulgated procedures that can facilitate New Jersey's move to a universal mandatory legal malpractice insurance system. For example:

- Entity law firms and lawyers already file certificates of liability insurance with the judiciary clerk of the Supreme Court under Rules 1:21-1A, 1B and 1C. It would create no significant burden to have all lawyers do the same.
- Lawyers now fill out annual registration forms and will soon be able to do so electronically. It would create no additional burden to require the lawyer to certify that he or she has secured professional liability insurance in the minimum amounts to be prescribed by the court. Without such mandatory coverage, a lawyer should not

be able to advise or provide legal services to clients who may be damaged by erroneous advice.

• Lawyers now pay annual assessments to the New Jersey Lawyers' Fund for Client Protection pursuant to R.1:28. They can also be required to pay their annual insurance premiums into a Professional Liability Fund, as is done in Oregon, which will then issue a certificate of liability insurance to the lawyer.

• A professional liability fund focused on lawyer malpractice, as opposed to lawyer dishonesty, can operate much along the lines of the Client Protection Fund and can draw from its administrative experience.

• Court rules such as R.1:40, providing complementary dispute resolution programs and other facilitative processes, can easily and effectively be applied to legal malpractice cases.

• Just as a pre-action letter under R. 1:20A-6 must be sent by a lawyer to a client in fee disputes, so as to encourage pre-suit resolution before the Fee Arbitration Committee, Court Rules could also provide that a prospective malpractice plaintiff be required, before starting an action, to send the prospective defendant lawyer a pre-action letter offering the lawyer the opportunity to arbitrate or mediate the malpractice dispute, thus avoiding litigation, if possible. That malpractice claims might thus be resolved more expeditiously and at less cost is beyond serious dispute.

The N.J. Insurance Marketplace Favors Universal Mandatory Insurance

Given the abundant number of lawyers licensed in New Jersey—some 80,000 by the judiciary's count alone—more lawyers would be paying into an insurance pool. With the infusion of more premium dollars from lawyers not currently insured, one could reliably predict that the cost of malpractice insurance will go down. Moreover, a professional liability fund with so many members, i.e., all the licensed and pro hac vice lawyers in New Jersey, could be a formidable negotiator for favorable insurance rates for all lawyers. The legal malpractice insurance market in New Jersey is already very competitive, with at least 27 insurance companies vying for our premium dollars, according the ABA's Standing Committee on Lawyer's Professional Liability. With more premium dollars from so many more prospective insureds who are currently uninsured attorneys, competition can be expected to be even more brisk, thus further driving down the current cost of insurance.

While premium rates may be subject to the vicissitudes of the insurance marketplace, New Jersey's strong public policy favoring the protection of clients from negligent lawyers should not be. Where there is a larger pool of insureds, those market fluctuations would be expected to be milder. A substantially larger pool of insureds can easily be accomplished by extending the court's mandatory insurance rule to all lawyers.

The opportunity for our Supreme Court to fortify its strong public policy favoring the protection of all consumers of legal services in New Jersey is here. The court can do so by simply extending its entity-limited mandatory malpractice insurance rules to all lawyers, and by creating a professional liability fund. The prototypes for such a system have been successful in Oregon and throughout Canada. Thus, the New Jersey clients of solo practitioners and small general partnerships will be on equal footing with clients of entity law firms in their access to legal remedies to compensate them for the damage they may suffer as a result of their lawyer's professional negligence. ■

APPENDIX S

New Jersey Law Journal

SECTION 3

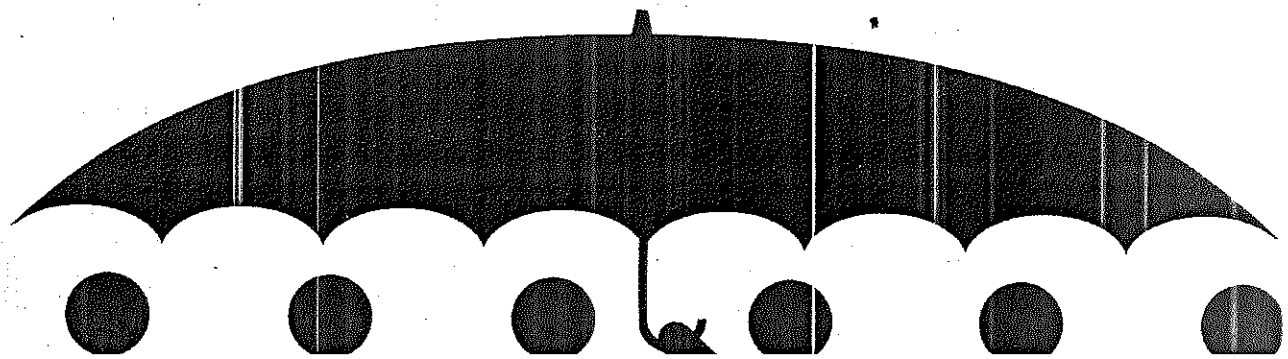
Professional Malpractice

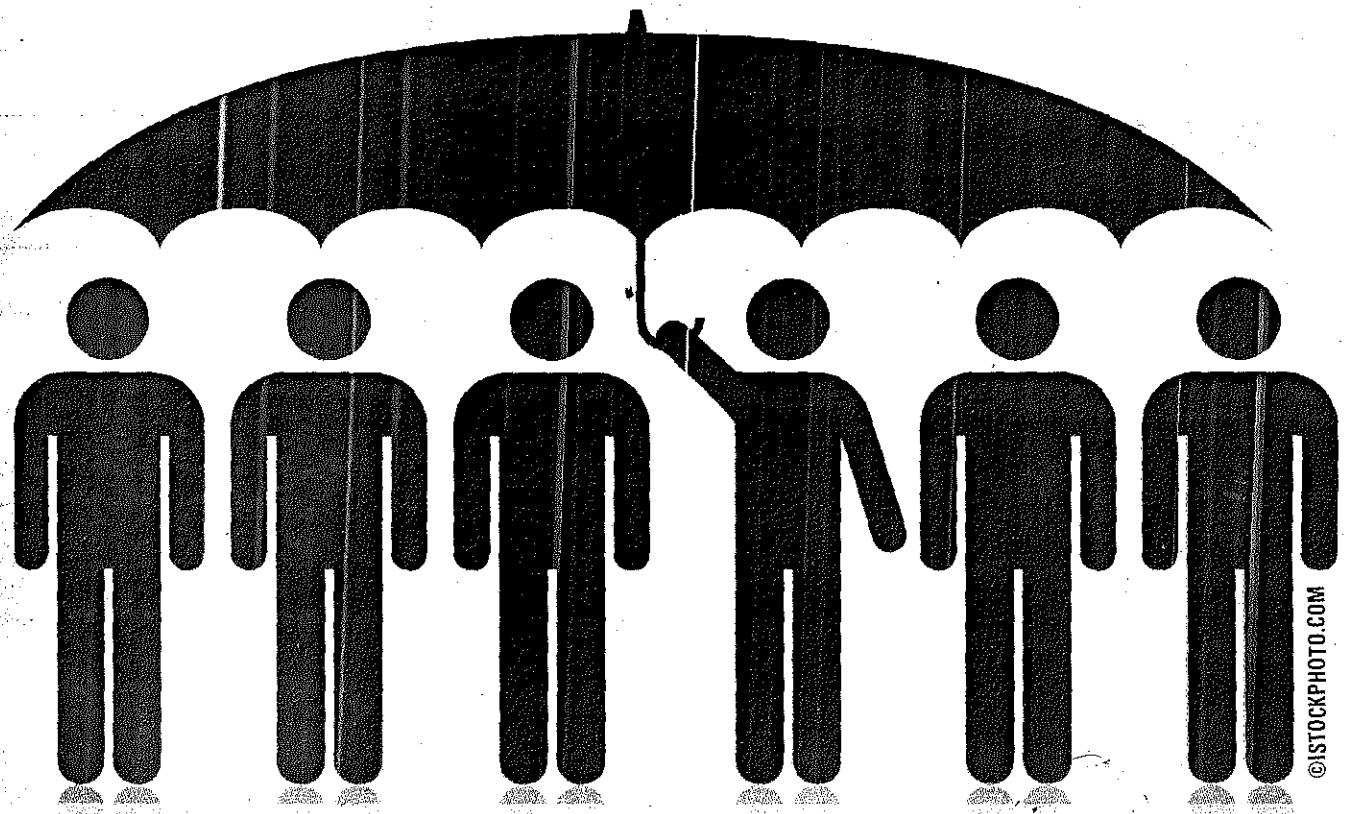
215 N.J.L.J. 137 MONDAY, JANUARY 20, 2014

An ALM Publication

All Clients Deserve Protection From Professional Negligence

A call for universal mandatory legal malpractice insurance in New Jersey





By Bennett J. Wasserman

New Jersey is now ready to complete the journey it started in 1970, when our Supreme Court took the historic step of adopting Court Rule 1:21-1A, which required all lawyers who practice as a professional corporation to carry legal malpractice insurance. By 1997, the court extended the rule to cover lawyers practicing as LLCs and LLPs as well. The notion of mandatory liability insurance in the professions and other walks of life was not unique at the time the court rule was first adopted. If one wanted the privilege of a license from the State of New Jersey—whether to drive a car, build a house, be a barber, a surgeon or a multitude of other service providers (professional and otherwise)—one needed to show financial responsibility through the purchase of liability insurance. Strangely, though, the court never applied the same concept of linking a license to securing liability insurance to the legal profession.

Court Rule 1:21-1A was therefore something of a vanguard. In the context of the attorney-client relationship, the rule's central purpose and the definitive public policy enunciated by the court was to assure that clients would be compensated if they suffered actual damage as a result of their lawyer›s professional negligence. Such a rule is entirely consistent with the lawyer's fiduciary duty to the client, which requires that when the client's interests and the lawyer's interests diverge, the lawyer must place the client's interest ahead of his own, even at the lawyer's expense. But the shortcoming of the court's mandatory insurance rule was that it protected only those clients of a limited number of lawyers—those who practiced law through an entity—a PC, LLC or an LLP.

Success of Universal Mandatory Malpractice Insurance Outside N.J.

In 1978, following New Jersey's lead, Oregon also opted for mandatory legal malpractice insurance. But Oregon went further and mandated

Continued on next page

New Jersey Law Journal

PUBLISHER: Robert S. Steinbaum
EDITOR-IN-CHIEF: Ronald J. Fleury

EXECUTIVE EDITOR
Pamela E. Brownstein
CASE DIGEST EDITORS
Debra McLoughlin, Judith Nallin
LAW EDITOR
Juliette Gillespie
TRENTON BUREAU CHIEF
Michael Booth
REPORTERS
Mary Pat Gallagher, David Gialanella, Charles Toutant
ART & PRODUCTION DIRECTOR
Douglas L. Jones
ASSISTANT EDITORS
Jonathan F. Erway
Jennifer Genova, Robert Stack
PHOTO EDITOR
Carmen Natale
DISPLAY/LAW FIRM ADVERTISING DIRECTOR
Vivian F. DiStaso
ACCOUNT MANAGER
Barbra Gazo
LAW FIRM/PROFESSIONAL ANNOUNCEMENTS
Sonya D. Nutter
DISPLAY/LAW FIRM COORDINATOR
Loyara Lafayette
ASSISTANT ART DIRECTOR
Charles Shaffer
CLASSIFIED SALES REPRESENTATIVE
Mitchell Cohn
GRAPHIC ARTIST
Korey Byer
DAILY DECISION SERVICE/PUBLIC NOTICES/ASST. MARKETING DIRECTOR
Lee Marie Serrano
CIRCULATION
Kristine W. Robinson
BOOKS MARKETING DIRECTOR
Linda Manahan
BOOKS EDITORS
Bridget Bosworth, Jennifer Thompson, Jessica Roelant
BOOKS SALES REPS
Amanda Eslinger, Lucretia Howard
Michael Jones, Jill Klem, Philip Mereday
BOOKS CUSTOMER SERVICE
Maria Rosario
CLE/EVENTS MANAGER
Douglas Brown
BUSINESS OFFICE SUPERVISOR
Geneva J. Ware
BUSINESS OFFICE
Jacob Awaitey, Carol Rosen, Iris Watson

EDITORIAL & BUSINESS OFFICES:
P.O. Box 20081 · 238 Mulberry Street
Newark, New Jersey 07101-6081
Phone (973) 642-0075 · Fax (973) 642-0920
Trenton Bureau: (609) 989-1900

All Clients Deserve Protection From Professional Negligence

Continued from preceding page

that *all* lawyers in private practice—not just entities who employ lawyers—carry legal malpractice insurance. Toward that end, the Oregon State Bar's Professional Liability Fund program provides malpractice insurance for every lawyer in private practice in Oregon. According to the American Bar Association, today there are over 12,000 practicing lawyers in Oregon. Insurance is a condition required of all lawyers in Oregon to obtain and to renew a license to practice law. The Oregon experience over the past quarter century has made it a perfect model for our own state to follow. No client is left unprotected. No lawyer is left uninsured. Lawyers are guaranteed affordable and stable insurance premiums. There are abundant and accessible CLE courses on malpractice avoidance and risk reduction which give lawyers further discounts on their premiums. All 12,000 practicing lawyers in Oregon pay into the Professional Liability Fund, making malpractice insurance affordable for all. Today, every practicing lawyer and every client in Oregon is protected with, at minimum, $300,000 of malpractice insurance. Lawyers also have the option to buy affordable excess coverage.

The successful Oregon model of universal mandatory legal malpractice insurance has not yet taken hold in New Jersey. That may be because the Oregon State Bar is an integrated bar association, meaning, it is part of that state's judiciary. Every lawyer in Oregon is a member of the State Bar, and every practicing lawyer contributes to its Professional Liability Fund. Not so in New Jersey, protected for negligence and ensures that clients receive the compensation they are entitled to." Like Oregon, Canada's law societies offer affordable universal mandatory malpractice insurance coverage to all lawyers and their clients—whether or not the practice is in the form of an entity.

Because Oregon and Canada's mandatory legal malpractice insurance programs are administered by associations that are integrated within their respective judiciaries, they bear strong resemblance to New Jersey's court-promulgated brand of mandatory, albeit limited, legal malpractice insurance coverage. Also like New Jersey, the Oregon and Canadian systems provide a Client Protection Fund, administered by court-appointed officials, to address recompense to victims of dishonest lawyers. All lawyers contribute to that fund. Also like New Jersey, Oregon and Canada offer attorney-fee dispute resolution committees. One can only wonder why, with so many more licensed attorneys in New Jersey than either Oregon or any Canadian province, our New Jersey Supreme Court has not yet expanded Rules 1:21A, 1B and 1C to include all practicing lawyers within their reach.

One thing seems clear, however: Our State Bar Association is not designed to play a role in New Jersey's mandatory legal malpractice insurance program, nor should it. On the issues that separate lawyers and clients, such as legal malpractice, the State Bar, perhaps appropriately and because it is a voluntary trade association, must put the interests of its members ahead of the interests of its members' clients. Our Supreme Court, on the other hand, consistently has come

Unequal Protection of N.J.'s Consumers of Legal Services

The reality of law practice in Ne Jersey calls for an expansion of th current mandatory insurance rule to a its lawyers. The majority of lawyers i New Jersey do not practice as an enti but rather as solos or in small gener partnerships to which the court's ma datory insurance rules do not current apply. According to the American Ba Association, more than 70 percent o all legal malpractice claims are brough against solos and small law firms. Thu the overwhelming majority of Ne Jersey clients are represented by lawye who are not required to have legal ma practice insurance. These lawyers' cl ents are thus deprived of the mandato insurance protection that Court Rul 1:21-1A, 1B and 1C offer the clients lawyers practicing as entities. This gla ing inequity makes a compelling arg ment that now is the time for the Ne Jersey Supreme Court to address th problem by taking the next logical st and to extend its entity-limited mand tory insurance rule to *all* lawyers w practice law in this state and, thus, to New Jersey consumers of legal service

There are no statistics to show ho many innocent clients who have bo fide malpractice claims against uni sured attorneys are left out in the c with no insurance protection for los caused by their lawyer's negligence. B one need go no further than the fi marked "rejected" of those lawyers w will not prosecute a meritorious le malpractice case because of the abse of insurance and the difficulties in c lecting a judgment against a solo pra tioner or a small firm of lawyers. Th clients, believed to be far more num ous than those who are the victims dishonest lawyers, cannot turn to New Jersey Client Protection Fund compensate for their lawyers' prof sional negligence. This leaves a sizea

Amanda Eslinger, Lucretia Howard
Michael Jones, Jill Klem, Philip Mereday
BOOKS CUSTOMER SERVICE
Maria Rosario
CLE/EVENTS MANAGER
Douglas Brown
BUSINESS OFFICE SUPERVISOR
Geneva J. Ware
BUSINESS OFFICE
Jacob Awaitey, Carol Rosen, Iris Watson

EDITORIAL & BUSINESS OFFICES:
P.O. Box 20081 · 238 Mulberry Street
Newark, New Jersey 07101-6081
Phone (973) 642-0075 · Fax (973) 642-0920
Trenton Bureau: (609) 989-1900
www.njlj.com

•••

REPRINTS
Denise Petratos
dpetratos@alm.com
(347) 227-3177

•••

ALM
An Integrated Media Company

120 Broadway
New York, N.Y. 10271-1101
(212) 457-9400

ALM SENIOR MANAGEMENT
PRESIDENT & CEO
BILL CARTER
SENIOR VICE PRESIDENT & CHIEF OPERATING OFFICER
KEVIN H. MICHIELSEN
SENIOR VICE PRESIDENT & CHIEF FINANCIAL OFFICER
ERIC F. LUNDBERG
SENIOR VICE PRESIDENT & CHIEF MARKETING OFFICER
LENNY IZZO
SENIOR VICE PRESIDENT, DIGITAL
JEFF LITVACK
SENIOR VICE PRESIDENT OF SALES
KEVIN J. VERMEULEN
VICE PRESIDENT & EDITOR IN CHIEF
ARIC PRESS
VICE PRESIDENT, REAL ESTATE MEDIA
MICHAEL DESIATO
GENERAL COUNSEL
ELISA MILLER

•••

Designated as an official publication by:
The United States District Court; The Supreme Court of New Jersey; Advisory Committee on Professional Ethics; New Jersey Executive Commission on Ethical Standards; New Jersey State Bar Association; New Jersey Institute for Continuing Legal Education. Member of the New Jersey Press Association.

protected with, at minimum, $500,000 of malpractice insurance. Lawyers also have the option to buy affordable excess coverage.

The successful Oregon model of universal mandatory legal malpractice insurance has not yet taken hold in New Jersey. That may be because the Oregon State Bar is an integrated bar association, meaning, it is part of that state's judiciary. Every lawyer in Oregon is a member of the State Bar, and every practicing lawyer contributes to its Professional Liability Fund. Not so in New Jersey, where our State Bar Association is a voluntary association serving first and foremost the interests of its more than 17,500 members. While our judiciary lists more than 80,000 lawyers in New Jersey, the American Bar Association cuts that figure to about 41,000 lawyers who are "active and resident." This figure does not take into account numerous out-of-state lawyers who, in these days of multistate law practice, have secured limited law licenses under RPC 5.5. Nevertheless, by any measure, New Jersey has more lawyers per capita than most other states. And, thus, the state has more lawyers who the court, in the exercise of its constitutional power to regulate lawyers and the practice of law, could require to contribute to a mandated insurance pool, thus spreading the risk and reducing premium costs of legal malpractice insurance for the entire profession. Such a step would give real meaning to New Jersey's public policy to protect the consumers of legal services.

The Oregon model has been enthusiastically adopted by our neighbor to the north—Canada, through its version of integrated bar associations called provincial law societies. According to one such law society's website: "Professional liability insurance ensures that lawyers are

Wasserman is vice president and general counsel of LegalMalpractice.com. He is chairman of the legal malpractice law group of Davis, Saperstein & Salomon in Teaneck, and serves on the faculty of Hofstra University Law School.

practicing lawyers within their reach.

One thing seems clear, however: Our State Bar Association is not designed to play a role in New Jersey's mandatory legal malpractice insurance program, nor should it. On the issues that separate lawyers and clients, such as legal malpractice, the State Bar, perhaps appropriately and because it is a voluntary trade association, must put the interests of its members ahead of the interests of its members' clients. Our Supreme Court, on the other hand, consistently has come down on the side of client protection, as the public good, rather than the interests of members of the bar, is paramount to the court. Because of that, it makes good sense that if our Supreme Court is destined to move forward toward universal mandatory legal malpractice insurance coverage, the effort should derive from the court's own constitutional mandate to regulate lawyers and the practice of law in New Jersey.

one need go no further than the notificatio
marked "rejected" of those lawye interest
will not prosecute a meritorious ofessional
malpractice case because of the ell as RPC
of insurance and the difficulties nd 1.4 (co
lecting a judgment against a solo to do so a
tioner or a small firm of lawyers e client to
clients, believed to be far more determine
ous than those who are the vict e for legal
dishonest lawyers, cannot turn The rea
New Jersey Client Protection F ow we *m*
compensate for their lawyers' p client's ma
sional negligence. This leaves a s otect our
group of New Jersey citizens w e client. I
effective recourse to cover the ient, and h
caused by their lawyers' profes n. The clie
negligence. At the end of the liti at there is
trail, these clients are left with no ot carry I
tive remedy for their lawyers' negli ot only hav
or breach of fiduciary duty which uty to our
them actual harm. is legal rig

Recognizing how inequitable e have al
is to the clients damaged by the ient's righ
yer's malpractice, several states amage we
adopted a "caveat emptor" type

N.J's Stron Cons

Protect
s of legal
een at th
ourt's juri
cardinal
andatory
y. *First A*
Lawson,
77 N.J. 12
awyer firm
ales, the
artner and
oncealed
enewal ap
otential
The third
Some of t
e firm ar
ued. The
overage
he policy
o disclos
hus depr
ers—eve
e firm—

ALSO INSIDE...

which requires an uninsured lawyer to advise a prospective client either directly or through a hard-to-find public filing with a state disciplinary authority that he or she is not insured for any loss caused by his or her professional negligence. Thus, the organized bar in these states have effectively rid themselves of their fiduciary duty to put the clients' interest ahead of their own on the issue of client protection by dumping onto the client the risk of loss for the lawyer's prospective breach of duties. This "duty to warn" mentality is usually reserved for the sellers and buyers of defective products or hazardous activities; not for the fiduciary duty characteristic of the attorney-client relationship. It would be repugnant to our Supreme Court's legacy—known for its staunch support for protecting both the integrity of the legal profession and the rights of consumers of legal services—to ever adopt such an inappropriate and half-baked approach to the law governing the sacrosanct attorney-client relationship.

Under New Jersey's law of attorney fiduciary duty, the lawyer must place the interests of the client ahead of his or her own, even if it costs the attorney money. It is indisputable that, from time to time, we lawyers make mistakes. When that happens, *Olds v. Donnelly*, 150 N.J. 424 (1997), makes it clear that "The Rules of Professional Conduct still require an attorney to notify the client that he or she *may* have a legal malpractice claim even if notification is against the attorney's own interest." Advisory Committee on Professional Ethics Opinion No. 684, as well as RPCs 1.7 (conflicts of interest) and 1.4 (communication), also require us to do so and to go so far as to counsel the client to secure independent counsel to determine whether the client should sue for legal malpractice.

The reason for this is that if we know we *may* have made a mistake on a client's matter, our tendency is to first protect our own interest before that of

might otherwise be covered. The trial court found the policy was in effect as to the entity, but not as to the partners. The Appellate Division reversed, holding that the insurance policy was void for all purposes. The Supreme Court, however, limited the disclaimer of coverage to the "defalcating" partners and the firm entity, but afforded insurance coverage to protect the innocent partner and the clients he may have damaged in unrelated matters that would otherwise be covered.

The significance of the *Lawson* case cannot be overstated and speaks directly to our state's overarching public policy to protect innocent clients from negligent lawyers. Here's how the court approached this case:

> [W]e must analyze the interplay between two established bodies of law. The first set of rules, arising in the corporate field, establishes the parameters of liability for individual partners of a limited liability partnership. The second, arising under insurance law, permits an insurer to rescind coverage when an insured, in applying for that coverage, has misrepresented a material fact. Because the parties' dispute centers on the conduct of attorneys, we also must consider our Rules of Court that seek to protect consumers of legal services that New Jersey attorneys maintain adequate insurance in certain circumstances. This case ultimately requires us to strike an appropriate balance in applying those sometime competing tenets.

The insurance carrier urged th court to void the policy in its entirety thus depriving the client of coverage, bu the court stopped short of that drasti proposal and held:

> [A]pplying the rule of law advocated by [the carrier] could leave members of the public...unprotected even though the insured [attorney] himself committed no fraud. In our view, that harsh and sweeping result would be contrary to the public interest. More specifically, it would be inconsistent with the policies underlying our Rules of Court that seek to protect consumers

Continued on page S-7

if notification is against the attorney's own interest." Advisory Committee on Professional Ethics Opinion No. 684, as well as RPCs 1.7 (conflicts of interest) and 1.4 (communication), also require us to do so and to go so far as to counsel the client to secure independent counsel to determine whether the client should sue for legal malpractice.

The reason for this is that if we know we *may* have made a mistake on a client's matter, our tendency is to first protect our own interest before that of the client. Let's assume we so alert the client, and he or she seeks a second opinion. The client's new attorney determines that there is good cause to sue. If we do not carry legal malpractice insurance, not only have we breached our fiduciary duty to our client by failing to protect his legal rights against us as tortfeasors, we have also substantially limited our client's right to be compensated for the damage we have caused him.

N.J's Strong Public Policy of Protecting Consumers of Legal Services

Protecting the rights of consumers of legal services in New Jersey has been at the forefront of our Supreme Court's jurisprudence for decades and is a cardinal attribute of our state's current mandatory legal malpractice public policy. *First American Title Insurance Co. v. Lawson, Wheeler, Lawson & Snyder*, 177 N.J. 125 (2003), concerning a three-lawyer firm practicing as an LLP, illustrates the point. There, the managing partner and a second partner knowingly concealed on a malpractice insurance renewal application that they knew about potential claims against the law firm. The third partner knew nothing of them. Some of those claims materialized and the firm and all three of its partners were sued. The malpractice carrier disclaimed coverage and sought a declaration that the policy was void ab initio for failure to disclose the known potential claim, thus depriving the firm and all members—even the third innocent partner in the firm—of coverage for any claim that

bar, seeking public comments for a proposed rule to broaden the state's electronic filing and record-keeping system. This request used the Internet as both

A lawyer also has the duty to provide a client with a full, detailed and accurate account of all money and property handled for said client. The client is

serves over 18 million unique visitors each year (see www.law.cornell.edu/lii/about/ about_lii last visited 12/27/2013).

Many legal malpractice claims are

claims and which arise from various statutes, such as securities regulations, and motions for sanctions, such as under Federal Rule of Civil Procedure 11.■

All Clients Deserve Protection From Professional Negligence

Continued from page S-3

of legal services by requiring attorneys to maintain adequate insurance in this setting.

This public policy statement articulating the importance of protecting consumers of legal services also points up the inequitable effect of the entity-limited mandatory insurance afforded by Court Rules 1:21-1A, 1B and 1C. Had the innocent lawyer in *Lawson* been a member of a general partnership, as opposed to a PC, LLP or LLC, neither he nor his clients would have gotten the same protection afforded by the public policy articulated by the *Lawson* decision and the court rule. To distinguish clients of entity law firms and nonentity law firms for purposes of insurance coverage is plainly illogical, unfair and even discriminatory. It presents a real issue of unequal protection and disparate treatment of one class of citizens as opposed to another. Why should clients who are represented by a solo or small general partnership have any less right to compensation for their lawyer's negligence than the clients of a lawyer who practices as part of a professional corporation, an LLC or an LLP? This dilemma alone should invite the court to eliminate the discriminatory effect on the clients of uninsured lawyers caused by Rules 1:21-1A,1B and 1C, by simply extending that same protection equally to *all* consumers of legal services.

Current Court Rules Can Facilitate the Benefits of Mandatory Insurance Coverage

In addition to the public policy imperative favoring an extension of the rules to cover all lawyers who provide legal services in New Jersey—whether they hold a plenary license or are admitted pro hac vice—there are already in place court-promulgated procedures that can facilitate New Jersey's move to a universal mandatory legal malpractice insurance system. For example:

- Entity law firms and lawyers already file certificates of liability insurance with the judiciary clerk of the Supreme Court under Rules 1:21-1A, 1B and 1C. It would create no significant burden to have all lawyers do the same.
- Lawyers now fill out annual registration forms and will soon be able to do so electronically. It would create no additional burden to require the lawyer to certify that he or she has secured professional liability insurance in the minimum amounts to be prescribed by the court. Without such mandatory coverage, a lawyer should not be able to advise or provide legal services to clients who may be damaged by erroneous advice.
- Lawyers now pay annual assessments to the New Jersey Lawyers' Fund for Client Protection pursuant to R.1:28. They can also be required to pay their annual insurance premiums into a Professional Liability Fund, as is done in Oregon, which will then issue a certificate of liability insurance to the lawyer.
- A professional liability fund focused on lawyer malpractice, as opposed to lawyer dishonesty, can operate much along the lines of the Client Protection Fund and can draw from its administrative experience.
- Court rules such as R.1:40, providing complementary dispute resolution programs and other facilitative processes, can easily and effectively be applied to legal malpractice cases.
- Just as a pre-action letter under R. 1:20A-6 must be sent by a lawyer to a client in fee disputes, so as to encourage presuit resolution before the Fee Arbitration Committee, Court Rules could also provide that a prospective malpractice plaintiff be required, before starting an action, to send the prospective defendant lawyer a pre-action letter offering the lawyer the opportunity to arbitrate or mediate the malpractice dispute, thus avoiding litigation, if possible. That malpractice claims might thus be resolved more expeditiously and at less cost is beyond serious dispute.

The N.J. Insurance Marketplace Favors Universal Mandatory Insurance

Given the abundant number of lawyers licensed in New Jersey—some 80,000 by the judiciary's count alone—more lawyers would be paying into an insurance pool. With the infusion of more premium dollars from lawyers not currently insured, one could reliably predict that the cost of malpractice insurance will go down. Moreover, a professional liability fund with so many members, i.e., all the licensed and pro hac vice lawyers in New Jersey, could be a formidable negotiator for favorable insurance rates for all lawyers. The legal malpractice insurance market in New Jersey is already very competitive, with at least 27 insurance companies vying for our premium dollars, according the ABA's Standing Committee on Lawyer's Professional Liability. With more premium dollars from so many more prospective insureds who are currently uninsured attorneys, competition can be expected to be even more brisk, thus further driving down the current cost of insurance.

While premium rates may be subject to the vicissitudes of the insurance marketplace, New Jersey's strong public policy favoring the protection of clients from negligent lawyers should not be. Where there is a larger pool of insureds, those market fluctuations would be expected to be milder. A substantially larger pool of insureds can easily be accomplished by extending the court's mandatory insurance rule to all lawyers.

The opportunity for our Supreme Court to fortify its strong public policy favoring the protection of all consumers of legal services in New Jersey is here. The court can do so by simply extending its entity-limited mandatory malpractice insurance rules to all lawyers, and by creating a professional liability fund. The prototypes for such a system have been successful in Oregon and throughout Canada. Thus, the New Jersey clients of solo practitioners and small general partnerships will be on equal footing with clients of entity law firms in their access to legal remedies to compensate them for the damage they may suffer as a result of their lawyer's professional negligence. ■

APPENDIX T

2 of 11 DOCUMENTS

Fordham Urban Law Journal

November, 2012

Fordham Urban Law Journal

40 Fordham Urb. L.J. 177

LENGTH: 15510 words

CONFERENCE: THE LAW: BUSINESS OR PROFESSION? THE CONTINUING RELEVANCE OF JULIUS HENRY COHEN FOR THE PRACTICE OF LAW IN THE TWENTY-FIRST CENTURY: ARTICLE: LAW AS A PROFESSION: EXAMINING THE ROLE OF ACCOUNTABILITY

NAME: Susan Saab Fortney*

BIO: * Howard Lichtenstein Distinguished Professor of Legal Ethics, Maurice A. Deane School of Law at Hofstra University. I thank the members of the Fordham Urban Law Journal, Professors Bruce Green, Sam Levine, and Russ Pearce for inviting me to participate in the conference The Law: Business or Profession? Thanks also to Professors Monroe Freedman, Stephen Gillers, and Joan Loughrey for their comments. Finally, thanks to my research assistants, Steven Hollander and Chris Leo.

LEXISNEXIS SUMMARY:
... Therefore, consumers in most states lost the unlimited liability protection afforded under general partnership law with limited or no assurance that firms would carry insurance or maintain assets adequate to pay claims. ... HALT, a self-described legal reform group, strongly urged that states go beyond the ABA "baseline recommendation" by requiring that lawyers directly disclose to clients whether or not they carry malpractice insurance. ... Because of the complexity of professional liability policies, the ABA Standing Committee on Lawyers' Professional Liability has opposed the adoption of mandatory disclosure rules because the lack of protection potentially misleads the client into believing remedies exist to recoup losses. ... Now that the Supreme Court of Texas has declined to adopt a disclosure rule, the proposed legislation may garner more support from those who believe that lawyers elevated their own interests above the public interest.

TEXT:
[*177]

Introduction

In asserting that law is a profession and not a business, lawyers often refer to the role self-governance plays in the legal profession. Julius Henry Cohen captured this sentiment in making the following exhortation: "Ours is a profession ... . We are all in a boat. The sins of one of us are the sins of all of us. Come, gentlemen, let us clean house." n1 As members of a profession, Cohen asserts that lawyers may be brought to prompt and summary accountability through a collective enterprise. n2

[*178] When Cohen and other bar leaders speak of accountability, their focus is often on the role that professional discipline plays in protecting the public. A similar concern relates to protecting the public by limiting law practice to attorneys who complete a course of education and demonstrate the requisite character befitting a member of the bar. n3

In his essays, Cohen recognizes the disparate positions of lawyers and their clients. For example, he notes that clients may not have the background or expertise to make informed judgments in retaining a lawyer. n4 Because lawyers stand in a position of trust and confidence, Cohen advocates limiting law practice to persons who possess "adequate learning and purity of character." n5 This approach to public protection targets the qualities of those who enter the door of the profession. Once admitted, the focus turns to policing those practitioners whose conduct runs afoul of the minimum standards to avoid professional discipline. n6 Far less attention is devoted to considering accountability of lawyers who depart from standards of care applicable in professional liability cases.

This Article will address this gap by examining accountability in the context of professional liability. To do so, it will consider select developments that required lawyers, the organized bar, legislators, and jurists to balance lawyer self-interest and public protection. Specifically, this Article will consider lawyers' collective campaign to limit their vicarious liability, as well as developments related to lawyers carrying legal malpractice insurance. An examination of legislation and regulatory decisions related to lawyers' professional liability over the last two decades reveals that accountability concerns may not have been adequately considered because of the absence of advocacy on behalf of consumers and the public. For lawyers and law professors committed to advancing the status of law as a profession, this Article ends by urging them to take steps to promote financial responsibility as a basic tenet of professionalism and to support initiatives that protect consumers injured by lawyers' professional misconduct.

[*179]

I. The Limited Liability Movement: Where Were the Lawyers?

Over the last century, the limited liability movement resulted in the most radical departure from a civil liability regime holding lawyers accountable for the acts and omissions of their law partners. Unlike the business and tax-related interests behind allowing lawyers to practice in professional corporations, the push behind the limited liability partnership structure was the desire of lawyers to limit their vicarious liability for their partners' professional malpractice. n7 In lawyers' campaign for limited liability, public protection was largely a secondary concern. n8 While a few states included insurance requirements and other protections to provide some degree of public protection, injured parties' ability to hold firm partners jointly and severally liable was virtually eliminated once the law firm converted to limited liability status. n9 As the limited liability structure spread nationwide, few lawyers and commentators critically questioned the limited liability organizational structure as a retreat from public protection in favor of lawyer protection. The following account of the genesis and growth of the limited liability partnership form illustrates that lawyers' own interest in self-protection dominated both the discourse and outcome.

[*180] The birth of the LLP structure dates back to the 1980s and the savings and loan debacle involving the collapse of numerous financial institutions insured by the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation. n10 In an effort to recoup hundreds of millions in losses, the government filed numerous cases against lawyers, accountants, and other professionals, alleging that the defendants' conduct caused the financial institutions (and eventually the government) to suffer damages. n11 In addition to suing the professionals' firms, the government pursued claims against individual law firm partners, including those who were directly involved in the representation of the failed institutions, as well as other partners whose liability arose from their status as general partners in the defendant law firms. n12 In various cases, the amount of damages that the government alleged far exceeded the amount of legal malpractice insurance available to the defendant firms. n13

To many, the government appeared to have both an unlimited war chest and zeal to recover as much as possible, even if it meant [*181] pursuing the personal assets of partners who were not directly involved in this representation of the failed financial institutions. n14 This was dramatically played out in litigation against Jenkens & Gilchrest (J & G), the now defunct Dallas-based law firm. In a meeting with J & G lawyers and their defense counsel, government lawyers made their intentions clear when they used an overhead projector to show their analysis of the non-exempt net worth of J & G partners. n15

Beyond the individual defendants involved in the actions filed by the federal agencies, the litigation and the government's aggressive posture captured the attention of thousands of lawyers who represented financial institutions. n16 Other lawyers familiar with the litigation became concerned about the prospect of "innocent" partners being held jointly and severally liable for the acts and omissions of their peers. n17

In Lubbock, Texas, the city where the government had sued J & G in federal court, partners in Crenshaw, Dupree and Milam (CDM), a twenty-one-person law firm, first proposed the limited liability partnership concept. n18 Because this was an established principle of partnership law, the CDM lawyers evidently recognized that it would take legisla-

tive action to eliminate unlimited liability for partners' malpractice. n19 The proponents elicited the assistance of a powerful state senator who introduced Texas Senate Bill 302, exclusively providing for limited liability for certain classes of professionals, including lawyers and accountants. n20 The legislation eliminated vicarious liability for torts claims by adding the following language to the Texas version of the Uniform Partnership Act:

A partner in a professional partnership is not individually liable, except to the extent of the partner's interest in partnership property, for the errors, omissions, negligence, incompetence or malfeasance committed in the course of rendering professional service on behalf [*182] of the partnership by another partner, employee, or representation of the partnership. n21

The bill that created a "limited liability partnership" structure passed the Texas Senate with little attention or comment. n22

The initial reception in the Texas House of Representatives was far more negative. n23 In the House, critics questioned the following features of the proposed legislation:

(1) Including only professionals, particularly lawyers,

(2) Relieving partners from responsibility for misconduct of those they directed or supervised (such as a doctor's nurse or technician, a lawyer's junior associate),

(3) Failing to signal to patients and clients that their professionals' liability was limited in complete reversal of historic and familiar partnership law, and

(4) Failing to provide any substitute source of recovery for injured patients and clients. n24

Despite these objections, the pressure to pass the legislation was substantial. Professor Alan R. Bromberg, a partnership law expert who had originally criticized the limited liability concept at the House hearing, later agreed to draft revisions to the bill to make it more acceptable. n25 The revisions were designed to address the concerns by doing the following:

(1) Extending the liability limitation to all partnerships,

(2) Denying protection to partners for misconduct of those working under their supervision or direction,

(3) Requiring annual registration [of the firm] with the state and the inclusion of "L.L.P." or "registered limited liability partnership in the firm name," and

(4) Requiring [the L.L.P. to carry] liability insurance in an arbitrary and admittedly often inadequate amount of $ 100,000. n26

With these changes, the revised bill was "quietly attached" to an omnibus bill proposed by the Texas Business Law Foundation, a not- [*183] for-profit corporation organized by a group of corporate lawyers from major Texas law firms. n27

With the enactment of the first limited liability legislation in Texas, the ember of change that started in a conference room of a small law firm in Lubbock, Texas spread like wildfire. n28 State by state, professionals lobbied for adoption of new legislation, arguing that it would be essential for the state to remain competitive in attracting and retaining business. n29

While lawyers and bar-related groups were lobbying for adoption of limited liability statutes, there appeared to be little resistance to passing legislation. One Texas legislator who was a partner with a plaintiff's firm first questioned the proposed Texas legislation as a "radical and undesirable proposal." n30 After some changes were made, the legislator withdrew his opposition. n31 Consumer and client advocacy groups also did not play a significant role in challenging sweeping changes that allowed lawyers to practice in limited liability firms. n32

[*184] As the limited liability movement spread across the nation, the protection that legislation provided actually expanded. n33 As noted above, the first proposed legislation initially only protected professionals. n34 The first statute that was adopted did not restrict protection to professionals, but limited the liability shield to vicarious liability claims relating to the malpractice of another firm partner. n35 In addition, the statute did not protect partners if another firm partner or representative working under the supervision or direction of the first partner committed the malpractice. n36 In this sense, the first Texas statute only provided a "partial shield" because it only covered tort-type claims and preserved supervisory liability. Subsequent statutes broadened the liability shield. For example, the Delaware legislation covered contract as well as tort claims, and it narrowed supervisory liability to misconduct of someone under the partners' "direct supervision and control." n37 Subsequently, other states eliminated the provisions that preserved vicarious liability for acts and omissions of supervised persons. n38 By 2008, eighty percent of the states had adopted "full-shield" statutes, providing a liability shield for all debts and obligations of the partnership. n39

Bar association groups eagerly supported LLP legislation that eliminated "even the moderate restrictions on limited liability." n40 Most notably, the American Bar Association (ABA), Business Law Section Committee on Partnerships and Unincorporated Business Organizations Working Group on Registered Limited Liability Partnerships prepared prototype provisions for inclusion in the [*185] Revised Uniform Partnership Act. n41 These provisions limited vicarious liability for all kinds of debts and extended protection to persons other than practicing professionals. n42

At the American Law Institute (ALI), a tentative draft of the Restatement of the Law Governing Lawyers included a section subjecting principals in a law firm to vicarious liability for the wrongful acts of firm principals and employees. n43 At the 1997 annual meeting, ALI members rejected this approach, adopting a version that recognized lawyers' ability to limit their liability. n44 The ALI vote on the Restatement section related to the liability of firm principals exemplifies how lawyer self-interest influenced what should have been an impartial restatement of legal principles. n45 In an insightful assessment of ALI deliberations and decisions on the content of the Restatement (Third) of the Law Governing Lawyers, Professor Monroe Freedman zeroed in on ALI members' "conflict of interest" in allowing their independent judgment to be "materially and adversely affected by their own financial interests." n46

Other bar-related groups, such as Professional Ethics Committees, also greased the way for law firms to practice as limited liability partnerships. Both the American Bar Association Standing Committee on Professional Ethics and various state ethics committees opined that practice in limited liability firms did not [*186] violate applicable ethics rules, provided that firms comply with statutory provisions, such as those requiring that the firms use the words "Limited Liability Partnership" or the initials "LLP" in their name. n47 Disappointingly, few opinions urged lawyers to take additional steps to communicate their limited liability status to clients and prospective clients. n48

Bar leaders and other lawyers who preached the status of law as a profession said little about how the limited liability movement dramatically changed the remedies available to persons injured by lawyers' acts and omissions. n49 Rather, lawyers operated out of self-interest. n50 In contrasting "professionalism" rhetoric with the bar's role in lobbying for limited liability protection for lawyers, Professor Roger C. Cramton observed:

In any setting in which lawyer professionalism is discussed, the profession laments the decline of mentoring in law firms and urges greater quality control measures. Yet [in pushing for the enactment of state legislation eliminating the traditional rule that a law partner's assets are at risk when a firm member's negligence leads to a malpractice or third-party award] it rejected the principles of monitoring, group responsibility and quality control that underlie the traditional partnership rule. Pocket-book interests have prevailed over "traditional professional values." Also, the organized bar usually takes the position that state legislatures have no business regulating the profession. But when the common law rule proved [*187] threatening, the bar sought and obtained immediate legislative action in many states. n51

Although professionals successfully lobbied for the enactment of limited liability legislation, state supreme courts could have exercised their inherent authority to prohibit or regulate practice in limited liability law firms. n52 The vast majority acceded to the popular will of lawyers, doing little to stem the tide. n53 In contrast to many, the Illinois Supreme Court resisted the pressure to simply bless allowing lawyers to practice in limited liability firms. n54 After an extended period of study and submissions by interested groups, the Illinois Supreme Court eventually adopted a rule that allowed lawyers to limit their liability, provided that they complied with safeguards in the rule, including insurance and financial responsibility provisions. n55 [*188] Unlike the first Texas legislation, which merely required that firms carry limits of liability of $ 100,000, the Illinois rule set the minimum limits of liability for professional liability insurance as $ 100,000 per claim and $ 250,000 annual aggregate, multiplied by the number of lawyers in the firm, provided that the firm's insurance need not exceed $ 5,000,000 per claim and $ 10,000,000 annual aggregate. n56 Through this rule, Illinois imposed meaningful financial responsibility requirements on lawyers seeking to limit their liability.

Although a few other jurisdictions used insurance to address questions of public protection, most jurisdictions did not. n57 Therefore, consumers in most states lost the unlimited liability protection afforded under general partnership law with limited or no assurance that firms would carry insurance or maintain assets adequate to pay claims. n58 Had a public watchdog or consumer advocate group been more involved in monitoring the limited liability movement, the question is whether decision-makers would have imposed adequate insurance requirements as the cost of doing business in a limited liability firm.

II. Mandatory Legal Malpractice Insurance: How the United States Differs from Other Countries (In Not Protecting Consumers)

As the limited liability form spread to other countries, insurance need not be used as a quid pro quo for eliminating vicarious liability [*189] of firm principals. Around the world, injured persons (as well as lawyers) were already protected because other jurisdictions, including most common law countries, require professional indemnity insurance for practicing lawyers. n59 For example, law firms in the United Kingdom (UK) must carry at least £ 2,000,000 per claim and a limited liability company must carry at least £ 3,000,000 per claim. n60 In its Handbook explaining standards of practice, the Solicitors Regulation Authority (SRA), the new national regulator in the UK, advises solicitors that they need professional indemnity insurance to practice. n61 The Law Society for England and Wales describes the justification for mandating that solicitors maintain professional indemnity insurance (PII) as follows:

> PII also increases your financial security and serves an important public interest function by covering civil liability claims, including: certain related defence costs, and regulatory awards made against you. It ensures that the public does not suffer loss as a result of your civil liability, which might otherwise be uncompensated. This is important in maintaining public confidence in the integrity and standing of solicitors. n62

Regulators from other countries share this perspective in asserting that PII protects consumers as well as lawyers. n63 Mandatory insurance protects injured persons who otherwise would be facing uncollectable losses because lawyers "go bare," practicing with no insurance or inadequate limits of liability on their policies. n64 Requiring minimum limits and types of insurance protects lawyers and clients from gaps in [*190] coverage. n65 Mandatory insurance also addresses the moral hazard of some uninsured lawyers negatively affecting the reputation of the legal profession when injured persons are left without recovery. n66 Finally, mandatory insurance may improve the accessibility and affordability of insurance. n67

Interestingly, the need to create a source for affordable insurance is what prompted Oregon decision makers to enact a mandatory insurance program in the 1970s. n68 A brief historical note on legal malpractice insurance and the evolution of the Oregon system provides another example of how market forces and lawyer self-interest sparked change.

In the United States, legal malpractice insurance first gained prominence in the 1960s when property and casualty insurers offered legal malpractice insurance as an ancillary service. n69 Lawyers became keenly interested in obtaining insurance in the 1970s when legal malpractice claims increased substantially. n70 Many insurers responded to these claims by changing their approaches to underwriting and by sharply raising premiums. n71 Other insurance companies simply discontinued writing legal malpractice insurance in certain states. n72 Because of these changes, the coverage provided decreased and the cost of insurance increased. n73

[*191] By the late 1970s, the market in various states became very restrictive, making legal malpractice insurance cost prohibitive for many and unavailable to others. n74 Lawyer organizations around the United States evaluated options to deal with the tough and expensive insurance market. n75 In some states, lawyers established bar-related mutual companies, owned by lawyers, to provide affordable insurance. n76 In other states, including California and Washington, lawyers explored the possibility of lowering insurance costs by requiring all lawyers to purchase insurance. n77 Although the California governor refused to sign proposed legislation requiring lawyers to carry insurance, the state of Oregon "borrowed the proposed California legislation and passed it as its own." n78 On July 1, 1978, Oregon established a mandatory insurance program in an attempt to deal with the insurance "crisis" where many lawyers were "simply unable to obtain insurance at a reasonable price." n79 Thus, Oregon became the first state in the U.S. to require that all lawyers in private practice obtain insurance through the state's professional liability fund (PLF). n80

[*192] Interestingly, the Oregon Bar Association originally proposed the mandatory insurance program with the hope that it would "provide lower rates, make coverage more available, and protect the public from harm by uninsured attorneys." n81 "The Oregon State Bar Association determined that [the PLF] would cost individual [lawyers] less than comparable ... insurance." n82 In commenting on the Oregon Bar Association's role in supporting a mandatory insurance program, one malpractice expert noted that "altruism, or concern for the consumer, was not entirely behind Oregon's decision to establish the PLF." n83 Lawyers and bar leaders recognized that the mandatory insurance program made economic sense for lawyers. n84

In arguing for mandatory legal malpractice insurance, commentators often point to the success of the Oregon PLF program. n85 Notwithstanding the Oregon experience in making insurance and loss prevention services accessible to all lawyers in private practice, organized bar groups and other interested bodies have staunchly and successfully opposed mandatory insurance. n86 As [*193] noted by Professor Leslie Levin, "while Australia, Canada, and the United Kingdom have long required lawyers to carry malpractice insurance, bar resistance to mandatory insurance continues unabated in the U.S." n87 Some outspoken opponents of mandatory insurance would require lawyers to disclose that they do not carry malpractice insurance. n88 As discussed in the next section, the debate over a mandatory disclosure rule reflects different perspectives on consumer protection and law as a business or profession.

III. Mandatory Disclosure of Insurance: What the Debate Reveals about Lawyer Attitudes

Following study and examination by bar groups, various states have rejected proposals for mandatory insurance programs. n89 As a middle ground approach to requiring insurance or continuing the status quo, a number of jurisdictions have adopted rules requiring that lawyers disclose the fact that they do not carry professional [*194] liability insurance. n90 Bar leaders representing large bar associations, as well as small ones, view mandatory disclosure of insurance status as a starting point on the road to improving client protection. n91

In the United States, state supreme courts, rather than bar associations, led the trend to adopt rules of professional conduct that require that lawyers disclose their lack of insurance. n92 The Supreme Court of Alaska broke new ground in 1999 when it became the first state to amend its professional conduct rules to mandate disclosure of a lack of insurance. n93 That same year, South Dakota used a similar approach in modifying the state professional conduct rules to require insurance disclosure to clients and potential clients in communications with them. n94 Within a couple of years, other courts, including the Supreme Courts of Ohio and New Hampshire, adopted rules requiring lawyers who lack malpractice insurance to notify their clients. n95

[*195] While additional state high courts were considering the disclosure issue, the ABA Client Protection Committee tackled the disclosure issue. After unsuccessfully floating proposals, including one to amend the Model Rules of Professional Conduct, the Committee changed its approach and recommended an ABA Model Court Rule on Insurance Disclosure (ABA Model Court Rule). n96 Unlike professional conduct rules that required lawyers to disclose

their lack of insurance directly to clients, the ABA Model Court Rule requires that lawyers disclose on their annual registration statements whether they intend to maintain professional liability insurance for their private law practices. n97 The ABA Model Court Rule was considered to be more "lawyer friendly" than the professional conduct rules, adopted in states such as Alaska and South Dakota, because violation of a court rule would not subject a lawyer to professional discipline. n98 Although the ABA Model Court Rule was "lawyer friendly," it only passed the House of Delegates by a narrow eleven-vote margin. n99

As of August 9, 2011, seventeen states have adopted mandatory disclosure rules that follow the ABA Model Court Rule approach that requires disclosure on lawyers' annual registration statements, rather than disclosure directly to clients and prospective clients. n100 [*196] Another seven states require disclosure directly to clients. n101 HALT, a self-described legal reform group, strongly urged that states go beyond the ABA "baseline recommendation" by requiring that lawyers directly disclose to clients whether or not they carry malpractice insurance. n102

Although the ABA Model Rule attempts to balance lawyer and consumer interests, five states have declined to adopt any version of an insurance disclosure rule. n103 North Carolina also joined the states that do not require disclosure. As of January 1, 2010, North Carolina eliminated the requirement for lawyers to inform the state bar whether they maintain legal malpractice insurance. n104

In each state that considered a mandatory insurance disclosure rule, lawyers passionately asserted arguments supporting their positions. The arguments articulated in favor of adoption of a rule largely focused on public protection concerns, while opposing arguments pointed to the negative consequences of adoption of such a mandatory disclosure rule. The following synopsis of the main arguments reveals that the proponents and opponents fundamentally differ on their perspectives of lawyer duties and the effects of adopting a rule related to a lawyer's insurance status.

Proponents advance a number of justifications for mandating that lawyers disclose whether they carry professional liability insurance. These arguments cover both client protection issues, as well as lawyer protection issues. A common client protection argument relates to disparate positions of lawyers and their clients. The vast majority of lay people enter an attorney-client relationship with little or no information on a lawyer's insurance status or the lawyer's ability to pay damages in the event of loss. Unless the person is a sophisticated [*197] consumer of legal services, prospective clients likely do not inquire about insurance. Study results suggest that the majority of consumers do not know whether lawyers are required to carry professional liability insurance. n105 Lay consumers may assume that lawyers are required to carry insurance. n106

To address the asymmetry and lack of information, proponents maintain that states should require disclosure when lawyers do not carry professional liability insurance. n107 This argument is based on the duty of lawyers to disclose information that is material to representation. As stated by James Towery, a former president of the California Bar Association and supporter of mandatory disclosure:

When a client hires a lawyer, is the lawyer's lack of insurance a material fact that the client is entitled to know? It is hard to fashion a persuasive argument that clients are not entitled to that information. Lawyers operate under a state license, and have a monopoly on "practicing law." With that monopoly go certain obligations. Full disclosure to clients of material information regarding the representation is certainly one of those obligations. n108

The special nature of the attorney-client relationship also militates in favor of disclosure. Because members of the legal profession have a "heightened responsibility in business relationships with clients," James C. Gallagher, a former president of the Vermont Bar Association, urged adoption of a mandatory disclosure rule so that clients can make informed decisions about retaining a lawyer. n109

Unless consumers possess sufficient information on a lawyer's insurance status, they cannot make an "efficient risk assessment" as [*198] to whether they wish to hire the lawyer. n110 To illustrate this point, consider the example of a claimant in a large personal injury case where the claimant is selecting between two different personal injury lawyers. The lawyers charge the same contingency fee, but one maintains legal malpractice insurance and the other does not. Retaining a lawyer without knowing whether the lawyer carries insurance is like purchasing a car without airbags. Unless the lawyer has substantial non-exempt assets, there is likely no safety mechanism to protect the client in the event of lawyer error or misconduct. n111

Failure to require disclosure shifts risk of loss to consumers who rely on the superior position of their lawyers. n112 As noted by a member of the Pennsylvania Professional Liability Committee, clients with meritorious claims suffer double injury when they are injured, first by a lawyer who they thought would protect them, and second when they do not have recourse because the lawyer had no coverage. n113

Often malpractice plaintiffs' lawyers do not pursue actions against lawyers who do not carry professional liability insurance. n114 Recognizing this, practitioners may see "going naked" as an "effective strategy for avoiding lawsuits but it comes at the cost of [*199] protecting the interests of clients." n115 As explained by Robert Fellmeth, Executive Director of the Center for Public Interest Law at the University of San Diego School of Law:

When you run naked it means you're immune - no one's going to sue you. Malpractice attorneys don't sue attorneys who don't have coverage. What's the point of getting a judgment and you don't know whether you can execute on it? Attorneys know how to hide assets. If you're a marginal practitioner, it pays to go naked. So the consumer has no recourse, and it's a disgrace. n116

The likelihood of being injured by an uninsured lawyer is significant because a substantial percentage of lawyers do not carry professional liability insurance. n117 Although there is a great deal of speculation on the number of uninsured lawyers in private practice, surveys suggest that the percentages of uninsured attorneys range from seventeen percent to forty-eight percent. n118

The adoption of mandatory insurance disclosure rules reduces the number of uninsured lawyers by creating incentives for lawyers to buy insurance. n119 First, the "strategy of going naked" becomes far less attractive if lawyers must disclose that they do not carry insurance. Second, the prospect of having to disclose one's insurance status may help lawyers recognize that costs associated with insurance coverage are part of the costs of practicing law.

Some proponents also assert that mandatory disclosure rules deter lawyer misconduct. The deterrence argument is based on the assumption that lawyers will engage in risk management in an effort [*200] to avoid premium increases. n120 The positive effects of purchasing insurance first occur when an uninsured lawyer applies for insurance, completing application questions that require a description of practice management controls such as conflict and calendar systems. Thereafter, insurers may provide risk management guidance and assist the insured in properly handling situations after the lawyers report errors to their carriers. n121

Many insured lawyers support mandatory disclosure rules. These lawyers have observed how innocent lawyers get sucked into litigation when the actual tortfeasors do not carry insurance. n122 The increased number of malpractice claims makes this more of a threat for responsible lawyers who carry insurance. n123

Finally, proponents argue that disclosure rules balance lawyer autonomy and client protection. n124 Mandatory disclosure rules allow lawyers to elect to purchase insurance or disclose their insurance status. At the same time, consumers of legal services are provided information so that they can make informed choices. Once lawyers disclose their insurance status, consumers can make the choice to retain other counsel, disregard the lack of insurance, or to request that the lawyer obtain coverage. n125 Thus, mandatory disclosure rules give consumers choices. At the same time, disclosure rules do not force lawyers to purchase malpractice insurance, but create incentives for them to do so.

[*201] Lawyers who oppose mandatory disclosure rules do not see those rules as a compromise that preserves lawyer independence. n126 Rather they assert that disclosure rules intrude on the choices lawyers should be able to make in representing clients. n127 Specifically, they argue that mandatory disclosure rules interfere with a practitioner's autonomy to decide whether to self-insure or purchase insurance. n128 By opening the door to more regulation of the business aspects of running a law practice, some fear that mandating disclosure is the beginning of a slippery slope of more restrictions on how lawyers practice. n129 Another concern related to lawyer independence is that mandatory insurance disclosure rules give too much power to insurance companies. n130

Those who oppose mandatory disclosure maintain that proponents have failed to demonstrate an actual need for mandating disclosure of insurance status. Specifically, they point to the lack of evidence for widespread occurrences of legal malpractice committed by uninsured lawyers. n131 Opponents also argue that a mandatory disclosure rule is unnecessary because consumers may always inquire as to whether a lawyer carries insurance. n132 Opponents maintain that consumers [*202] consider a variety of factors when retaining counsel, including the lawyer's experience and disciplinary record. n133

In opposing mandatory disclosure, critics point to a variety of unintended consequences that arise from mandating disclosure. Most notably, they warn that more information on insurance will "invite frivolous lawsuits." n134 They also argue that the mandatory insurance rule will eventually increase the cost of legal fees because lawyers likely would transfer insurance costs to consumers of legal services. n135

Some of the most vocal critics argue that adoption of mandatory disclosure rules will disproportionately affect solo and small firm lawyers. n136 They assert that many solo and small firm practitioners cannot afford insurance and therefore disclosure rules will unfairly stigmatize them. n137

To lawyers familiar with professional liability coverage, the most persuasive criticism is that mandatory disclosure actually misleads lay people. n138 Because of the claims-made nature of professional liability insurance, opponents argue that disclosure will adversely affect clients who assume that coverage exists when it does not. n139 Unlike occurrence policies, claims-made policies cover claims that are made and reported during the policy term. Therefore, lawyers who disclose [*203] that they carry insurance at the beginning of the attorney-client relationship may not be insured at the time that the actual claim is made and reported. n140 Other concerns relate to the fact that limits of liability, deductibles, insuring agreements, exclusions, and even conditions vary widely. n141 Because of the complexity of professional liability policies, the ABA Standing Committee on Lawyers' Professional Liability has opposed the adoption of mandatory disclosure rules because the lack of protection potentially misleads the client into believing remedies exist to recoup losses. n142

In 2010, the Supreme Court of Texas weighed the arguments related to adoption of a mandatory disclosure rule. n143 Following a recommendation from the Board of Directors of the State Bar of Texas, the Supreme Court of Texas concluded that it would maintain the status quo and not adopt any form of disclosure rule. n144 This decision came after a lengthy debate and conflicting recommendations. n145 First, in 2008, the State Bar of Texas Task Force on Insurance Disclosure voted against adoption of an insurance disclosure rule. n146 Within a year, the Grievance Oversight Committee [*204] (GOC), a body appointed by the Supreme Court of Texas, recommended that the Supreme Court of Texas adopt a rule requiring that lawyers disclose to their clients the fact that they do not carry professional liability insurance. n147 The Supreme Court of Texas then asked the State Bar Board of Directors to take a position. n148 Before doing so, the Board of Directors conducted a multi-phase inquiry and study process that included reports, public hearings, written submissions, blog postings, and published commentaries. n149

[*205] To obtain the perspectives of consumers of legal services, State Bar leadership included the public in hearings and conducted a public opinion survey. n150 The survey conducted in November 2009 started with open-ended questions related to the factors respondents believed were important when hiring lawyers. n151 In response to these questions, respondents did not identify professional liability coverage as a factor. n152 When asked a specific question about insurance, forty-nine percent of respondents indicated that a lawyer's lack of insurance would affect their decision to hire the lawyer. n153 Eighty-eight percent reported that they would be less likely to hire a lawyer who does not carry professional liability insurance. n154 Sixty-four percent also believed that lawyers should be required to disclose to their clients whether or not they carry professional liability insurance. n155 A somewhat telling fact regarding the importance of lawyers carrying insurance, thirty-six percent of the respondents indicated that they would actually pay more in fees in order to ensure that their lawyer carries professional liability insurance. n156 Although most prospective clients might not ask whether a lawyer carries insurance, these results suggest that many consumers view insurance status as material information. n157

[*206] Despite strong public support for a disclosure rule and the GOC recommendation, the State Bar Board of Directors recommended against requiring disclosure, siding with the majority of practitioners who opposed mandatory disclosure. n158 Practitioner opinions voiced in both written submissions and hearing testimony overwhelmingly opposed requiring disclosure. n159 The email invitation soliciting opinions generated 182 letters and comments, with 83% opposed to mandatory disclosure, 12% in favor of it, and 5% neutral on the matter. n160 On the Texas Bar Blog, 92% of comments were opposed to disclosure and 8% were in favor of disclosure. n161 Of the eight responses received from State Bar Sections and Committees, six were against requiring disclosure and two were neutral. n162 At public hearings conducted in seven cities, 125 people gave their opinions, with six indicating that they supported a disclosure requirement, twelve indicating that they took no position, and 107 opposing a disclosure requirement. n163

To learn more about the basis for the opposition to mandatory disclosure, I analyzed the hearing testimony as summarized on the [*207] State Bar of Texas website. n164 The largest number of lawyers opposed the disclosure because there was no evidence of a problem. n165 Other common complaints were that disclosure would be misleading n166 and would increase malpractice suits. n167 Other concerns related to how a disclosure requirement would unfairly

impact segments of the bar and stigmatize uninsured lawyers. A number of lawyers also referred to the costs of insurance. n168 Those few who supported adoption of a disclosure rule tended to make public protection arguments. n169

[*208] An examination of the written comments submitted by email, letters, and blog postings reveals a similar pattern. Some opponents of disclosure challenged the public protection justification for requiring disclosure, asserting that insurance is for the benefit of the insured. n170 As stated in the letter from the Chair of the Law Practice Management Committee, "Mandatory disclosure inverts the intention and beneficiary of coverage ... . Legal malpractice insurance is not for the protection of clients or the public but rather the protection of the insured ... ." n171

In stark contrast to the vast majority of submissions, three former presidents of the State Bar of Texas wrote letters supporting the adoption of a new rule. n172 David J. Beck, former bar president and chair of the State Bar of Texas Task Force on Insurance Disclosure, explained his support:

Recognizing that there are persuasive arguments on both sides of the issue, the principal reason I decided in favor of disclosure is that the issue squarely pits the interests of lawyers on one side against the interests of the public on the other. I firmly believe that we [*209] should come down on the side of the public. Practicing law is a privilege and our basic goal must be to serve the public. n173

Another Texas lawyer prefaced his comments by noting that he considers law to be a "profession and not merely a business." n174 The lawyer described the tension between lawyer and client interests as follows: "I have heard the arguments expressed by the opponents to disclosure. I truly feel they simply beg the question and unfortunately place the attorneys [sic] well-being over that of the clients. In my mind, that is contrary to our basic obligations." n175

The opinions expressed in the Texas debate over a mandatory disclosure rule reflect lawyers' attitudes about disclosure and financial accountability for misdeeds. Many lawyers espouse the rhetoric of professionalism while placing their own financial interests over those of clients and injured persons. Evidently, they do not agree that financial accountability is an important aspect of practicing law as a profession.

Conclusion: Embracing Accountability and Distinguishing Law Practice as a Profession

In discussing limited liability and insurance initiatives, this Article focuses on the dynamics involved when lawyers have the opportunity to make choices related to public protection. Reviewing the course of [*210] events reveals that lawyers have tended to elevate their own self-interest over consumer interests. n176

The birth and growth of the LLP form illustrates that no organized group played a role in articulating the interests and concerns of consumers of legal services and other persons injured by lawyer malpractice. The LLP legislation apparently swept through the United States under the radar of consumer advocacy groups. Because many states do not restrict the LLP structure to professionals, allowing a variety of enterprises to organize as LLPs benefitted experienced consumers of legal services, such as business owners. n177 Moreover, sophisticated users of legal services, such as corporations, did not need to rely on unlimited liability of general partnerships when retaining lawyers. In engaging counsel, such consumers could protect their own interests by requiring their lawyers to maintain malpractice insurance as a condition of employment. n178 Therefore, the persons left without protection were inexperienced users of legal services who may have assumed that lawyers carry insurance. n179 Such consumers likely do not know the effect and consequences of their lawyers practicing in LLPs. n180

Regardless of legislative action, state supreme courts could have taken steps to prohibit or regulate lawyers practicing in LLPs. Using their inherent authority, the courts could have refused to recognize the LLP shield or required additional safeguards as a condition of [*211] allowing firm principals to limit their vicarious liability. The majority of high courts did not use their authority to regulate law practice, but simply allowed firm partners to limit their liability and practice as if they were members of business organizations, rather than professional organizations with special responsibilities. n181

Various considerations may explain the failure of courts to do more with respect to client protection. First, the vast majority of judges practiced law before assuming their judicial positions. These judges may have empathized with firm principals' desire to limit their liability. n182 Second, in states with judicial elections, judges rely heavily on financial and other support from the practicing bar. n183 Third, individual judges may not have focused on the changing economics of law firms and the consequences of eliminating vicarious liability for thinly capitalized firms. Finally, on a

more subconscious level, judges may make decisions that favor lawyer interests over public interests because judges respond to the world as lawyers. n184

A small number of state supreme courts carefully considered the consequences of lawyers practicing in LLPs. For example, the Illinois Supreme Court took steps to provide some degree of public protection by imposing adequate insurance requirements for limited liability firms, determined on a per-lawyer basis. n185 By doing so, the [*212] Illinois court conditioned the elimination of vicarious liability of firm partners on their firms carrying insurance at higher levels than the $ 100,000-per-firm amount required in the first LLP legislation. n186 In this sense, insurance became a trade-off for firm principals who demonstrated their financial responsibility in the form of insurance or other assets.

Other than Illinois and a few other states that imposed meaningful insurance requirements, client interests appeared to receive little attention. This fact is unsurprising for virtually no critics successfully championed the concerns of consumers of legal services and persons injured by lawyers' misdeeds.

Consumers should not look to the ABA to protect their interests. The ABA functions more as a trade group that represents lawyers' interests than as a professional group committed to client protection. Although the ABA states that its mission is "to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession," the ABA's goals and objectives do not describe consumer protection concerns. Most revealing is the first goal of the ABA, which reads "serve our members." When the ABA mission statement was proposed in 2008, former ABA president Michael Greco asserted that the mission statement should put the "rule of law" first. n187 In describing his opposition to the proposed amendment, he stated:

The issue is whether the American Bar Association from this day forward will define itself as a trade association or as a noble profession - whether it's changing its highest priority from serving the people we are bound to serve or serving our own interests ... . The proposed statement will tell the world that the goals lead off with serving ourselves. n188

Greco's recommendation was rejected and the ABA adopted the proposed mission statement that puts lawyers first. n189

[*213] Within the ABA there are pockets of consumer-minded individuals, such as the ABA Standing Committee on Client Protection. n190 These groups have supported initiatives such as the ABA Model Rule that requires lawyers to disclose their lack of insurance. n191 Despite the diligent efforts of these groups, strong sectors within the bar convinced a number of state supreme courts to not adopt a mandatory disclosure rule. n192 Evidently, decision-makers in states that declined to pass mandatory disclosure rules were not persuaded that such a rule was necessary to protect consumers or those lawyers who act responsibly in carrying insurance. n193

While courts will continue to assume primary responsibility for lawyer regulation, lawyers may face legislative action. n194 For example, proponents of mandatory disclosure have threatened to resurrect a bill proposed by a Texas legislator. n195 Now that the Supreme Court of Texas has declined to adopt a disclosure rule, the proposed legislation may garner more support from those who believe that lawyers elevated their own interests above the public interest. n196

[*214] In the long run, the support for various consumer protection initiatives will increase if more lawyers view financial responsibility as a defining feature of professional practice. Currently, there appears to be no consensus on the ethical and professional dimensions of lawyer accountability. For example, one distinguished bar leader opposed the adoption of a disciplinary rule that required lawyers to disclose their insurance status, asserting that neither the purchase of insurance nor the failure to purchase insurance implicates "ethical tenets." n197 Beyond the ethics rules that represent minimum standards to avoid professional discipline, professionalism creeds often refer generally to civility and public service, with limited attention to client protection concerns. n198

Law school educators and bar leaders should challenge lawyers to examine the role that client protection plays in professional practice. Starting in law school, professors should devote more attention to legal malpractice and the importance of lawyers being accountable for their acts and omissions. n199 In regulating lawyers, courts should hold them to strict accountability for the performance and observance of their professional duties. n200 Finally, those who espouse the status of law as a profession should recognize financial responsibility as a professional virtue and promote it as such. n201

[*215] If we fail to protect those who rely on us, we fail to fulfill our obligations as a protected profession. As former ABA president Michael Greco suggested, the choice is ours. n202 Will lawyers function as a trade group protecting their own personal interests over public interests, or will lawyers embrace accountability as a defining attribute of law as a profession? To answer this question, we need not take a position that law is a business or profession. n203 Rather, law is a business of relationships in which lawyers' conduct should be guided by professional ideals and values. What distinguishes the practice of law from other business pursuits is how we treat, and remain accountable, to those who trust us.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability PartnershipsInsurance LawMalpractice InsuranceGeneral OverviewTortsVicarious LiabilityPartnersLimited Partners

FOOTNOTES:

n1. Julius Henry Cohen, The Law, Business or Profession? 109 (1924) (referring to the "germ of the American guild-idea").

n2. Id. at 22-23 (asserting that one destroys the basis of professional discipline if one makes the law a business).

n3. See generally id. at 125-41 (calling for more demanding educational requirements for lawyers). The chapter ends by noting that "Education for the Bar must include moral training - if it is to be education for the Bar." Id. at 141.

n4. Id. at 288. Cohen suggests that the "poor, ignorant and helpless" need more protection than more sophisticated clients because they are less likely to exercise judgment in hiring lawyers. Id.

n5. Id.

n6. See generally id. at 3-22.

n7. See Robert W. Hillman, Organizational Choices of Professional Service Firms: An Empirical Study, *58 Bus. Law. 1387, 1391-96 (2006)* (tracing the development of professional corporations, limited liability companies, and limited liability partnerships). Although similar issues arise with respect to all limited liability vehicles that lawyers use to avoid vicarious liability, this Article focuses on the development and effect of the limited liability partnership structure. Unlike the professional corporation and limited liability company structures, the LLP form stemmed solely from lawyers' desire to escape liability for the acts and omissions of their partners.

n8. For a discussion of the successful and rapid campaign of lawyers to gain limited liability protection, see Charles W. Wolfram, Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign, *39 S. Tex. L. Rev. 359, 360 (1998).* Professor Wolfram warned that injured claimants "will end up paying for the gains lawyers thereby achieved." Id.; see also Susan Saab Fortney, Seeking Shelter in the Minefield of Unintended Consequences - the Traps of Limited Liability Law Firms, *54 Wash. & Lee L. Rev. 717, 724-29 (1997)* (analyzing the internal and external consequences of converting to limited liability law firms).

n9. See Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Limited Liability Partnerships, the Revised Uniform Partnership Act, and the Uniform Limited Partnership Act (2001) 165-66 tbl.3-1 (2011) (outlining statutory approaches to limit partners' liability for partnership debts and obligations). Only a few

states impose insurance requirements in the LLP statute as a substitute for a partner's individual liability. Id. § 2.06.

n10. For insights on the evolution of the LLP structure from the vantage point of the law professor who served as chair of the legislative committee for a Texas non-profit group organized to support business-related legislation, see Robert W. Hamilton, Registered Limited Liability Partnerships, Present at the Birth (Nearly), *66 U. Colo. L. Rev. 1065 (1995).*

n11. See Ethan S. Burger, The Use of Limited Liability Entities for the Practice of Law: Have Lawyers Been Lulled into a False Sense of Security?, 40 Tex. J. Bus. L. 175, 179 (2004) (describing the government's efforts to recoup billions lost in connection with the savings and loan crisis).

n12. In an attempt to maximize recovery, the government asserted both vicarious liability and direct liability claims against firm attorneys who were not directly involved in the representation. The direct liability claims asserted that partners have an affirmative duty to monitor their peers. For an analysis of the government's allegations, see Susan Saab Fortney, Am I My Partner's Keeper? Peer Review in Law Firms, *66 U. Colo. L. Rev. 329, 329-35 (1995).* See also John S. Dzienkowski, Legal Malpractice and the Multistate Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims, *36 S. Tex. L. Rev. 967, 981 n.68 (1995)* (noting that in a high-profile case the government sued firm partners regardless of whether they were at the defendant firm at the time of suit). "By doing this, the government was suing different firms with different insurance policies and thus sought to obtain judgments against as many potential defendants as possible." Id.

n13. While in private practice, I represented a legal malpractice carrier that insured a number of law firms sued by the government in connection with failed financial institutions. In connection with the claims against Jenkens & Gilchrest (J & G), the carrier attempted to obtain a declaratory judgment allowing it to tender to the court the amount remaining under the policy's limits of liability. After the trial court denied the petition, the government settled the cases against the insured law firm. Thereafter, the government continued to pursue claims to recover amounts under insurance policies issued to other firms who hired former J & G partners.

n14. See Hamilton, supra note 10, at 1069 (noting that the government agencies devoted a "significant part of their total resources to the recovery of funds lost in the collapse of Texas institutions").

n15. Id. at 1071.

n16. Id. (referring to the thousands of lawyers who watched the litigation unfold with the "but for the grace of God go I" reaction).

n17. See Burger, supra note 11, at 178 (describing the confluence of events that motivated lawyers to seek liability protection).

n18. See Hamilton, supra note 10, at 1066-74 (tracing the origin of the LLP concept and legislative initiatives).

n19. Id. at 1072-73.

n20. See id.; see also Bromberg & Ribstein, supra note 9, at 3.

n21. Bromberg & Ribstein, supra note 9, at 3.

n22. Id. at 4.

n23. Hamilton, supra note 10, at 1073 (identifying some of the criticisms).

n24. Bromberg & Ribstein, supra note 9, at 4.

n25. See Hamilton, supra note 10, at 1073-74.

n26. Bromberg & Ribstein, supra note 9, at 4.

n27. Hamilton, supra note 10, at 1072, 1074 (noting that Democratic Governor Ann Richards allowed the bill to become effective without her signature). While lawyers and bar-related groups were pushing for adoption of limited liability statutes, there appeared to be little resistance to passing legislation. Id. One Texas legislator who was a partner with a plaintiff's firm first questioned the proposed Texas legislation as a "radical and undesirable proposal." Id. at 1073. After some changes were made, the legislator withdrew his opposition. Id.

n28. See Bromberg & Ribstein, supra note 9, at 12 ("In 1994, 13 states adopted LLP provisions ... [and] about the same number had adopted LLP during only the first half of 1995."). Around the world, various jurisdictions (including the United Kingdom and Canadian provinces) recognize the LLP form. Id. at 17.

n29. See Elizabeth S. Miller, The Perils and Pitfalls of Practicing Law in a Texas Limited Liability *Partnership, 43* Tex. Tech L. Rev. 563, 564 (2011) ("The [LLP] concept was quickly copied in other states, and all states and the District of Columbia have since added LLP provisions to their partnership statutes.").

n30. Hamilton, supra note 10, at 1073. "Two other legislators argued to lawyer witnesses, "You want your cake and yet you want to eat it too,' and "If you want to swim with the sharks, you should recognize that you might get eaten by them.'" Id. Others questioned whether the bill was necessary because lawyers could limit their liability as Professional Corporations and resisted the legislation as "help-a-lawyer bill." Id.

n31. Bromberg & Ribstein, supra note 9, at 4.

n32. See Martin C. McWilliams, Jr., Who Bears the Costs of Lawyers' Mistakes? - Against Limited Liability, *36 Ariz. St. L.J. 885, 889 (2004)* (noting that "legislatures adopted the new limited liability entity formats with minimal inquiry into normative consequences").

n33. For an account of how Delaware and other states expanded the statutory protection to extend to all liabilities, see Bromberg & Ribstein, supra note 9, § 1.01(b).

n34. See supra note 20 and accompanying text.

n35. Miller, supra note 29, at 564 (describing the evolution of the Texas statute that originally shielded partners only from liability "arising out of the errors, omissions, negligence, incompetence, or malfeasance of other partners or representatives of the partnership"). Later, "in 1997, the LLP provisions in the Texas Revised Partnership Act were amended to provide protection from all debts and obligations of the partnership." Id. at 564-65. Most statutes now eliminate partners' vicarious liability for all types of classes of claims. Bromberg & Ribstein, supra note 9, § 101(c)-(d).

n36. For a discussion of the unresolved issues related to supervisory liability, see Bromberg & Ribstein, supra note 9, at 126-28.

n37. Id. at 10-11.

n38. See id. at 165-69 tbl.3-1 (outlining the different approaches to supervisory liability).

n39. Id. at 15.

n40. Id. at 14.

n41. Id.

n42. Id.

n43. Fortney, supra note 12, at 360 (citing Restatement (Third) of the Law Governing Lawyers (Tentative Draft No. 7, 1994)).

n44. Id. at 362. The ALI membership adopted the following provision: "Each of the principals of a law firm organized as a general partnership without limited liability is liable jointly and severally with the firm." *Restatement (Third) of the Law Governing Lawyers § 58* (2000) (emphasis added). Based on this final version, Professors Bromberg and Ribstein state that the "Restatement explicitly recognizes limitation of lawyers' liability in LLPs under applicable law." Bromberg & Ribstein, supra note 9, at 258-59.

n45. See Monroe H. Freedman, Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements, *26 Hofstra L. Rev. 641, 646-60 (1998)* (analyzing three different issues that illustrate how lawyers' own financial interests affected their independence in formulating sections of the Restatement of Law Governing Lawyers).

n46. Id. Professor Freedman warns that these conflicts of interest

have compromised the integrity of the ALI's Restatements of the Law to the point that no judge, scholar, or student can rely on a Restatement rule or comment as representing the objective judgment of members, unaffected by the partisanship of advocates who are creating precedents to protect their clients' and their own interests in future litigation.

Id. at 660.

n47. For a critique of the ABA Ethics Opinion, see Susan Saab Fortney, Professional Responsibility and Liability Issues Related to Limited Liability Partnerships, *39 S. Tex. L. Rev. 339, 405-22 (1998).*

n48. In Wisconsin, the Supreme Court recognized that lawyers seeking limited liability should do more than comply with the minimum statutory provisions. The Wisconsin Supreme Court amended the Wisconsin Supreme Court Rules of Professional Conduct for Attorneys, allowing lawyers to practice in LLPs and other limited liability organizations, provided that the lawyers give public and actual notice to clients. Wis. Sup. Ct. R. of Prof'l Conduct for Attorneys R. 20:5.7. The rule imposes other conditions, including that a limited liability law firm "include a written designation of the limited liability structure as part of its name." Id. In addition, the firm

must "provide to clients and potential clients in writing a plain-English summary of the features of the limited liability law under which [the firm] is organized." Id.

n49. See Wolfram, supra note 8, at 362 (noting that the bar played a pivotal role in pushing for limited liability legislation).

n50. Id.

n51. Roger C. Cramton, Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable, *70 Fordham L. Rev. 1599, 1613 n.48 (2002).*

n52. "Bar associations have played a pivotal, if not very public, role in obtaining the legislation. Indeed, very few bar groups opposed the legislation, and their opposition can be adequately explained on the ground of self-interest." Wolfram, supra note 8, at 362 (analyzing the inherent powers doctrine and courts' response to the organized bar's push for limited liability legislation). According to Professor Wolfram, the state's highest court claim of exclusive "inherent powers" is embodied in two principles:

The milder version of the claim involves judicial assertion of a constitutional power to regulate lawyers even in the absence of legislation. Quite beyond that, most state supreme courts also claim the exclusive power to regulate lawyers as the court sees fit - even if the state's legislature has enacted legislation that on its face is applicable to lawyers. Under the latter claim, courts say they have both the power and the duty to strike down legislation interfering with the judicial power to regulate lawyers.

Id.

n53. Id. ("In contrast to the robust and highly successful bar activity, [Professor Wolfram notes] that most courts have not been involved in the LLP adoption process in any way.").

n54. The Illinois Bar Association and Chicago Bar Association petitioned the Illinois Supreme Court, proposing rules to allow lawyers to use statutory vehicles to limit lawyers' vicarious liability. The Illinois Supreme Court adopted rules "nearly identical" to those proposed in the petition. See Sheldon I. Banoff & Steven F. Pflaum, Limited Liability Legal Practice: New Opportunities and Responsibilities for Illinois Lawyers, CBA Record (Apr. 2003), available at http://www.kattenlaw.com/files/Publication/577a24dc-3a89-446f-a62a-e577ba99ada0/Presentation/PublicationAttachment/f08f5eab-12c9-44c4-bbf4- 5bf5c287b0dc/Limited%20Liability%20Legal%20Practice.pdf (providing a detailed analysis of the Illinois approach from the perspectives of authors who participated in the drafting of the petition submitted to the Illinois Supreme Court).

n55. Until Illinois adopted the rule, it was the only state that imposed unlimited vicarious liability on principals in law firms. Illinois Rule 722 on Limited Liability Legal Practice now allows lawyers to limit their liability under the applicable state statutes provided that the entity maintains adequate insurance or proof of financial responsibility as defined in the Rule. See Ill. Sup. Ct. R. 722(b)(1).

n56. As an alternative to purchasing insurance, the Illinois Rule provides that law firms may maintain proof of financial responsibility in a sum no less than the minimum required annual aggregate for adequate insurance for a limited liability entity. Under the Rule, "proof of financial responsibility" means funds that are "specifically designated and segregated for the satisfaction of any judgments against a limited liability entity, and any of its owners or employees, entered by or registered in any court of competent jurisdiction in Illinois, arising out of wrongful conduct." Ill. Sup. Ct. R. 722(b)(3) (internal quotation marks omitted).

n57. See Bromberg & Ribstein, supra note 9, at 64-65 (identifying eight statutes that impose insurance requirements). In some states, other applicable law, such as licensing statutes or professional conduct rules, may require insurance or financial responsibility for limited liability firms. Id. at 65.

n58. See Petition of the Chicago Bar Association and the Illinois State Bar Association at 1, In re Proposed Rules Regulating Vicarious Liability of Lawyers Practicing in Limited Liability Entities, No. 18095 (Ill. Mar. 27, 2002) (arguing that the protections in the proposed rule provided "more effective [protection] than vicarious liability as a means of ensuring that clients receive compensation for losses suffered due to malpractice").

n59. Jennifer Ip & Nora Rock, Mandatory Professional Indemnity Insurance and a Mandatory Insurer: A Global Perspective, 10 LawPro Mag. 2, 10-11 (2011).

n60. Id. at 10 (discussing the increased difficulty UK firms encountered in obtaining affordable PII for the 2009-2010 and 2010-2011 insurance years). For a table of PII requirements worldwide, see Professional Indemnity Insurance Requirements Around the World, PracticePro, http://practicepro.ca/LawPROmag/ Professional-Indemnity_AroundWorld.pdf (last visited Aug. 23, 2012).

n61. Professional Liability Insurance, L. Soc'y § 3.2 (July 4, 2012), http://www.lawsociety.org.uk/advice/practice-notes/professional-indemnity-insurance/.

n62. Id.

n63. "In most common law jurisdictions, professional indemnity insurance for lawyers is made mandatory by law or by law society or bar association regulation." Ip & Rock, supra note 59, at 11 (citing Professional Indemnity Insurance Requirements Around the World, LawPRO Mag., http://www.practicepro.ca/LAWPROMag/ ProfessionalIndemnity_AroundWorld.pdf (last visited Jan. 29, 2013)).

n64. Id.

n65. Id. (explaining that lawyers who obtain insurance on their own initiative expose themselves and their clients to "potentially dangerous gaps in coverage").

n66. Id. at 12 (referring to this as a "free-rider" problem that Scandinavian regulators cited as a reason for requiring that all members obtain insurance).

n67. See Bennett J. Wasserman & Krishna J. Shah, Mandatory Legal Malpractice Insurance: The Time Has Come, N.J. L.J., Jan. 14, 2010 (arguing that the extension of insurance to all lawyers would make premiums more affordable). "With increased competition in the insurance marketplace ... the resulting revenue infusion to carriers by mandating insurance coverage would not only lower premiums, but it would extend protection to all clients ... ." Id.

n68. See supra notes 66-67 and accompanying text.

n69. George M. Cohen, Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions, *4 Conn. Ins. L.J. 305, 307 (1998);* see also Fredric L. Goldfein, Legal Malpractice Insurance, *61 Temp. L. Rev. 1285, 1285 (1988)* (noting that it was not until the 1960s that insurers realized that they could make a profit).

n70. See Cohen, supra note 69, at 308 (tracing developments that contributed to the expansion of lawyers' liability exposure).

n71. Insurers radically changed the coverage provided by changing policies to be "claims-made" rather than occurrence policies and by revising the insuring agreements to provide for deducting defense costs from the limits of liability available to pay damages. Id.

n72. "In some jurisdictions, such as California, insurers started dropping out of the legal malpractice insurance market and focusing on more profitable and stable areas." Id. (citing Issues in Forming a Bar-Related Professional Liability Insurance Company 4 (ABA Standing Comm. on Lawyers' Professional Liability ed., 1989)).

n73. See Goldfein, supra note 69, at 1285 ("By the end of the 1970's, premiums began to increase sharply."). For a description of how "claims-made" coverage is more restrictive than "occurrence" coverage, see id. at 1286-90.

n74. See id. at 1285 (citing Smith, Cautious Optimism - An Overview of Lawyer Malpractice, 12 B. Leader 13, 14 (1989)).

n75. See Cohen, supra note 69, at 309-31 (chronicling bar initiatives to make insurance more accessible and affordable).

n76. California and North Carolina organized the first bar-related insurance companies. See id. at 308. Numerous states followed, creating bar-related companies that write insurance and provide risk management services. For a listing of the bar-related companies, see National Association of Bar-Related Insurance Companies, http://www.nabrico.org (last visited Oct. 3, 2012). As stated on the website for the National Association of Bar-Related Insurance Companies, affiliated member companies are "dedicated to personal service, quality coverage, and the satisfaction of their insureds." Id.

n77. "Legislators believed that [mandatory coverage through state-endorsed funds] would greatly assist a growing number of attorneys who were unable to obtain insurance, as well as protect clients who were represented by uninsured attorneys." Goldfein, supra note 69, at 1296.

n78. Manuel R. Ramos, Legal Malpractice: Reforming Lawyers and Law Professors, *70 Tul. L. Rev. 2583, 2610 (1996).*

n79. Goldfein, supra note 69, at 1296; Ramos, supra note 78, at 2610.

n80. By legislative enactment, the board of governors for the unified state bar association has the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance. See *Or. Rev. Stat. § 752.035* (2011). Currently, the professional liability fund commission requires that "qualified members of the profession ... carry professional liability insurance offered by the fund with primary liability limits of at least $ 200,000." Id.

n81. Goldfein, supra note 69, at 1296.

n82. Nicole A. Cunitz, Note, Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?, *8 Geo. J. Legal Ethics 637, 652 (1995).*

n83. Ramos, supra note 78, at 2610.

n84. See id. at 2610-12 (analyzing the pricing structure). Although initially met by heavy criticism, past survey results suggest that members of the Oregon Bar are satisfied with services provided. See Nicholas A. Marsh, Note, "Bonded & Insured?": The Future of Mandatory Insurance Coverage and Disclosure Rules for Kentucky Attorneys, *92 Ky. L.J. 793, 800 n.56 (2004)* (citing the Oregon PLF website that reported on survey results indicating that 99% of the respondents indicated that they were "satisfied" and 87% reported that they were "very satisfied" with services provided by the PLF).

n85. See, e.g., Ramos, supra note 78, at 2611-12 (asserting that "Oregon's PLF has been a success and a model for any insurance carrier"); Cunitz, supra note 82, at 651-52. In advocating that every state should follow Oregon's example, the vice-president of an international insurance broker and risk-management consulting group notes that most of the arguments against mandatory insurance deal mostly with "logistics, not substance." David Z. Webster, Mandatory Malpractice Insurance, Yes: It's Essential to Public Trust, *79 A.B.A. J. 44, 44 (1993)*. Mr. Webster concludes by stating: "Oregon has solved the logistics problem and, as an added benefit, has reduced cost and developed a credible loss-control program and a workable claims statistical base. But most important, Oregon has assured the client public protection in the event of lawyer malpractice." Id.

n86. In explaining why the Oregon model of mandatory insurance has "stayed only in Oregon," Manuel Ramos summarizes the opposition as follows:

Lawyers in other states do not like it. The ABA is against it. Insurance carriers oppose it. Many attorneys would prefer not to pay several thousand dollars a year in premiums, and believe that the best insurance is to be "bare": it is cheaper and most plaintiff's attorneys will simply not bother to prosecute a legal malpractice case against them. Insurance carriers do not like the idea of legislation that might put them out of business. ALAS, the nation's largest legal malpractice insurer based on premium income, is opposed to mandatory insurance because "it simply does not work." The Alliance of American Insurance is also against mandatory legal malpractice insurance: "Guaranteeing injured clients the means to collect gets beyond what the insurance product is designed to do." Because any mandatory ... insurance program must cover all lawyers, it is unlikely that any insurance carrier will commit to writing a state's mandatory program. Insurance companies relegated to offering excess coverage would soon see premium income decrease substantially. Some might even go out of business.

Manuel R. Ramos, Legal Malpractice Insurance: The Profession's Dirty Little Secret, *47 Vand. L. Rev. 1657, 1728-29 (1994)* (footnotes omitted). Professor Ramos concludes by stating that these arguments against mandatory legal malpractice insurance are unsupportable from the standpoint of consumer protection. See id.

n87. Leslie C. Levin, Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock, *22 Geo. J. Legal Ethics 1549, 1588 (2009)* (reviewing Richard Abel, Lawyers in the Dock: Learning From Attorney Disciplinary Proceedings (2008)).

n88. Harry H. Schneider, Jr., Mandatory Malpractice Insurance, No: An Invitation to Frivolous Suits, *79 A.B.A. J. 45 (1993)* (suggesting that insurance disclosure is a "less divisive and less expensive" way of accomplishing the goal of public protection).

n89. See, e.g., Robert I. Johnston & Kathryn Lease Simpson, O Brothers, O Sisters, Art Thou Insured?, 24 Pa. Law. 28, 30 (2002) (explaining that studies conducted by the Pennsylvania Bar Association Professional Liability Committee concluded that a mandatory insurance proposal was not realistic in a state with a bar the size of Pennsylvania).

n90. For a discussion of insurance "status disclosure" as an ideological compromise between camps that are concerned about interests of the "lawyers and health of the legal profession on one side and the rights of the consuming public on the others," see Farbod Solaimani, Watching the Client's Back: A Defense of Mandatory Insurance Disclosure Laws, *19 Geo. J. Legal Ethics 963, 974-75 (2006).*

n91. Compare James E. Towery, The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance, 14 Prof. Law. 22 (2003) (the former president of the California Bar Association arguing that a lawyer's lack of insurance is a "material fact" clients are entitled to know), with James C. Gallagher, Should Lawyers Be Required to Disclose Whether They Have Malpractice Insurance?, 32 Vt. B. J. 5 (2006) (former president of the Vermont Bar Association asserting that lawyers should have to disclose their insurance status because of the heightened obligations lawyers owe clients).

n92. James E. Towery, Should Disclosure of Malpractice Insurance Be Mandatory, GP Solo, Apr.-May 2003, available at http://www.americanbar.org/newsletter/ publications/gp_solo_magazine_home/gp_ solo_magazine_index/towery.html. Mr. Towery chaired the ABA Standing Committee on Client Protection and served past president of the State Bar of California. By statute enacted in 1988, California first required a form of malpractice insurance disclosure in certain fee contracts. Id. This provision was later "sunsetted" and not reenacted. Id.

n93. Jeffrey D. Watters, What They Don't Know Can Hurt Them: Why Clients Should Know if Their Attorney Does Not Carry Malpractice Insurance, *62 Baylor L. Rev. 245, 257 (2010).*

n94. South Dakota's rule now is considered to be the most stringent reporting requirement because it requires disclosure to the client or potential client in every communication with them. Id. The Rule also covers the presentation of the disclosure and extends the requirements to every advertisement by the attorney, whether written or in the media. Id.

n95. Towery, supra note 92, at 38. In a reported case, the Supreme Court of Ohio suspended a lawyer from the practice of law for twenty-four months for violations of the Ohio Professional Conduct Rules, including the rule that required the lawyer to inform a client, in a writing signed by the client, if the lawyer does not maintain professional liability insurance. See generally *Cincinnati Bar Ass'n v. Trainor, 950 N.E.2d 524 (Ohio 2011).*

n96. Richard Acello, Climate Change: States Warm to the Disclosure of Liability Coverage, A.B.A. J. (Nov. 1, 2009, 8:00 PM), http://www.abajournal.com/magazine/ article/climate_change/.

n97. ABA Model Court Rule on Insurance Disclosure, ABA Standing Comm. on Client Protection (Aug. 9, 2004), http://www.americanbar.org/content/dam/aba/ migrated/cpr/clientpro/Model_Rule_InsuranceDisclosure.authcheckdam.pdf [hereinafter ABA Model Court Rule].

n98. Watters, supra note 93, at 255. Under the ABA Model Court Rule, the highest court of the jurisdiction will designate the means for making disclosure information available to the public. ABA Model Court Rule, supra note 97.

n99. 5 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 38.1 (2012) (noting that the ABA rule focuses on the "fact and maintenance of insurance" rather than the amount of insurance).

n100. State Implementation of ABA Model Court Rule on Insurance Disclosure, ABA Standing Comm. on Client Protection (Aug. 9, 2011), http://www.americanbar.org/content/dam/aba/administrative/ professional_responsibility/chart_implementation _of_mcrid_080911.authcheckdam.pdf [hereinafter State Implementation Chart]. States vary on public access to the information that lawyers disclose on their registration statements.

Some make information available on the state website, others on request, and others do not allow public access to information. See Watters, supra note 93, at 256.

n101. The following states require disclosure directly to clients: Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania, and South Dakota. State Implementation Chart, supra note 100.

n102. HALT Status Update: Does Your State Require Lawyers to Make Their Insurance Status Known, HALT, http://www.halt.org/reform_projects/ lawyer_accountability/pdf/Malpractice_insurance _disclosure_091505.pdf (last visited Aug. 23, 2012) [hereinafter HALT Report]. In comments to the Illinois Supreme Court, HALT argued that disclosure in registration papers merely assures that the high court will be informed of an attorney's insurance status, but does not guarantee that clients will have access to the information. Id.

n103. The following states have rejected a disclosure rule: Arkansas, Connecticut, Florida, Kentucky, and Texas. State Implementation Chart, supra note 100.

n104. Frequently Asked Questions, N.C. St. B., http://www.ncbar.gov/faq/f_faq.asp (last visited Aug. 23, 2012) (noting that clients must check with their lawyers if the clients want to obtain information on the lawyer's legal malpractice insurance coverage).

n105. According to a public opinion survey conducted for the State Bar of Texas, eighty-seven percent of respondents reported that they did not ask if their attorneys carried professional liability insurance. PLI Disclosure Survey of the Public, St. B. Tex. (Nov. 2009), http://www.texasbar.com/pliflashdrive/material/PublicSurvey.pdf . The State Bar of Texas contracted with North Texas State University to conduct a telephone survey of 500 Texas residents, reflective of the demographics of Texas. Id.

n106. Devin S. Mills & Galina Petrova, Modeling Optimal Mandates: A Case Study on the Controversy over Mandatory Professional Liability Coverage and Its Disclosure, *22 Geo. J. Legal Ethics 1029, 1033 (2009)* (referring to studies that reveal that most clients assume that their attorneys are covered).

n107. For a analysis of the asymmetric distribution of information in the attorney-client relationship, see Eli Wald, Taking Attorney-Client Communications (and Therefore Clients) Seriously, *42 U.S.F. L. Rev. 747, 751-55 (2008).*

n108. Towery, supra note 91, at 23 (suggesting those attorneys who question the materiality of insurance information put the question to a cross-section of their clients).

n109. To support his position, Mr. Gallagher refers to court opinions that describe the special nature of the lawyer-client relationship. Gallagher, supra note 91, at 5.

n110. Mills & Petrova, supra note 106, at 1034.

n111. According to a 2008 public opinion survey conducted by the State Bar of Texas Task Force on Insurance Disclosure, eighty percent of respondents indicated that it was "very important" or "moderately important" for them to know whether the attorney they are hiring carries insurance. Watters, supra note 93, at 247. In addition, seventy percent of the respondents agreed that lawyers should inform potential clients whether or not the lawyer carries insurance. Id. at 247-48.

n112. See Mills & Petrova, supra note 106, at 1032-33 ("Not requiring malpractice insurance, and not requiring attorneys to disclose any lack of coverage, unfairly forces legal clients to bear the burden of risk of loss ... . Furthermore, when lawyers are the casual agents of malpractice damages, and their clients are the victims, it seems incongruous that potential victims should be the ones to carry the risk of malpractice resulting in financial loss.").

n113. Johnston & Simpson, supra note 89, at 32; see also Nicole D. Mignone, Comment, The Emperor's New Clothes? Cloaking Client Protection Under the New Model Court Rule on Insurance Disclosure, *36 St. Mary's L.J. 1069, 1083 (2005)* (noting that the grievance process inadequately provides financial compensation for aggrieved clients). In most states, Client Protection Fund programs provide limited recovery for a narrow class of claims. For a discussion of the scope of coverage protected by client protection funds, see Lisa G. Lerman & Philip G. Schrag, Ethical Problems in the Practice of Law 148 (3d ed. 2012) (explaining that client protection funds are state-sponsored programs designed to reimburse clients whose lawyers have stolen their money). "Many client protection funds reimburse only a fraction of the valid claims that are submitted to them." Id. at 152.

n114. "Legal malpractice cases are rarely pursued against an uninsured attorney unless that attorney has significant assets." Ramos, supra note 86, at 1727.

n115. Acello, supra note 96 (quoting Robert Fellmeth).

n116. Id.

n117. See Johnston & Simpson, supra note 89, at 28 (noting that in 2001 the insurance industry and bar officials estimated that the percentage of uninsured lawyers in the United States ranged from twenty percent to fifty percent at any given time).

n118. The lower end of this estimate is based on findings in a mandatory survey of lawyers conducted at the direction of the Illinois Supreme Court. Id. at 29 (quoting the chief counsel of the Illinois State Bar Association who noted that that the "general feeling was that something needs to be done" even though the numbers came in slightly better than projected). The upper end of the estimate derives from 6,160 responses to a Professional Liability Survey distributed by the State Bar of Texas in 2008. See PLI Disclosure - Attorney Survey Findings, St. B. Tex. (Feb. 2008), http://www.texasbar.com/pliflashdrive/material/11_Attorn ey_Survey_0208.pdf.

n119. After South Dakota adopted a mandatory disclosure rule the number of insured attorneys in the state rose from eighty percent to ninety-six percent. Carole J. Buckner, Malpractice Insurance Disclosure Lurches Toward Approval, Orange County Law, April 2008, at 51.

n120. Mignone, supra note 113, at 1083 (suggesting that disclosure rules would lead attorneys to deliver legal services with greater care).

n121. See Anthony E. Davis, Professional Liability Insurers as Regulators of Law Practice, *65 Fordham L. Rev. 209, 220-25 (1996)* (describing the types and effectiveness of risk management programs conducted by insurers).

n122. See Johnston & Simpson, supra note 89, at 32 (explaining that members of the Pennsylvania Professional Liability Committee have seen responsible lawyers drawn into malpractice suits because another lawyer involved in the matter proved to be uninsured).

n123. Mills & Petrova, supra note 106, at 1033 (citing Ronald E. Mallen, Cutting Through the Malpractice Maze, The Brief, Summer 1986, at 10, 12-13). For a discussion of the statistical evidence of a dramatic increase in legal malpractice claims, see Judith L. Maute, Bar Associations, Self-Regulation and Consumer Protection Whither Thou Goest?, J. Prof. Law. 2008, at 66-69.

n124. See, e.g., Solaimani, supra note 90, at 974-75 (analyzing whether mandatory insurance disclosure is a "perfect ideological compromise" between client and lawyer interests).

n125. Arguably, a "materiality-based" communications rule, such as one advocated by Professor Eli Wald, would cover a disclosure of a lawyer's insurance status. See Wald, supra note 107, at 751-55, 779-80 (justifying a "materiality-based" disclosure rule on the basis of the nature of the attorney-client relationship and the asymmetric distribution of information in the relationship).

n126. See, e.g., Charles Wood, Few Fans of Mandatory Disclosure, Mont. Law., June-July 2002, at 11 (referring to opposition of Montana attorneys who argued that mandating insurance disclosure was "playing into the hands of the malpractice insurance companies by forcing more lawyers to buy coverage rather than be embarrassed by a disclosure statement").

n127. See Acello, supra note 96, at 41 (referring to a "don't tread on me" attitude that may be at play in resisting mandatory disclosure).

n128. Steve N. Six, Mandatory Malpractice Insurance Disclosure: Is the Time Right for Kansas?, 72 J. Kan. B. Ass'n 14, 14 (2003) (noting that a mandatory rule makes no allowance for the fact that some lawyers have adequate financial resources to cover claims).

n129. Mignone, supra note 113, at 1086; see also Mark Hansen, More States Require Lawyers to Say Whether They Carry Malpractice Insurance, A.B.A. J., May 23, 2006, available at http://www.abajournal.com/magazine/article/disclosure_ rules/.

n130. See Hansen, supra note 129. For a discussion of the emerging role of insurers as regulators of the legal profession, see Davis, supra note 121, at 220-32. See generally Charles Silver, Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis, *65 Fordham L. Rev. 233 (1996).*

n131. See Mills & Petrova, supra note 106, at 1034 (articulating the counter argument that "absence of proof is not the proof of absence"); see also Towery, supra note 91, at 23 (suggesting that the lack of evidence of unsatisfied judgments against uninsured lawyers can be attributed to the fact that claims against uninsured lawyers are "often abandoned, precisely because there is no available insurance").

n132. See Wood, supra note 126, at 11 (quoting a Montana attorney who insisted that potential clients should be accountable for asking about an attorney's insurance status).

n133. Edward C. Mendrzycki, Should Disclosure of Malpractice Insurance Be Mandatory? - Con, GP Solo, Apr.-May 2003, available at http://www.americanbar.org/newsletter/publications/gp_ solo_magazine_home/gp_solo_magazine _index/towery.html (asserting that there is "no empirical evidence showing that simply stating that a lawyer is uninsured offers any useful information to a client who is making a decision whether to hire counsel").

n134. Mignone, supra note 113, at 1086 (referring to opposition expressed by an ABA delegate). In supporting their position, critics can use the proponents' own argument that malpractice lawyers do not pursue claims against uninsured professionals.

n135. Cunitz, supra note 82, at 656-57.

n136. See Buckner, supra note 119, at 51-52 (noting that opponents of the proposed disclosure rule "predicted consequences ranging from premium increases, rising costs for legal services, reduction in availability of low-cost legal services, increases in malpractice claims and the demise of small firm and solo law practices").

n137. Marsh, supra note 84, at 810 (suggesting that stigma is "especially problematic for attorneys operating on limited budgets" because they may be forced out of practice if they are required to choose between purchasing insurance and bearing a negative stigma).

n138. For example, in a commentary in opposition to mandatory disclosure, Edward Mendrzycki, the former chair of the ABA Standing Committee on Lawyers' Professional Liability, identified various features of malpractice policies that could lead clients to believe that they could recover sums under an attorney's professional liability policy. See Mendrzycki, supra note 133.

n139. See id.

n140. For a discussion of the differences between occurrence and claims-made policies and other terms of professional liability policies, see Susan Saab Fortney, Legal Malpractice Insurance: Surviving the Perfect Storm, *28 J. Legal Prof. 41, 43-44 (2004).*

n141. Some argue that "the effort to provide more detailed disclosure addressing these finer points [of coverage] may cause even more confusion." Gallagher, supra note 91, at 6.

n142. Mignone, supra note 113, at 1084. Many members of the ABA Standing Committee on Lawyers' Professional Liability are affiliated with professional liability insurers or law firms that defend legal malpractice cases.

n143. See generally Terry Tottenham, Radio Nowhere, *33 Tex. B.J. 728 (2010)* (describing the debate and how the State Bar "worked hard" to engage members in considering the recommendation to the Supreme Court of Texas).

n144. In a letter dated April 14, 2010 to the President of the State Bar of Texas, the Supreme Court of Texas reported its decision to not adopt an insurance disclosure rule. Court Decides Against Mandatory Professional-Liability Insurance Disclosure, Tex. Sup. Ct. (Apr. 16, 2010), http://www.supreme.courts.state.tx.us/ advisories/Professional_Insurance_Disclosure_ 041610.htm.

n145. The State Bar of Texas website contains a great deal of information on the State Bar's consideration of the insurance disclosure issue, including reports from various bodies and findings from surveys. For a Table of Contents and links to pertinent documents, see generally Professional Liability Insurance Disclosure - Table of Contents, St. B. Tex., http://www.texasbar.com/pliflashdrive/home.html (last visited Oct. 12, 2012).

n146. By a margin of one vote, the State Bar of Texas Task Force on Insurance Disclosure recommended against requiring attorneys to inform prospective clients of whether or not the attorney carried professional liability insurance. Memorandum from David J. Beck, Chair, Task Force on Insurance Disclosure for State Bar of

Texas Board of Directors (June 11, 2008), available at http://www.texasbar.com /pliflashdrive/material/3_TaskForce_Report_ June08.pdf. The Task Force's due diligence included surveying lawyers and members of the public. In the survey of lawyers, seventy-seven percent of respondents were against requiring disclosure of whether they carried professional liability insurance. In contrast, in the survey of members of the public, seventy percent reported that they believed that lawyers should be required to inform a potential client whether they carried professional liability insurance. Id.

n147. The final recommendation of the GOC stated:

The Committee, having studied the recommendations of the State Bar's Task Force on insurance disclosure, and having reviewed how other states have addressed these same issues, and after having studied the cost and availability of professional liability insurance in Texas, recommends that the State Bar of Texas, at the direction [of] the Texas Supreme Court, implement a Professional Liability Insurance Disclosure rule. The rule, the Committee believes, should be made part of the Disciplinary Rules of Professional Conduct so that any violation of the rule will be handled through the grievance process ... .

Grievance Oversight Committee Appointed by the Supreme Court of Texas, Excerpt from the Grievance Oversight Committee 2009 Report to the Supreme Court (2009), available at http://www.texasbar.com/pliflashdrive/material/8_Grievance%20Report.pdf [hereinafter GOC Report]. The GOC provided specific provisions for the proposed disclosure rule, including the recommendation that the rule require disclosure at the time a client engages a lawyer when the lawyer does not carry at least $ 100,000 per claim and $ 300,000 in the aggregate." Id. at 6. By way of full disclosure, I previously served as the chairperson of the GOC. I also participated in some of the GOC's discussions of the mandatory disclosure rule.

n148. Letter from Wallace B. Jefferson, Chief Justice of the Supreme Court of Texas, to Harper Estes, President, Board of Directors, State Bar of Texas and Roland Johnson, President Elect, Board of Directors, State Bar of Texas (June 23, 2009), available at http://www.texasbar.com/pliflashdrive/material/ SCt_Letter_062309.pdf.

n149. Bar leadership designed the study to obtain information from both attorneys and members of the bar. Bar directors sought feedback from attorneys by sending first class letters to their constituents, through the Texas Bar Blog, email submissions, and responses from State Bar Sections, Committees and local bar associations. See Executive Summary, St. B. Tex., http://www.texasbar.com/pliflashdrive/material/ ExecSummaryFinal.pdf (last visited Oct. 12, 2012). The Texas Bar Journal also published pro and con commentaries. See generally Chuck Herring & Bill Miller, Pro/Con Professional Liability Insurance Disclosure: Should Be Required, *72 Tex. B.J. 822 (2009).*

n150. For the survey report, see St. B. Tex., supra note 105.

n151. The first question was an open-ended one asking, "What are the top five things you would want to know about an attorney before you would hire them?" Id. The second question asked, "Of those top five you indicated, which is the most important to you?" Id.

n152. Id. at Question 1. Eleven percent indicated that they had asked if their attorneys carried professional liability insurance. Id. at Question 4.

n153. The question asked, "If a lawyer were to inform you that he or she does not carry professional liability insurance, would that information affect whether or not you hire them?" Id. at Question 8. Thirty-six percent answered "no" and fifteen percent indicated "Don't Know/No Response." Id.

n154. Id. at Question 9.

n155. Id. at Question 13. By comparison sixty-six percent of respondents believed that doctors should be required to disclose to their clients whether or not they carry professional liability insurance, and fifty-five percent reported that mechanics should be required to do so. Id. at Questions 14 and 15.

n156. Id. at Question 16. A somewhat higher percentage of respondents (forty-nine percent) indicated that they would pay more in fees to ensure that their doctor carries professional liability insurance. Id. at Question 17.

n157. To build on data obtained from the telephone survey and "to gain further insight into the public's knowledge, understanding and opinions [related to] professional liability insurance," the State Bar of Texas retained consultants to conduct focus groups in four Texas cities. St. B. Tex., supra note 149, at 4. After hearing a definition of professional liability insurance, seventy percent of the focus group participants thought attorneys should be required to disclose whether they carried insurance. See Chris Fick & Greg Liddell, Personal Liability Insurance: Public Opinion Focus Group Study, Human Interfaces Inc. (Jan. 15, 2010), http://www.texasbar.com/pliflashdrive/material/SBOT%20FG%20Repo rt_Final_V3.pdf. The researchers report that this percentage went down to sixty-five percent after hearing unbiased arguments for and against disclosure. Id. at 10-11.

n158. State Bar of Texas Board of Directors, Official Minutes, St. B. Tex. (Jan. 28-29, 2010), http://www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_ and_Minutes&Template=/CM/ContentDisplay.cfm&Cont entFileID=319. On the recommendation in question, thirty-nine directors voted against the recommendation and one voted for the recommendation. Id. If the Supreme Court of Texas determined that disclosure should be required, the Board of Directors unanimously approved (with one abstaining) recommending that the Supreme Court adopt an administrative rule (not a disciplinary rule) that requires each Texas lawyer to disclose the existence or non-existence of professional liability insurance on the State Bar of Texas website. Id. With the second recommendation, the Board opted for the approach that is considered more "lawyer-friendly" because the requirement is set forth in an administrative, court rule rather than a disciplinary rule. Consumer advocates also prefer disclosure directly to clients, rather than on a website. See HALT Report, supra note 102.

n159. For a numerical analysis of the submissions, see St. B. Tex., supra note 149, at 2-3.

n160. Id. at 2.

n161. Id. (reporting that ten of the sixteen comments in favor of a disclosure rule appeared to be from physicians and non-lawyers).

n162. Id.

n163. Id. at 3. Sixty-one persons testified at the hearings. Id. For links to audio recordings and hearing reports, see St. B. Tex., supra note 145.

n164. See St. B. Tex., supra note 145. To categorize the positions, I largely relied on the arguments used by the researchers who conducted focus groups with non-lawyers in Texas. See Mignone, supra note 113, at 1083-87 (discussing the focus groups conducted for the State Bar of Texas). Using codes, I identified the up to two arguments made by each person.

n165. As stated by a solo practitioner in the Public Hearing in San Antonio on October 14, 2009, "If it ain't broke, don't fix it." San Antonio - Oct. 14, 2009, St. B. Tex., http://www.texasbar.com/pliflashdrive/material/PLI_SanAn tonio_Hearing_ upload.mp3 (last visited Oct. 12, 2012).

n166. A number of lawyers expressed the concern that disclosure would mislead clients. As stated by a family law practitioner in Houston, "These are claims-made policies, not occurrence policies like car insurance. If disclosure were required, the public would be confused and think, "If there's a bad result, I can make a claim.'" Houston - Oct. 16, 2009, St. B. Tex., http://www.texasbar.com/pliflashdrive/ material/PLI_Houston_Hearing_upload.mp3 (last visited Oct. 12, 2012).

n167. As stated in testimony at the Houston Hearing, "A disclosure requirement would open the floodgates to frivolous litigation." Id. Those who claim that requiring insurance will "simply put a target on lawyers' backs" may not fully appreciate the hurdles that plaintiffs must overcome in a legal malpractice case. Experienced lawyers who handle legal malpractice cases recognize the numerous challenges in winning a legal malpractice case, including expenses associated with retaining expert witnesses and establishing causation. These challenges include the "case within the case requirement" in cases involving civil litigation and the "exoneration requirement" in cases involving criminal defense work. For a discussion of the elements and burdens in legal malpractice cases, see Susan Saab Fortney & Vincent Johnson, Legal Malpractice Law: Problems and Prevention (2008). See also Benjamin H. Barton, Do Judges Systematically Favor the Interest of the Legal Profession?, *59 Ala. L. Rev. 453, 491-502 (2008)* (using a number of aspects of legal malpractice cases to show that lawyers "enjoy" several unique advantages when sued for legal malpractice and that it is much harder to prove legal malpractice cases compared to medical malpractice cases).

n168. See, e.g., Lubbock - Oct. 29, 2009, St. B. Tex., http://www.texasbar.com/ pliflashdrive/material/PLI_Lubbock_Hearing_ upload.mp3 (last visited Oct. 12, 2012). It is unclear whether those who mentioned "costs of insurance" knew the actual cost of insurance or if they think that any amount is unreasonable. As noted in the GOC report, a non-profit insurer in Texas offers special rates for new lawyers with first year polices costing $ 500 per year for coverage of $ 100,000 per claim and a $ 300,000 limit for claims aggregated. GOC Report, supra note 147, at 5. After four years of practice, the premium goes up to $ 1,750 per year. Id. Because numerous factors go into premium calculation for experienced attorneys, it is difficult to determine an average premium for experienced attorneys. The GOC Report noted that an informal survey of the members of the Task Force on Insurance Disclosure indicated that each was paying approximately $ 4,000 per year. Id.

n169. One lawyer who handles legal malpractice cases testified in support of a mandatory disclosure rule explaining that he approaches the issue "from the perspective of what's best for the client." Dallas - Oct. 28, 2009, St. B. Tex., http://www.texasbar.com/pliflashdrive/material/PLI_Dalla s_Hearing_upload.mp3 (last visited Oct. 12, 2012).

n170. Although it is true that liability policies protect the insured, they only cover claims for damages brought by third parties. See Third-Party Insurance Definition, BusinessDictionary.com, http://www.businessdictionary.com/definition/third-party-insurance.html#ixzz1y8Bk5vcp ("Liability insurance purchased by an insured (the first party) from an insurer (the second party) for protection against the claims of another (the third) party. The first party is responsible for its own damages or losses whether caused by itself or a third party.").

n171. Letter from Philip Farlow, Chair of the Law Practice Mgmt. Comm., to Gib Walton, Attorney, Vinson & Elkins LLP (June 16, 2008), available at http://www.texasbar.com/pliflashdrive/material/Sections_ CommitteesResponses.pdf. The Chair-Elect of the Council of the General Practice, Solo, and Small Firm Section warned, "Once the principle that malpractice insurance is for the benefit of the client or "the public' and not the insured the next logical implication of that principle is that malpractice insurance should be mandatory for protection of the client." See Letter from Wendy Buskop, Chair-Elect, Council of the Gen. Practice, Solo, and Small

Firm Section to State Bar of Texas (n.d.), available at http://www.texasbar.com/ pliflash-drive/material/sections_committeesResponses.pdf.

n172. See Letter from Broadus A. Spivey, Attorney, to Roland Johnson, President, State Bar of Texas (Nov. 20, 2009) (on file with author); Letter From W. Frank Newton to Roland Johnson, President, State Bar of Texas (Dec. 9, 2009) (on file with author). Mr. Spivey represents plaintiffs in legal malpractice cases and Mr. Newton manages a non-profit foundation and previously served as a law school dean.

n173. See Letter from David J. Beck, Attorney, Beck Redden & Secrest, to Roland K. Johnson, President, State Bar of Texas (Dec. 16, 2009) (on file with author). A director of Public Citizen made a similar observation related to lawyers' special position, in stating:

Having a law license is an important right. It also is a privilege granted by the State. Lawyers should be honest and forthright in dealings with clients. An uninsured lawyer who injures a client is likely to leave the client without any practical remedy. Texas law requires drivers to have insurance, but does not require lawyers to have insurance - even though lawyers have great power and great potential to injure clients financially. This proposed rule would cost lawyers nothing. It does not require that they carry insurance. It simply requires honesty and forthright disclosure of insurance status. Texas consumers are entitled to at least that much information.

See Letter from Tom "Smitty" Smith, Dir., Pub. Citizen, Texas Office, to Roland K. Johnson, President, State Bar of Texas (Dec. 30, 2009) (on file with author) [hereinafter Public Citizen Letter].

n174. See Letter from Roger W. Anderson, Attorney, Gillen & Anderson, to State Bar of Texas (Oct. 16, 2009) (on file with author).

n175. Id.

n176. In a survey conducted by the Utah Bar Association, thirty-two percent of the attorney-respondents agreed with the statement, "The public believes that attorneys put their own interests ahead of their clients," and nine percent "strongly agreed" with the statement. Utah State Bar, 2001 Survey of Members, Questionnaire 2, Question 51, available at http://www.utahbar.org/documents/2011_SurveyOf Attorneys.pdf.

n177. See Bromberg & Ribstein, supra note 9, § 2.03(a)(3) (describing the types of business that may organize as LLPs under state laws).

n178. Corporations have increasingly dictated the terms of engagement in Outside Counsel (OC) Guidelines. These guidelines cover a range of concerns, including insurance, billing, and staffing. For a fascinating analysis of OC Guidelines' influence on the conduct of lawyers, see generally Christopher J. Whelan & Neta Ziv, Privatizing Professionalism: Client Control of Lawyers' Ethics, *80 Fordham L. Rev. 2577 (2012).*

n179. In a November 2009 public opinion survey conducted for the State Bar of Texas, 87.1% of respondents indicated that they did not ask their attorneys whether the attorneys carried professional liability insurance. See St. B. Tex., supra note 105. Approximately 70% of the 500 respondents indicated that they did not know if their attorneys carried professional liability insurance. Id. at Question 5.

n180. According to a survey I conducted of members of the Austin Chamber of Commerce in June 1996, 91.27% of the respondents did not understand the effect of law firms practicing as LLPs or LLCs. See Fortney, supra note 8, at 752 n.158.

n181. As noted by Professor Wolfram, most courts have not been involved in the LLP adoption process in any way and "in only a very few states have the courts played a role in implementing their local legislation that is more consistent with inherent powers claims." Wolfram, supra note 8, at 361-62.

n182. See Barton, supra note 167, at 456 (identifying a number of "conscious factors" that might influence judges to favor the interests of the legal profession: "[the judges] are all lawyers, many of their friends and colleagues are lawyers, and (whether they are elected or appointed) they likely have their job in large part because of the efforts of other lawyers").

n183. For a critical analysis of judicial selection and cause for concern about impartiality, see Judicial Selection in the States, How It Works/Why It Matters, Inst. for Advancement Am. Legal Sys. (2008), http://iaals.du.edu/images/ wygwam/documents/publications/Judicial_Selection_ States2008.pdf. "In the last four election cycles, candidates for state high courts have raised nearly double the amount raised by candidates in the 1990s." Id. at 4.

n184. See Barton, supra note 167, at 456 (using the theory of "new institutionalism" to explain how judges share with lawyers a set of norms, thought patterns, and behaviors and that these "deeply ingrained biases, thought-processes, and views of the world ... control judicial thinking and outcomes" in a way that is favorable to the legal profession).

n185. Illinois was the last state to adopt a rule allowing lawyers to practice in limited liability firms. The Illinois Supreme Court adopted this rule after a lengthy debate and evaluation process in which interested groups submitted position papers. See supra notes 54-56 and accompanying text.

n186. See supra note 55 and accompanying text.

n187. See House of Delegates Passionately Debates ABA's Goals, A.B.A. J. (Aug. 12, 2008, 9:00 AM), http://www.abajournal.com/news/article/house_of_d elegates_ passionately_debates_abas_goals/.

n188. Id.

n189. See id. ("Our members are the soul of this association. Our members are those who we are bound to serve." (quoting the incoming chair of the ABA's membership committee defending the proposed mission) (internal quotation marks omitted)).

n190. For a description of the charge of the ABA Standing Committee on Client Protection, see Who We Are, Standing Committees: Client Protection, http://apps.americanbar.org/dch/committee.cfm?com=SC105020& new (last visited Aug. 24, 2012).

n191. In 2004, the ABA Standing Committee recommended the Model Rule on Insurance Disclosure that the ABA House of Delegates approved by a slim margin. See Mills & Petrova, supra note 106, at 1036-37 (chronicling the Committee's effort).

n192. For example, in Texas, state bar sections, committees, and local bar associations overwhelmingly opposed adoption of a mandatory disclosure rule. According to its Executive Summary, the State Bar of Texas received eight responses "from State Bar Sections and Committees with six [against a mandatory disclosure rule] and two neutral... . Likewise, six responses were received from local bar associations with five against (in the form of resolutions and polls) and one neutral (an informational newsletter article)." St. B. Tex., supra note 149.

n193. In professional liability litigation, the burden may fall on the shoulders of insured lawyers when plaintiffs do not pursue claims against uninsured lawyers.

n194. James Fischer, External Control Over the American Bar, *19 Geo. J. Legal Ethics 59, 108 (2006)* (suggesting that there may be increased flashpoints between legislators and the bar over lawyers' professional and public duties).

n195. See, e.g., Public Citizen Letter, supra note 173 (warning that the Texas legislature was likely to address the insurance disclosure issue if the Supreme Court of Texas did not do so).

n196. See Herring & Miller, supra note 149, at 822 (noting that the previously proposed legislation did not move forward because it appeared as if the court would mandate disclosure). In warning that the "days of self-regulation may be numbered," Professor Fischer explains that self-regulation may become a "victim of lawyer success or, as some critics would have it, lawyer excess." Fischer, supra note 194, at 109.

n197. See Mendrzycki, supra note 133, at 37. Mr. Mendrzycki chaired the ABA Standing Committee on Lawyer's Professional Liability.

n198. See, e.g., The Supreme Court of Ohio Commission on Professionalism, Professionalism CLE Guidelines, adopted June 14, 2002, http://www.supremecourt.ohio.gov/Boards/CP/guidelines.pdf (surveying various definitions of professionalism).

n199. See Ramos, supra note 78, at 2618-23 (suggesting that the failure to cover legal malpractice in law school amounts to a form of malpractice by law school professors). At the Fordham-Touro Symposium, The Law: Business or Profession?, I circulated a short questionnaire asking professors about coverage in their professional responsibility classes. In the small sample, only two professors answered the following question in the affirmative, "In your classes, do you discuss whether lawyers have a professional responsibility to cover damages arising from their acts or omissions?" Nine reported that they did not cover the topic, with one professor noting that s/he does not "directly" cover the topic and that it "seems pretty obvious." Another indicated that s/he "sometimes" discusses the issues. See Survey from Fordham-Touro Symposium, The Law: Business or Profession? (Apr. 23-24, 2012) (on file with author).

n200. See, e.g., Gallagher, supra note 91, at 5 (quoting court opinions that underscored responsibilities that lawyer-fiduciaries owe clients).

n201. For an interdisciplinary analysis of the common characteristics of professionals, see Sande L. Buhai, Profession: A Definition, *40 Fordham Urb. L.J. 241 (2012);* Debra Lyn Bassett, Redefining the "Public" Profession, *36 Rutgers L.J. 721, 771 (2005).*

n202. See House of Delegates Passionately Debates ABA's Goals, supra note 187.

n203. See Christine Parker, Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible, 23 U. Queensland L.J. 347, 380 (2004) (suggesting that there is no justification for drawing stark distinctions between law as a business and profession).

APPENDIX U

Q&A Mandatory Disclosure to Clients of an Attorney's Lack of Professional Liability Insurance

See page 19 of this issue of the *Bar Bulletin* for Proposed Revisions to the Rules of Professional Conduct 16-104 NMRA.

1. **Is there a problem with lawyers' not carrying professional liability insurance?**
The Lawyers Professional Liability Committee (LPLC) believes there is a problem. The raw data for New Mexico shows that in 2005, 19.7 percent of lawyers in private practice were not insured. In 2006, the first year after mandatory disclosure to the State Bar was implemented, 20.3 percent of the lawyers were uninsured. Last year 17.1 percent were not insured.

   However, the data suggests that the number of uninsured lawyers may be higher. Some lawyers indicate they are "self-insured." Others did not provide adequate information to confirm that they are reporting professional liability insurance, as opposed to general liability, property and casualty, or workers' compensation insurance. If one adds the two reporting "self-insured" lawyers to the 356 unconfirmed "other" respondents, the total uninsured attorneys increases from 618 to 978, or 27 percent of those lawyers in private practice.

2. **Will the proposed rule reduce the number of uninsured lawyers?**
In every state in which a mandatory disclosure rule has been implemented, the percentage of insured lawyers has increased. After the adoption of similar rules in Alaska and South Dakota, the lawyers reacted in a predictable fashion. A significant number of lawyers who had previously been uninsured obtained malpractice insurance shortly before the effective date of the new rules. In other words, the new rules provided a positive incentive for uninsured lawyers to obtain insurance so that they would not be required to disclose to clients their lack of insurance. The LPLC believes the same thing will happen in New Mexico.

3. **What are the demographics of the lawyers who have reported they are not insured?**
The vast majority of lawyers who report that they are uninsured are in solo practice or small firms (two to four lawyers). The data from the 2008 dues forms indicate that the vast majority of uninsured lawyers (over three quarters) practice in the larger metropolitan cities and the county in which the city is located:

Bernalillo County (Albuquerque)	319
Sandoval (Bernalillo, Rio Rancho)	31
Chavez (Roswell)	5
Dona Ana (Las Cruces)	40
San Juan (Farmington)	11
Santa Fe	75
Total	**481 [78% of Total Uninsured]**

4. **Do clients believe that lawyers have liability insurance?**
In other states where polling of the public has been conducted, a majority of those polled indicated they thought lawyers had insurance. In Texas last year, 75 percent of the public responding to a poll said they thought lawyers should be required to have liability insurance.

5. **Is there documented proof that clients have been harmed by lawyers who have not had insurance?**
The LPLC has not conducted a study regarding this issue. Lawyers who represent clients in lawsuits against attorneys report anecdotally that there are cases that are not pursued because of a lack of insurance and clients who have been unable to be fully compensated when they have sued uninsured lawyers (see question 26).

6. **If there is no hard data that the public is being harmed by uninsured lawyers, why is this rule being proposed?**
A majority of the LPLC believes that as a matter of public policy (or at least the policy of the State Bar of New Mexico) lawyers, because of their higher calling and fiduciary duty to clients, should either be insured or should disclose their insured status. There is a populist element in the State Bar membership that believes that clients have a right to know—to make an informed decision regarding the purpose of legal services. Additionally:
   - Insurance is available to protect the public (not a lawyer who needs a defense).
   - Insurance is generally a cost of doing business for everyone in America.
   - Given the fiduciary relationship between the attorney and the client, disclosure at a minimum should be required.
   - Clients, who often rely on the ability to recover damages from insurance available to a tortfeasor, may presume that lawyers also have insurance and this presumption needs to be discussed with the client.
   - It does not matter how many claims there are when just one claim can be devastating and tarnish the reputation of the profession.

7. **Will all lawyers be required to comply with the proposed rule?**
No. As used in this rule, "lawyer" includes a lawyer provisionally admitted under Rule 24-106 and Rules 26-101 through 26-106; however, it does not include a lawyer who is a full-time judge, in-house corporate counsel for a single corporate entity, or a lawyer who practices exclusively as an employee of a governmental agency. Only lawyers who are in private practice and who do not have insurance in the amount of $100,000 per claim or $300,000 in the aggregate must make the disclosure. Lawyers who are insured at or above the limits in the proposed rule are **not** required to make any disclosure to the client.

8. **Will the proposed rule apply to out-of-state lawyers?**
Yes. The proposed rule will apply to any lawyer in private practice who represents clients in New Mexico. It will apply to lawyers in private practice who are admitted pro hac vice before any court over which the New Mexico Supreme Court has superintending control.

9. **Does a lawyer have to include a statement on the lawyer's letterhead or in advertisements that complies with the proposed rule?**
No. The proposed rule does not require this. It requires that the client sign an acknowledgement at the time the lawyer is hired. The acknowledgement can be a separate document or it can be contained within a written contingent fee agreement or engagement letter that the client signs at the beginning of the representation.

10. **What must the uninsured lawyer tell a client?**
The proposed rule contains the wording required for the notice and acknowledgment signed by the client. Thus, every lawyer will use the same explanation. This does not mean, however, that the lawyer cannot explain to the client why the lawyer does not have insurance. Any additional verbal or written explanation may not be misleading.

11. **Won't this proposed rule harm the new lawyer starting a practice?**
The LPLC believes that new lawyers will not be harmed. New lawyers do not have what is known as retroactive exposure or an experience tail. The premium for new lawyers is normally less than the premium for experienced lawyers. However, new lawyers may have a tendency to represent on insurance applications that they handle many types of work, including work that is viewed as higher risk work, and for this reason, a new lawyer may be charged a higher premium or be declined coverage altogether. The State Bar has resources available to assist any lawyer in obtaining coverage.

12. **Won't the fact that a lawyer has insurance make it more likely that a lawyer will get sued?**
There are lawyers who believe that if they have no insurance, they will not get sued. There are lawyers whose practice is in a substantive area in which they believe they will not be sued. Criminal law and insurance defense are examples. In fact, lawyers who practice in all areas are being sued.

    There is no data to support or refute the position that having insurance increases the likelihood of being sued. Often, a lawyer's insured status (or the amount of coverage) is unknown until after the lawsuit is filed. Lawyers who sue lawyers indicate it is often the size of the claim that makes a difference. If the damage to the client is large, plaintiff's counsel may still pursue the uninsured lawyer and his assets. If the claim is small, the lack of insurance may be a factor in making the decision to take cases. A concern has been expressed that jurors may award larger damages against a lawyer who is insured. Normally, whether a defendant is insured or uninsured is not admissible.

13. **Doesn't the State Bar's Client Protection Fund protect clients from uninsured lawyers?**
The Client Protection Fund protects clients in a limited manner regardless of the lawyer's insured status. The fund compensates clients for what amounts to dishonest conduct, criminal acts, or fraud related to client funds. Often these acts are excluded from coverage under a professional liability policy. The LPLC does not consider the Client Protection Fund to be a form of insurance.

14. **Won't requiring insurance drive up the cost of legal services and deprive low income or poor people of access to legal services?**
There is no data to support this concern. A lawyer is not required by this rule to have insurance, and any client who knowingly signs the acknowledgement may engage an uninsured lawyer.

15. **What will happen to a lawyer who violates the proposed rule?**
The LPLC considered this issue and discussed two forms of special sanctions but in the proposed rule being presented to the Board of Bar Commissioners, there are no special sanctions. The State Bar will not initially have a way to monitor compliance with the rule. In time, lawyers who report on the dues forms that they are not insured may be subject to random auditing to determine if they are complying with the proposed rule. Any lawyer who does not comply with the proposed rule may be subject to a disciplinary proceeding.

16. **What type of policy will comply with the rule, and what about policies that erode the amount of coverage (Pac-man policies)?**
The proposed rule requires a professional liability policy that covers the errors and omissions of a lawyer and those employees the lawyer supervises. New Mexico insurance regulations currently do not permit the carrier to issue a claims expense policy with limits under $500,000 per claim or in the aggregate. Thus, a policy that complies with the proposed rule cannot have a Pac-man provision.

    A policy that provides $500,000 or more in coverage can have a claims expense provision, but the claims expense provision cannot consume more than 50 percent of the amount of the coverage. Thus, no policy currently available in New Mexico can erode coverage to limits below those in the proposed rule.

However, there is one exception in the insurance regulations that could be used to allow a 100 percent claims expense deductible to be included in the policy.

17. **What about lawyers who cannot obtain the minimum liability insurance because of their prior claims experience?**
Lawyers who cannot get insurance because they have a bad claims record may nevertheless continue to practice law. They will, however, be required to comply with the proposed rule and obtain a signed client acknowledgement. There still may be coverage available within the limits required by the proposed rule, but the carrier may charge a higher premium.

18. **Won't the proposed rules result in "insurability" becoming a *de facto* determination of "competency"?**
Some lawyers have expressed the concern that insurance underwriters may be in a position to determine who can practice law. However, the proposed rule does not require that a lawyer have insurance, only that a lawyer makes a disclosure that he or she does not. Underwriting, therefore, plays no role in determining competency or one's right to practice law.

19. **Isn't the LPLC made up of lawyers who represent insurance companies, and isn't the proposed rule a gimmick to help their clients get more business?**
The LPLC membership includes lawyers who represent uninsured lawyers before the Disciplinary Board and the courts, lawyers who represent lawyers who are insured, lawyers who sue lawyers, lawyers who represent government agencies, and lawyers in private practice.

20. **Isn't the proposed rule the next step on the road to requiring all New Mexico lawyers to have professional liability insurance as a condition to practicing law?**
Oregon is the only state that requires all lawyers to be insured, and Oregon had to create a captive insurance company to do it. The State Bar of Virginia is considering a rule requiring all lawyers in private practice to have insurance issued by a commercial carrier. The LPLC has rejected this idea because doing so may exclude a very small number of lawyers from being able to practice law. The LPLC notes, however, that requiring certain lawyers to have insurance is not new. The State Bar of New Mexico and the New Mexico Supreme Court already require lawyers who want to be certified as "specialists" to carry a minimum of $250,000 under a legal malpractice policy, unless the attorney practices exclusively as an employee of a governmental agency or exclusively as in-house corporate counsel for a single corporate entity (see Rule 19-203(B)).

21. **Many lawyers get calls seeking simple advice or small pro bono matters. Many lawyers give "cocktail party advice." If they are not insured, can they give this advice, or must they get the person to come in and sign the disclosure first? Is it possible to allow an incidental level or value of services to be provided?**
Aside from the fact that it is unwise to give "incidental advice" because a lawyer often is not aware of all the facts or of the context in which the question is asked, incidental responses normally do not result in a formal contingent fee agreement or an engagement letter.

If those asking a question believe they are retaining a lawyer to represent them, or the lawyer understands that he or she is being retained, the disclosure would be required by any uninsured lawyer.

The proposed rule is not intended to cover this type of situation. It envisions a situation in which the lawyer is formally retained to handle a matter.

22. **Is a firm with a deductible in excess of $100,000 required to comply with the rule? Is the firm insured, self-insured, or not insured as the rule is written? How does the rule impact larger firms with self-insured reserves and a layer of excess coverage, or smaller firms who elect large deductibles?**
This problem is not limited to large firms. A solo practitioner or a firm of any size could acquire a policy with a deductible or self-insured retention in excess of $100,000.

When the need arises to pay a settlement or a judgment, the language of the specific policy will determine whether the carrier is required to pay the judgment and collect the deductible from the insured or whether the insured must first pay the deductible. Many policies state that the carrier will pay all amounts that the insured becomes legally obligated to pay **in excess** of the deductible shown on the declarations page.

A number of the largest New Mexico firms belong to a special risk retention insuring group called Attorney's Liability Assurance Society (ALAS), and their members maintain a self-insured reserve (SIR) in excess of $100,000 with the carrier acting in the role of an excess carrier. In the ALAS 2007 Annual Report, The Modrall Firm, The Rodey Firm, and The Hinkle Cox Firm were listed as New Mexico members. Holland & Hart was listed in Colorado, and Lewis & Rocca was listed in Arizona. These firms have New Mexico offices. These firms are not totally self-insured.

A law firm, whether it has a deductible or a SIR, is insured so technically the requirement of the proposed rule is met. The LPLC does not believe the State Bar should set standards for deductibles.

The LPLC added the following provisions and a footnote in order to clarify the role of deductibles or SIRs:

(5) The minimum limits of insurance specified by this Rule include any deductible or self-insured retention, [fn 4] which must be paid as a precondition to the payment of the coverage available under the professional liability insurance policy.

(6) A lawyer is in violation of this Rule if the lawyer or the firm employing the lawyer maintain a professional liability policy with a deductible or self-insured retention that the lawyer knows or has reason to know cannot be paid by the lawyer or the lawyer's firm in the event of a loss.

[fn 4] The use of the term "deductible" includes a claims expense deductible. The professional liability insurance carrier must agree to pay, subject to exclusions set forth in the policy, all amounts that an insured becomes legally obligated to pay *in excess of the deductible or self-insured retention* shown on the declarations page of the policy.

The proposed rule does not permit a lawyer or a firm to be totally "self-insured" and section (6) of the proposed rule does not allow a lawyer or a law firm to rely on a policy of insurance with a deductible with SIR or reserve that the lawyer knows or should have known the lawyer or the firm cannot pay. The LPLC recommends that when a claim is asserted against a lawyer that the lawyer establish or set aside a cash reserve large enough to cover the deductible or the SIR.

23. **Did the committee consider not mentioning any amount of insurance in the disclosure?**
The LPLC has considered this issue, and the committee believes that the amount of insurance should be mentioned.

If a lawyer, or the lawyer's staff, informs a client that the lawyer does not have the "coverage required by the State Bar," it is very likely that the client will ask what that amount is. The LPLC is concerned that in responding a lawyer or a lawyer's staff may make a negligent misrepresentation.

The purpose of the defined disclosure and acknowledgement is to make certain that all uninsured lawyers are initially providing the client with the same information.

24. **Does the committee have any information on the premium costs at different coverage levels (e.g., $100,000 vs. $500,000)?**
This information is not readily available. It is often proprietary. Because of the underwriting variables, costs vary but it may be possible to acquire basic rate information.

The LPLC selected the amounts referenced in the rule because they are generally available in the commercial market, they are in the lower band of coverage provided by most carriers, and they generally provide the most competitive rates. These rates, with but one possible exception, do not allow for "claims expense deductibles" (see question 16). Coverage of $500,000 or more would permit the use of a claims expense deductible.

The LPLC will endeavor to obtain this information and post it on the State Bar's Web site.

25. **What happens when the insurance company goes out of business and the attorney is left with no insurance? Does the attorney now have to provide notice to all clients until new coverage is secured?**
Yes, the lawyer must give notice; it is the same as not having insurance or allowing insurance to lapse. The lawyer will have to inform clients that coverage has lapsed.

Normally, an adequate amount of notice is given for a lawyer to secure a policy from another carrier. The LPLC believes that a firm would have a reasonable amount of time to secure new coverage with an adequate tail to cover any short "uninsured period," before it must give the notice to its clients.

26. **Are there any statistics that show how many attorneys in New Mexico are sued for legal malpractice?**
There are no statistics for New Mexico that are accurate. These records are not kept by the courts or the State Bar, and a docket search would be time consuming and less than accurate. There are many claims asserted in New Mexico that are settled without a lawsuit being filed. Nationally 21.32 percent of claims are settled with no suit being commenced (see *ABA Profile of Legal Malpractice Claims 2004-2007*).

We know that nationally from 2004 to 2007, 44,000 claims were asserted against **insured lawyers** (see the *ABA Profile of Legal Malpractice Claims 2004-2007*).

In an effort to answer this question, an informal survey of New Mexico defense counsel for legal malpractice liability carriers was conducted. Firms were asked to provide information regarding the number of **insured** claims filed against New Mexico lawyers in the last five years. Four lawyers reported a total of 151 claims. One lawyer stated that 20 percent of the claims he has defended were for uninsured lawyers.

The *ABA Profile of Legal Malpractice Claims 2004-2007* shows that 70 percent of all insured claims are brought against lawyers in firms with one to five lawyers. The highest rate of uninsured lawyers in New Mexico falls within the one-to-five lawyer group. It would appear that statistically the chances of an uninsured New Mexico lawyer being sued are rather high.

27. **Whose responsibility is it to report an attorney in non-compliance to the Disciplinary Board?**
Rule 16-803(A) requires that any "...lawyer who has knowledge that another lawyer has committed a violation of the *Rules of Professional Conduct* that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." The proposed rule is part of the *Rules of Professional Conduct*. The comments to Rule 16-803 state that the "...term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." Intentionally violating the rule in order to induce clients to retain a lawyer would be reportable. A clerical error with no other pattern of avoidance may not constitute a reportable violation.

The State Bar lacks the resources to police or enforce this rule, just as it lacks the resources to enforce every provision of the *Rules of Professional Conduct*. As is the case with most Disciplinary Board violations, the violations will be reported by clients who believe, correctly or incorrectly, that they have been harmed by lawyers and learn they were not given the disclosure; and by lawyers and judges who learn about violations.

APPENDIX V

I Can Help You Sell Your Law Practice!!

Ed Poll

(/vidcast-list.html)

Risky Business - Some Thoughts on Legal Malpractice Insurance

02/01/2007

Reprinted from:

Law Practice TODAY (http://www.abanet.org/lpm/lpt/)

Published 2/07

Malpractice is a predominant concern for the profession, and more so for small firms and independent practitioners. Mandatory disclosure of malpractice liability insurance is a growing trend and with that comes increased risk of a malpractice suits. This article investigates these recent trends in malpractice insurance and provides preventative measures you may take to avoid malpractice.

Lawyers in most states face mandatory requirements to join the state bar association and to undertake a certain number of continuing legal education hours. Now there is a growing trend to make lawyers disclose - whether at the time of engagement, on their web sites or in some other way - whether they carry malpractice liability insurance. The ABA's House of Delegates approved a mandatory disclosure rule in 2004 and nearly 20 states have adopted disclosure rules that either disclose evidence of malpractice insurance to the public or place it on file with the state bar. A public interest group, HALT, advocates making mandatory disclosure nationwide.

Who Is At Risk?

Malpractice allegations are obviously a major concern for the profession. In my home state of California (which is likely to put mandatory disclosure rules into practice this year), lawyers spend 80% of their dues each year to support the State Bar's disciplinary system. Typically these complaints are not over gross malfeasance such as misappropriation of trust funds. To the contrary, over half of disciplinary actions involve clients' allegations of practice management failings: poor service, unreturned phone calls, inaccurate arithmetic on the billing statements and so on. Malpractice actions often are based on the same failings.

Because such conduct is so prevalent, malpractice insurance is expensive. The least costly annual premiums for experienced lawyers range from $4,000 to $7,000 per lawyer. It's not surprising that this burden falls heaviest on small firms and solo practitioners. In California, where one-quarter of all lawyers earn $50,000 a year or less (an income level that is beyond many sole practitioners in other parts of the country), nearly 20% of lawyers lack malpractice insurance coverage. A recent survey in Illinois showed that 20% of all lawyers - and 40% of solos - similarly lack coverage.

Mandatory malpractice disclosure will likely have little impact on large firms. They already carry malpractice insurance and are not concerned that their clients will worry about coverage. However, for a firm of any size, placing this issue in the engagement agreement will raise the consciousness of clients to the potential for malpractice and cause an increase in litigation against lawyers. Since the lawyer mentions coverage, why not sue? The assumption is that any settlement or damages will come from the lawyers' malpractice insurer.

Are There Malpractice Red Flags?

The bottom line is that every lawyer, even the most competent and conscientious, faces the risk of a malpractice lawsuit. The truth is that certain red flags indicate a greater risk of being sued.

Areas of Practice

Personal injury litigation practice accounts for about one-third of all malpractice claims. Add the related area of medical malpractice claims and the percentage is even higher. The reasons for that are simple. If the personal injury lawyer misses or misreads the applicable statute, the liability is clear-cut and irrevocable. And if the attorney misses the statute, the client can always claim, with 20-20 hindsight, "the jury would have given us a big award." The single most important protection for the attorney against such a claim is to document everything that goes into the analysis and communication process - every letter, every staff contact, every phone call. If you can demonstrate that you were on top of things, the client can't prove otherwise.

Difficult Clients

Clients who should be suspect as prospective sources of malpractice litigation can often be identified when discussing the engagement letter. Think twice about clients who:

- Will not discuss or agree on fees, or will not sign a fee agreement or pay a retainer.
- Insist that their matter is "life and death" and thus can initiate minute emergencies that may result in errors under pressure.
- Use pressure tactics to urge that their matter be handled first once the engagement begins.
- Demonstrate a negative or know-it-all attitude toward lawyers and the judicial system.
- Cannot articulate what they want you to achieve.
- Have employed two or more lawyers before you on the same matter.

Technological Incompetence

Lawyers who do not use at least the minimum amount of technology may be committing malpractice per se. One of the Rules of Professional Conduct requires that a lawyer be competent to handle a given matter. And one criterion for competency is the standard of care in the local community. Facing lawyers who are significantly more sophisticated in the use of technology may set a standard of care against which you are measured. If you don't use technology effectively for research, file management and the like, you may be perceived as willfully less competent than your competitors. And that's malpractice.

Lack of Communication

A study several years ago contended that doctors talk three minutes longer with their patients (clients) than other professionals (lawyers) and that doctors are sued less than lawyers. This may be extreme, but it is true that the focus of the conversation between a professional and a client should be to understand the intent and desires and wants of the client. Only then will you know the services required. If you inform the client (so the client understands clearly) what to expect, there is far less likelihood of a malpractice claim.

Special Appearances

There can be a real malpractice problem when an attorney makes a special court appearance on behalf of another lawyer. This generally occurs in smaller communities, but quite a few attorneys in major metropolitan areas routinely make appearances for other lawyers as a professional courtesy and source of income to help out with a schedule conflict or to handle a routine matter. The lawyer who engages the contract "pinch hitter" becomes responsible - in a malpractice sense -

for any errors committed even in a seemingly simple case. This may seem obvious. But court decisions have also upheld malpractice findings in the reverse situation, where the attorney making the special appearance becomes liable for the errors of the primary lawyer or even of other lawyers who made previous special appearances.

What Can Be Done?

In recent years the perception has grown that a primary purpose of Bar Associations is to protect the public. Such thinking shapes the primary argument about legal malpractice disclosure: it is in the best interests of the public to know this information. There is really no good answer as to why. There is no reporting requirement to disclose auto, fire, liability, homeowners or other insurance premiums. Why is malpractice insurance different?

If Bar Associations really cared about "the public good," they would take two important steps: educate the public about what malpractice insurance costs add to their legal bills and make affordable malpractice insurance available to all lawyers. State bar associations should communicate the complexities of the malpractice insurance industry and work with the insurance industry to create affordable malpractice insurance coverage.

The best example of what can be done is the state of Oregon's Professional Liability Fund, which is the mandatory provider of primary malpractice coverage for Oregon lawyers. Since 1978, the Professional Liability Fund has provided coverage of $300,000 per claim/$300,000 aggregate to all attorneys engaged in the private practice of law in Oregon. In 2006, the basic assessment for this coverage was $3,000 for each attorney. The coverage provided by the Fund is on a "claims made" basis. Note that the assessments are much less than the nationwide average payment for malpractice insurance and that all lawyers are covered. The playing field between large and small firms is at least manageable. And the public is truly protected.

If mandatory disclosure of malpractice insurance is to be a nationwide trend, there should be no insurance disclosure requirement without enabling lawyers to obtain affordable malpractice insurance. The Oregon model shows that it can be done. The alternative imposes an unaffordable malpractice insurance burden on the majority of lawyers who can least afford it.

This Article is listed under the following categories:

- Management (/taxonomy/term/1)
- Financial and Cash Flow Management (/taxonomy/term/3)

What's New

- Law firm study: With size, comes growth (https://www.lawbiz.com/coachs_corner_4-27-17.html)
- Spring Cleaning: More than Dust Bunnies (https://www.lawbiz.com/coachs_corner_2-16-17.html)
- Where are You with Disaster Preparedness and Recovery Planning? (https://www.lawbiz.com/coachs_corner_2-2-17.html)
- Equal Treatment: A Continuing Conversation (https://www.lawbiz.com/coachs_corner_1-12-17.html)
- Lawyers as Bankers: Extending Credit to Clients (https://www.lawbiz.com/coachs_corner_1-5-17.html)
- Collections Litigation: Taking the "Happy" Out of "Sue Happy" (https://www.lawbiz.com/coachs_corner_12-29-16.html)

Search Site

Search

Advanced Search
(https://www.lawbiz.com/search/node)

LawBiz on:
(https://twitter.com/LawBiz)
(http://www.linkedin.com/in/lawbiz)
(http://www.youtube.com/LawBizGuide)
(https://www.facebook.com/LawBizManagement?ref=ts)
(https://plus.google.com/b/117766543473158265575/117766543473158265575/posts)

Latest Blog Posts

Tweets from @LawBiz

Buying and Selling Law Practices

Read Tweets from Ed Poll.

Visit https://twitter.com/LawBiz (https://twitter.com/LawBiz)

Eastern Washington Law Firm For Sale (http://www.lawbizregistry.com/law-practices-for-sale/law-practice-for-sale-eastern-washington-mountains.php)

Office: 310-953-8547 (tel:3109538547)
Email: EdPoll@LawBiz.com (mailto:edpoll@
or Ask the Expert (/ask_expert.html)

Northern California Plaintiffs Personal Injury Practice for Sale (http://www.lawbizregistry.com/law-practices-for-sale/law-practice-for-sale-Northern-California-Plaintiffs.php)

APPENDIX W

Lawyer's Professional Liability Insurance Survey

Introduction

Your participation in the following survey will assist the Ad Hoc Committee on Attorney Malpractice Insurance in making a recommendation to the Supreme Court of New Jersey regarding whether New Jersey should implement an insurance disclosure requirement in accordance with the ABA Model Court Rule, as well as whether professional liability insurance should be mandatory . The survey will take less than five minutes to complete, and all responses will remain confidential.

Note: The survey requires that you complete questions that are marked with asterisks.

Lawyer's Professional Liability Insurance Survey

Private Practice

Note: The survey requires that you complete questions that are marked with asterisks.

* 1. Are you engaged in the private practice of law in New Jersey? (Please answer "No" if you are a lawyer admitted *pro hac vice* in a New Jersey matter, an employee of a public entity or non-profit organization, or corporate or insurance house counsel.)

- ◯ Yes
- ◯ No

Lawyer's Professional Liability Insurance Survey

Attorneys and Their Firms

Note: The survey requires that you complete questions that are marked with asterisks.

* 2. How many years have you been admitted to practice?

- ◯ Less than 5 years
- ◯ 5 to 10 years
- ◯ More than 10 years

* 3. On average, do you dedicate more than 26 hours per week to the private practice of law in New Jersey?

- ◯ Yes
- ◯ No

* 4. How many lawyers are in your firm?

- ◯ 1
- ◯ 2
- ◯ 3 to 5
- ◯ 6 to 9
- ◯ 10 to 19
- ◯ 20 to 49
- ◯ 50 or more

* 5. What type of legal entity do you practice under for your New Jersey practice?

- ◯ Sole Proprietorship
- ◯ General Partnership
- ◯ Professional Corporation
- ◯ Other (please specify)
- ◯ Limited Liability Company
- ◯ Limited Liability Partnership

Lawyer's Professional Liability Insurance Survey

LPL Insurance

Note: The survey requires that you complete questions that are marked with asterisks.

* 6. Are you currently insured by a Lawyer's Professional Liability (LPL) insurance policy?

- ◯ Yes
- ◯ No

Lawyer's Professional Liability Insurance Survey

Reasons for No Coverage

Note: The survey requires that you complete questions that are marked with asterisks.

* 7. If you are not currently insured by a Lawyer's Professional Liability (LPL) insurance policy, do you routinely disclose to your clients that you do not have such insurance?

- ◯ Yes
- ◯ No

* 8. Why don't you have an LPL insurance policy?

- ☐ Too Expensive
- ☐ Coverage Declined
- ☐ Believe that it is Not Necessary
- ☐ Other (please specify)

Lawyer's Professional Liability Insurance Survey

LPL Coverage Details

Note: The survey requires that you complete questions that are marked with asterisks.

* 9. Please set forth the per claim and aggregate coverage limits of the LPL Insurance Policy by which you are insured:

	Less than $100,000	$100,000 to $299,999	$300,000 to $499,999	$500,000 to $999,999	$1,000,000 or more	Not Applicable	Do Not Know
Per Claim Limits	◯	◯	◯	◯	◯	◯	◯
Aggregate Limits	◯	◯	◯	◯	◯	◯	◯

* 10. What is the deductible/retention for the LPL Insurance Policy by which you are insured?

- ◯ $0 to $4,999
- ◯ $5,000 to $9,999
- ◯ $10,000 to $14,999
- ◯ $15,000 to $19,999
- ◯ $20,000 to $49,999
- ◯ $50,000 to $99,999
- ◯ $100,000 or more
- ◯ Not Applicable
- ◯ Do Not Know

Lawyer's Professional Liability Insurance Survey

Demographic Information

Note: The survey requires that you complete questions that are marked with asterisks.

11. How do you identify yourself? (Select all that apply)

- ☐ American Indian or Alaskan Native
- ☐ Black or African American
- ☐ Native Hawaiian or Other Pacific Islander
- ☐ Hispanic or Latino
- ☐ Asian
- ☐ Other
- ☐ White

12. What is your gender?

- ◯ Male
- ◯ Female

13. What is your age?

- ◯ 20 to 29
- ◯ 50 to 59
- ◯ 30 to 39
- ◯ 60 to 69
- ◯ 40 to 49
- ◯ 70 or over

14. What is your income obtained from the private practice of law?

- ◯ Under $49,999
- ◯ $200,000 to $249,000
- ◯ $50,000 to $99,999
- ◯ $250,000 to $499,999
- ◯ $100,000 to $149,999
- ◯ $500,000 or more
- ◯ $150,000 to $199,000

Lawyer's Professional Liability Insurance Survey

Thank you for participating in the survey. Please select "Done" to complete the survey.

APPENDIX X

REPORT TO COMMITTEE ON

QUESTIONNAIRE RELATING TO LPL INSURANCE

DISTRIBUTED AT

SOLO AND SMALL FIRM SECTION ANNUAL CONFERENCE

MARCH 12, 2015

BACKGROUND

The Committee has recently discussed the content and modes of distribution for a survey to capture relevant data on which New Jersey lawyers maintain LPL insurance, with particular focus on lawyers who practice in a legal form that is not required to maintain such insurance under Rule 1:21-1A, 1:21-1B or 1:21-1C. The occurrence of the Annual CLE Conference Solo and Small Firm Section of the New Jersey State Bar Association provided an opportunity to gather relevant data from a potentially critical population, although not of statistically significant size.

The Committee approved the creation and distribution at the Conference of a questionnaire, asking respondents to provide pedigree information (size of firm, form of firm entity), LPL coverage information, and to opine on the acceptability of various proposed methods of reporting LPL insurance information to a state judicial entity and a proposed rule requiring disclosure by the lawyer of LPL insurance coverage or lack thereof directly to the client. The questionnaire used is attached to this report.

The Conference was held at two locations: Mount Laurel, New Jersey on February 28, 2015 (which was attended by approximately 170 people) and Parsippany, New Jersey on March 7, 2015 (which was attended by approximately 300 people). Not all the attendees were lawyers.

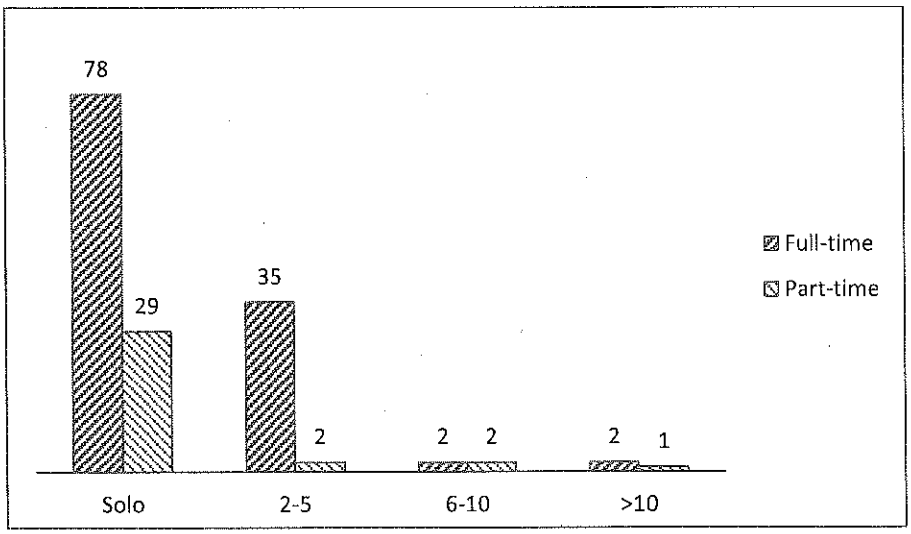
One hundred fifty-one (151) usable responses were received (55 from Mount Laurel and 96 from Parsippany) from lawyers in attendance. One response was received from a lawyer practicing exclusively as in-house counsel and has not been included in the following analysis. Several respondents failed to answer one or more of the questions in the questionnaire and some of the answers given may be incorrect, based on inconsistency with other answers in the same response (e.g., respondent indicated his/her firm had more than one attorney, but also answered that the firm practiced as a sole proprietorship).

Notwithstanding, the following analysis gives some insight – although not statistically significant – into the choices New Jersey solo and small firm lawyers have made regarding LPL insurance and their views on mandatory reporting or disclosure of LPL information.

RESPONDENTS BY FIRM SIZE

Table 1 shows the distribution of respondents, both full-time and part-time lawyers, by firm size.

Table 1 - Distribution by Firm Size-Full-time and Part-time



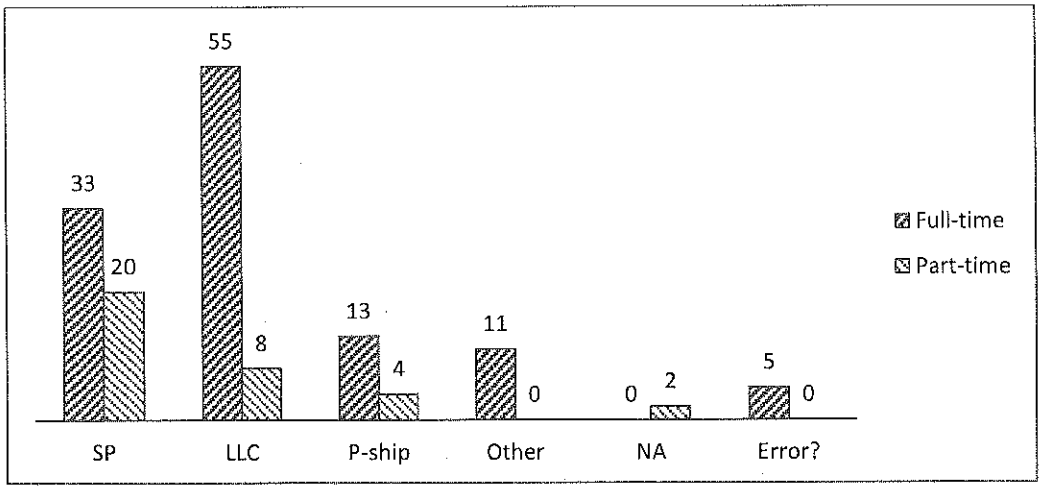
Of respondents who practice full-time, 66% are solos and fully 97% practice in firms of 5 lawyers or less. 85% of respondents who practice part-time are solos, and 91% practice in firms of 5 lawyers or less.

Note that some lawyers practicing as solos may be required to maintain LPL insurance because they practice as an LLC, PC or other entity covered by Rules 1:21-1A-C. Note further that the definition of "full-time" was based on working at a New Jersey law practice more than 30 hours per week. This was a somewhat arbitrary definition.

RESPONDENTS BY ENTITY TYPE

Table 2 shows the distribution of respondents by the type of entity in which they practice.

Table 2: Distribution by Entity Type-Full-time and Part-time



Fifty-three (53) lawyers stated they practiced as sole proprietorships; this represents a little over 35% of the total. As noted previously, however, a couple of the respondents who claimed to practice as sole proprietors also listed the number of lawyers in their firm at more than 1. It may be that this was a pure mistake, or a misinterpretation of how to answer the question (perhaps a general partnership with little formality).

Sixty-three (63) respondents practiced in a limited liability company.

Note further that the question regarding firm type did not distinguish between general partnerships, which are not subject to R. 1:21-1A-C, and limited liability partnerships, which are. That was an error of the questionnaire creator, failing to realize that the two entities were treated differently under the Rule.

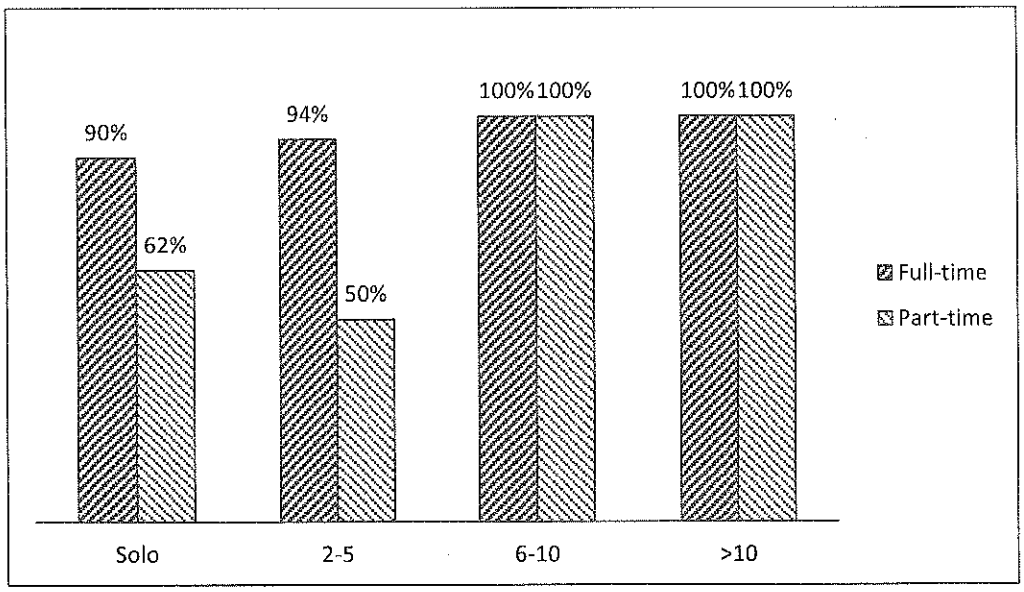
Most of the respondents who checked "Other" indicated they used a professional corporation or professional limited liability corporation for law practice.

Finally, note that two respondents practicing law part-time did not answer this question. Five responses from full-time lawyers indicated that the firm entity was a sole proprietorship but also indicated that the number of lawyers in the firm was greater than one.

RESPONDENTS AND LPL COVERAGE

Table 3 shows the percentage of full-time and part-time respondents, by firm size, who indicated that they are covered generally by LPL insurance.

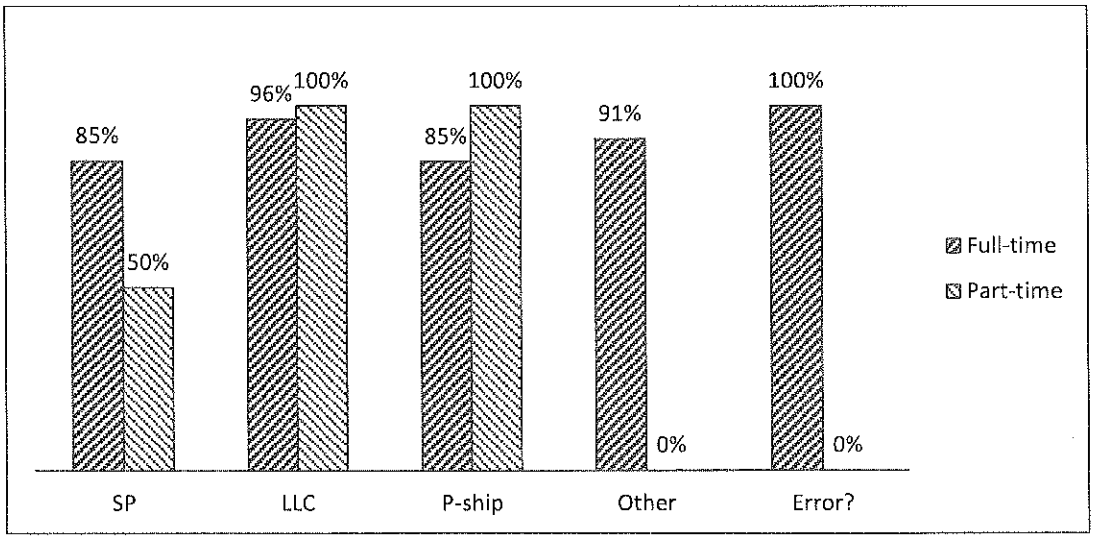
Table 3: Full-time and Part-Time Lawyers with LPL Insurance



Seventy (70) of 78 full-time solos are covered, while only 18 of 29 part-time solos are insured. Interestingly, not all lawyers in firms with 2 to 5 lawyers are covered; 33 of 35 full-time lawyers in this bracket have insurance, while 1 of 2 part-time lawyers do.

Table 4 shows the percentage of full-time and part-time respondents, by firm entity, covered by LPL insurance.

Table 4: Entities with LPL Insurance-Full-time and Part-time



Clearly, part-time sole proprietors have the lowest incidence of LPL coverage. It is worth noting, however, that apparently lawyers in LLCs and other entities likely governed by R. 1:21-1 are not universally covered by LPL insurance. This may reflect the fact that R. 1:21-1 does not have a strong enforcement process that would routinely identify and bring to the Court's attention entities in violation of the Rule.

RESPONDENTS WITH COMMENTS

Forty-one (41) comments were received from respondents. The comments were predominantly negative and ran generally to the following themes (with some commenters hitting more than one theme):

1. LPL insurance is too expensive, or will become so (17 comments).
2. Lawyers are regulated enough and don't need more (8 comments)
3. Reporting or disclosure of LPL insurance will encourage malpractice suits (7 comments).
4. Generally bad or ruinous for the profession (especially solos) (3 comments).
5. Clients already ask, or can ask, about LPL insurance (2 comments).

On the positive side, five (5) comments were favorable to either mandatory insurance or mandatory reporting or disclosure.

I have not collated the data regarding the questions 8 through 12 of the questionnaire, but will provide that information shortly.

LAWYER'S PROFESSIONAL LIABILITY INSURANCE QUESTIONNAIRE

****Complete only if you are in active private practice in New Jersey****

1. Do you dedicate more than 30 hours per week to practicing law in New Jersey? Yes ☐ No ☐
2. How many lawyers (full-time or part-time) in your firm? 1 ☐ 2-5 ☐ 6-10 ☐ >10 ☐
3. What kind of legal entity is your firm? Sole proprietorship ☐ LLC ☐ Partnership or LLP ☐ Other: _____.
4. Are you currently insured by a lawyer's professional liability (LPL) insurance policy? Yes ☐ No ☐
5. If you answered "No" to Question 4, please tell us below why you choose not to have LPL insurance.
6. If you answered "Yes" to Question 4, who maintains the LPL policy? Me ☐ My firm ☐
7. If you answered "Yes" to Question 4, are any of your activities as a lawyer <u>not</u> covered by LPL insurance (e.g., you are employed by a firm that maintains an LPL policy, but also do legal work on the side that is not insured)? Yes ☐ No ☐

WHICH OF THE FOLLOWING, IF ANY, WOULD BE ACCEPTABLE TO YOU?

8. A court rule requiring you or your firm to report annually to the Supreme Court of New Jersey whether all of your activities as a lawyer are covered by LPL insurance? Yes ☐ No ☐
9. A court rule requiring you or your firm to report annually to the Supreme Court details about the LPL policy (if any) insuring you, such as carrier, policy number and policy limits? Yes ☐ No ☐
10. An online listing on the New Jersey judiciary website disclosing which lawyers in private practice in New Jersey are covered by LPL insurance, and which are not? Yes ☐ No ☐
11. An online listing on the New Jersey judiciary website disclosing details about the policies of LPL insurance covering lawyers in private practice in New Jersey? Yes ☐ No ☐
12. A court rule requiring you, if you are not covered by an LPL insurance policy with at least the minimum limits of liability stated in the rule, to disclose this fact to each new client early in your representation of the client? Yes ☐ No ☐
13. COMMENTS:_____

_____

_____

_____

_____

Table 5: Lawyers Accepting Coverage Reporting (Question 8)

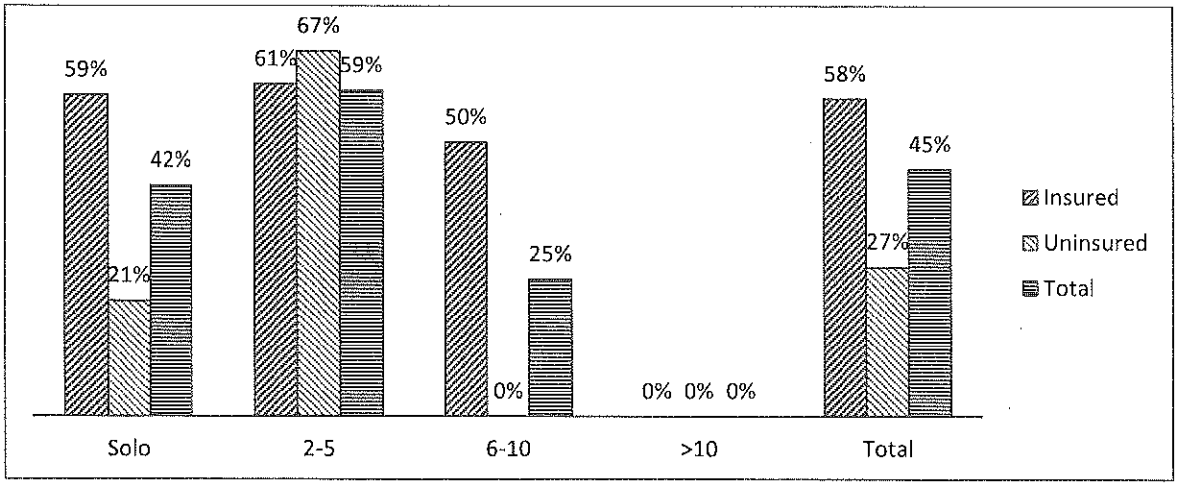


Table 6: Lawyers Accepting Detailed Reporting (Question 9)

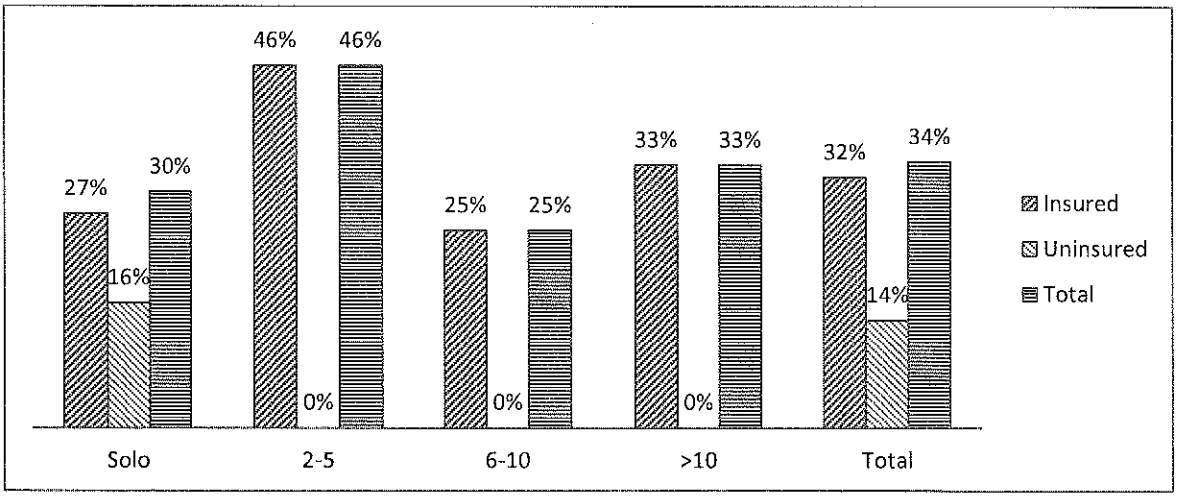


Table 7: Lawyers Accepting Online Listing-Coverage (Question 10)

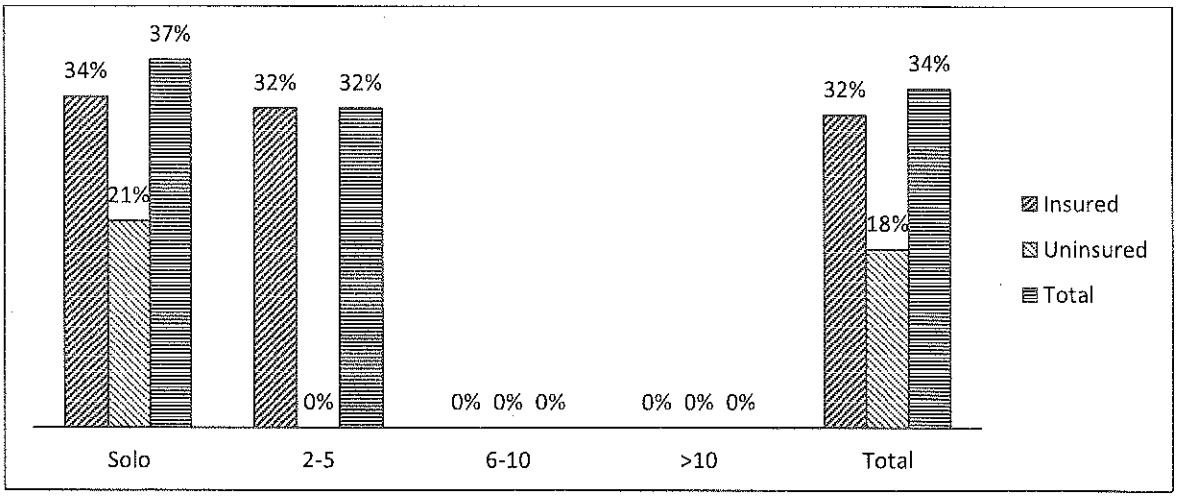


Table 8: Lawyers Accepting Online Listing-Details (Question 11)

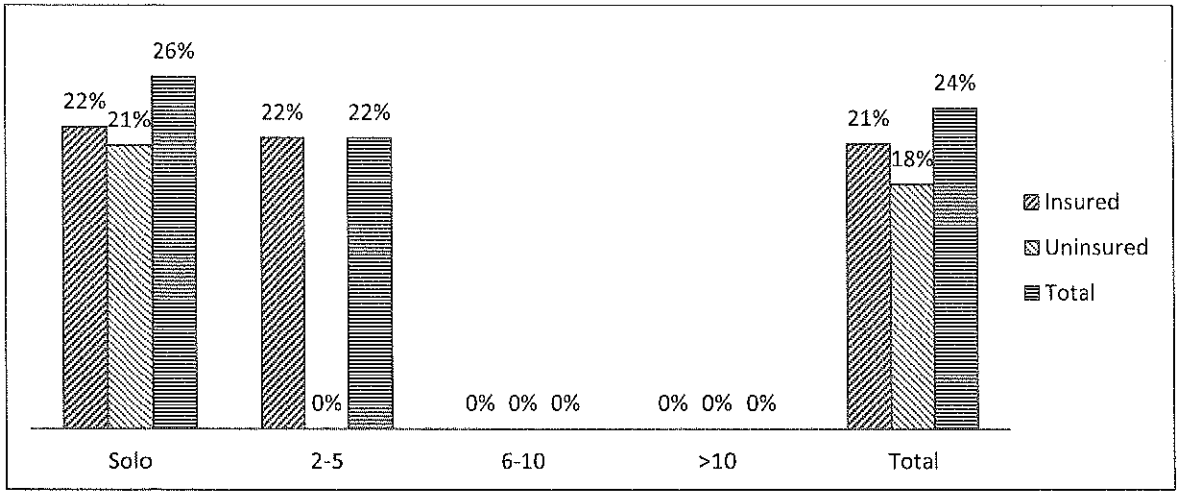
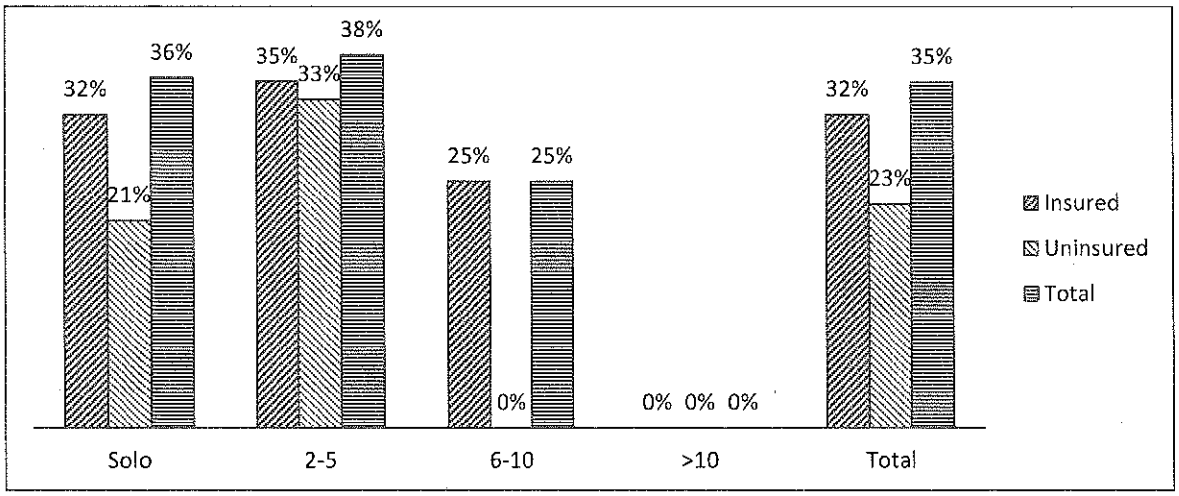


Table 9: Lawyers Accepting Client Disclosure of Coverage (Question 12)



APPENDIX Y

CD of Presentation by Ira Zarov,

Past CEO of Oregon's PLF

APPENDIX Z

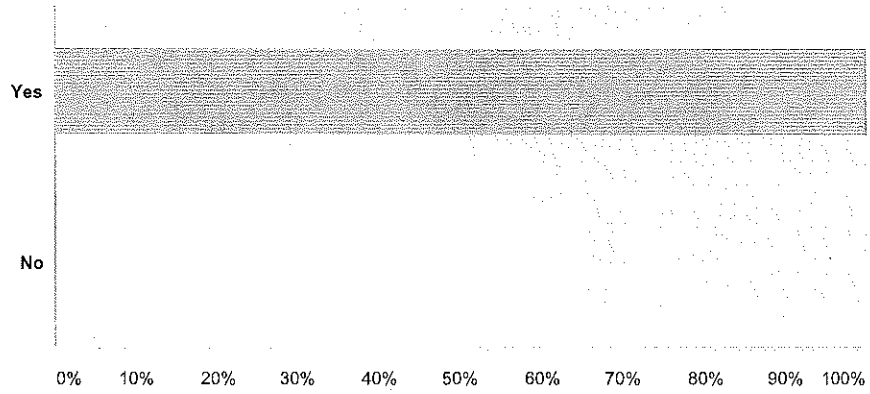
Survey Responses from

ALL Attorneys

Engaged in the Private Practice of Law

Q1 Are you engaged in the private practice of New Jersey law? (Please answer "No" if you are a lawyer admitted pro hac vice in a New Jersey matter, an employee of a public entity or non-profit organization, or corporate or insurance in-house counsel.)

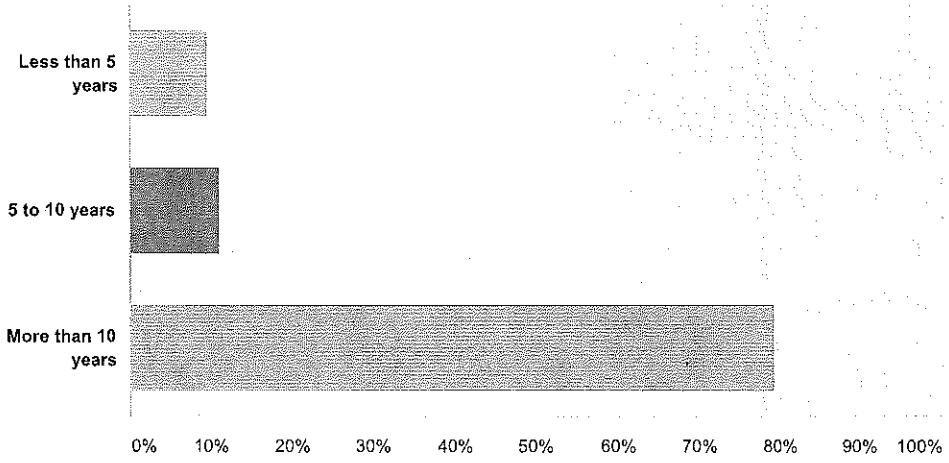
Answered: 2,629 Skipped: 0



Answer Choices	Responses	
Yes	100.00%	2,629
No	0.00%	0
Total		2,629

Q2 How many years have you been admitted to practice?

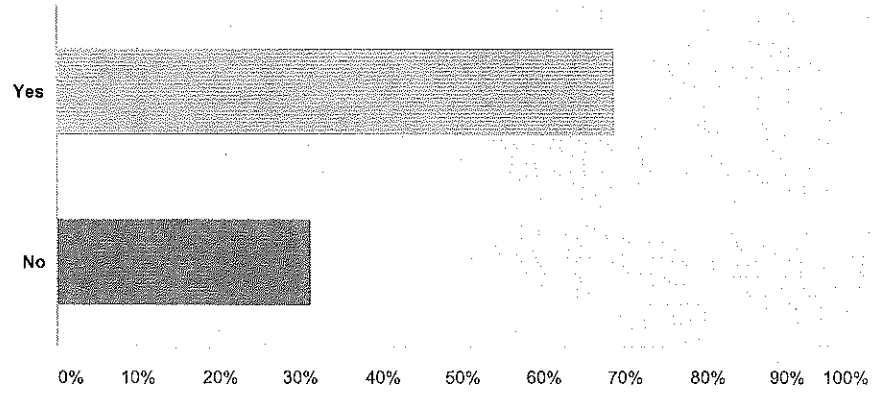
Answered: 2,594 Skipped: 35



Answer Choices	Responses	
Less than 5 years	**9.52%**	247
5 to 10 years	**11.10%**	288
More than 10 years	**79.38%**	2,059
Total		**2,594**

Q3 On average, do you dedicate more than 26 hours per week to the private practice of New Jersey law?

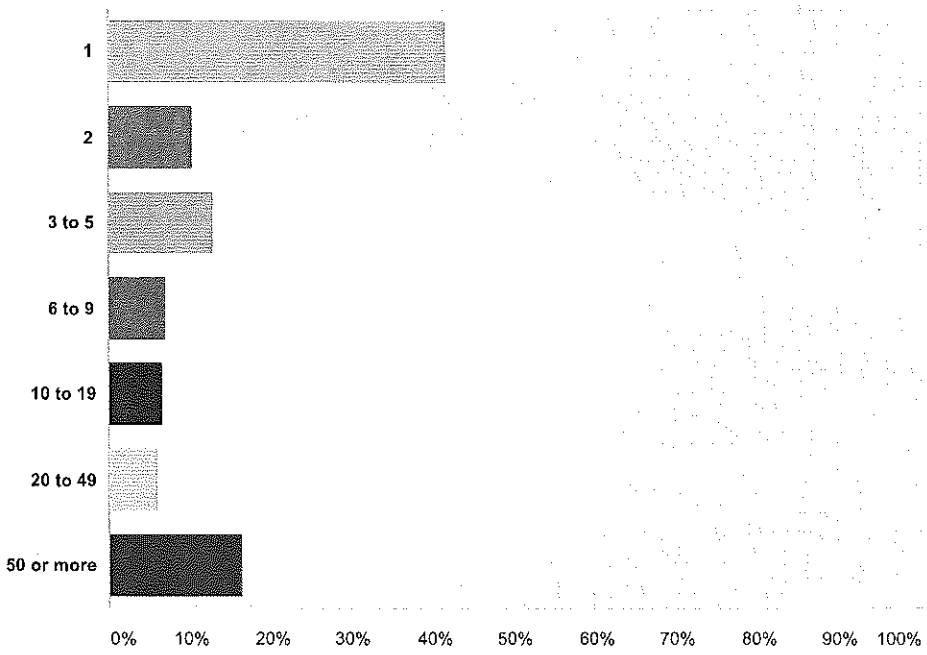
Answered: 2,594 Skipped: 35



Answer Choices	Responses	
Yes	68.58%	1,779
No	31.42%	815
Total		2,594

Q4 How many lawyers are in your firm?

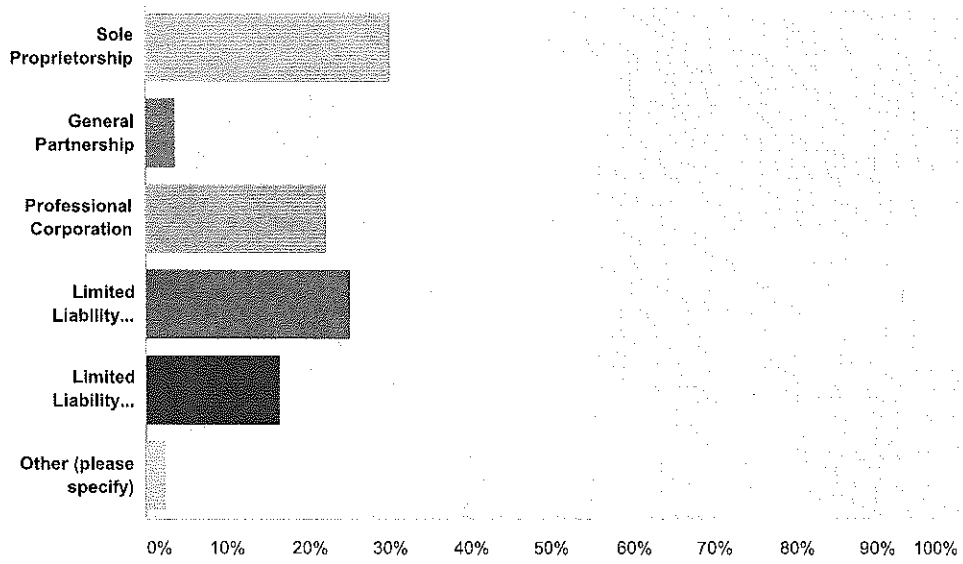
Answered: 2,594 Skipped: 35



Answer Choices	Responses	
1	41.48%	1,076
2	10.14%	263
3 to 5	12.84%	333
6 to 9	6.90%	179
10 to 19	6.44%	167
20 to 49	5.94%	154
50 or more	16.27%	422
Total		**2,594**

Q5 What type of legal entity do you practice under for your New Jersey practice?

Answered: 2,594 Skipped: 35



Answer Choices	Responses	
Sole Proprietorship	**30.11%**	781
General Partnership	**3.74%**	97
Professional Corporation	**22.17%**	575
Limited Liability Company	**25.06%**	650
Limited Liability Partnership	**16.46%**	427
Other (please specify)	**2.47%**	64
Total		**2,594**

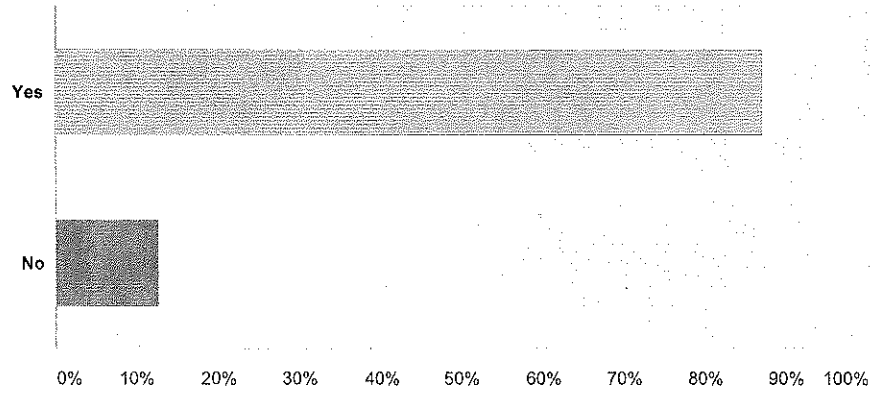
#	Other (please specify)	Date
1	P.A.	5/29/2016 11:26 AM
2	Nothing currently	5/25/2016 5:01 PM
3	Sole practitioner	5/25/2016 9:33 AM
4	Not certain.	5/24/2016 8:50 PM
5	PLLC	5/24/2016 5:06 PM
6	SOLO PRACTITIONER	5/24/2016 3:41 PM
7	Sole Prop.--independ. contractor for LLC--coverage by LLC	5/24/2016 11:56 AM
8	I am semi-retired and "of counsel" to two firms.	5/24/2016 11:47 AM
9	independent contractor to law firm	5/24/2016 11:14 AM
10	not sure of the type of entity	5/24/2016 11:05 AM
11	Contract attorney	5/24/2016 10:37 AM

12	Partnership of Professional Corporations	5/24/2016 10:22 AM
13	P.A.I	5/24/2016 10:06 AM
14	associate	5/24/2016 10:03 AM
15	Professional Association	5/24/2016 9:44 AM
16	ltd	5/24/2016 9:42 AM
17	PLLC	5/24/2016 9:24 AM
18	Of counsel to general partnership firm	5/20/2016 11:42 AM
19	document review attorney	5/15/2016 4:08 PM
20	I am "Of Counsel" to sole proprietor	5/12/2016 9:41 PM
21	Professional Association	5/12/2016 8:52 PM
22	PLLC	5/12/2016 8:50 PM
23	H	5/12/2016 6:04 PM
24	municipal attorney, municipal judge	5/12/2016 5:13 PM
25	Contract Attorney	5/12/2016 12:15 PM
26	Professional Association	5/12/2016 11:40 AM
27	P.A.	5/12/2016 10:47 AM
28	unknown	5/12/2016 10:37 AM
29	P.A.	5/12/2016 10:35 AM
30	Sole proprlorship & independent contractor	5/12/2016 10:25 AM
31	Professional Limited Liability Company (NY)	5/12/2016 10:05 AM
32	of counsel	5/12/2016 10:03 AM
33	professional association	5/9/2016 9:06 PM
34	PA	5/6/2016 2:18 PM
35	I am retired but because I still look over corporate documents I am required to maintain my status as an active practioner even though I no longer receive any fees.	5/6/2016 1:15 PM
36	teach law	5/6/2016 12:10 PM
37	Professional Association	5/6/2016 9:30 AM
38	Of Counsel	5/6/2016 7:38 AM
39	Contract Attorney	5/5/2016 6:05 PM
40	professional association	5/5/2016 4:26 PM
41	General Counsel at Private Corporation	5/5/2016 3:57 PM
42	Professional Association formed under Maryland law	5/5/2016 3:29 PM
43	NY Professional Limited Liability Company reg in NJ	5/5/2016 2:21 PM
44	Per diem	5/5/2016 1:46 PM
45	Retired- Doing only Pro Bono work	5/5/2016 1:18 PM
46	Part Time Sole Proprietorship	5/5/2016 1:13 PM
47	single member LLC	5/5/2016 1:03 PM
48	Per Diem practice for other law offices	5/5/2016 12:28 PM
49	My work is limited to pro bono work and I do so under auspices of non-profits that cover me for malpractice insurance when I handle cases referred to medo	5/5/2016 12:21 PM
50	professional association	5/5/2016 11:45 AM

51	PA	5/5/2016 11:28 AM
52	S corp	5/5/2016 11:17 AM
53	Contract Attorney	5/5/2016 10:56 AM
54	LLC, but returning to sole prop.	5/5/2016 10:49 AM
55	prior to Sole Propietorship, I was a P.C.	5/5/2016 10:46 AM
56	Retired, but retain my license	5/5/2016 10:37 AM
57	PLLC	5/5/2016 10:28 AM
58	Professional Limited Liability Corporation	5/5/2016 10:26 AM
59	Retired from active practice but for sitting as an arbitrator in two counties	5/5/2016 10:25 AM
60	I am of counsel to a sole proprietor	5/5/2016 10:21 AM
61	Single Member LLC, so technically sole proprietorship	5/5/2016 10:14 AM
62	PC	5/5/2016 9:39 AM
63	Professional Association	5/5/2016 9:35 AM
64	Professional Association	5/5/2016 9:19 AM

Q6 Are you currently insured by a Lawyers' Professional Liability (LPL) insurance policy?

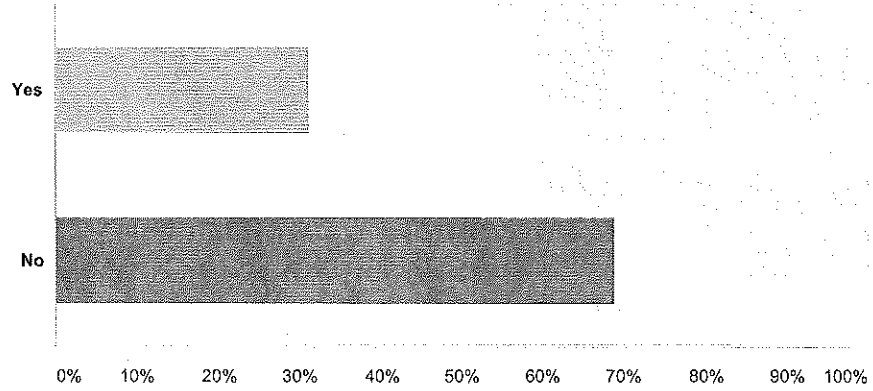
Answered: 2,559 Skipped: 70



Answer Choices	Responses	
Yes	87.26%	2,233
No	12.74%	326
Total		2,559

Q7 If you are not currently insured by a Lawyers' Professional Liability (LPL) insurance policy, do you routinely disclose to your clients that you do not have such insurance?

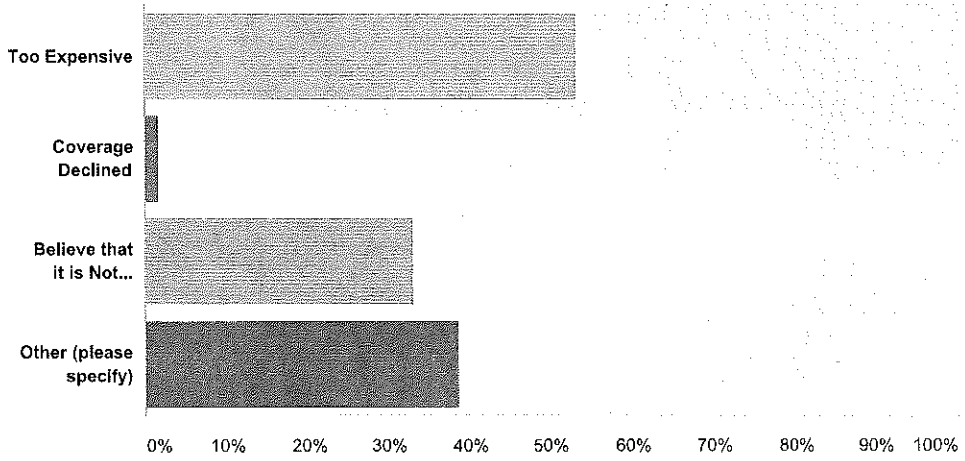
Answered: 318 Skipped: 2,311



Answer Choices	Responses	
Yes	31.13%	99
No	68.87%	219
Total		318

Q8 Why don't you have an LPL insurance policy?

Answered: 318 Skipped: 2,311



Answer Choices	Responses	
Too Expensive	53.14%	169
Coverage Declined	1.57%	5
Believe that it is Not Necessary	33.02%	105
Other (please specify)	38.68%	123
Total Respondents: 318		

#	Other (please specify)	Date
1	Not enough business to warrant the cost	5/29/2016 7:19 AM
2	I only do pool work for the office of the public defender. I am covered by them	5/27/2016 5:18 PM
3	I carry arbitrators and mediators malpractice insurance. My practice is limited to acting as an arbitrator or mediator in commercial matters. I do not represent clients in private practice and have not done so since 1996.	5/27/2016 1:56 PM
4	currently I only handle pro bono cases through Legal Services of NJ and other organizations for which I am covered by the organization's malpractice insurance	5/27/2016 11:55 AM
5	Haven't taken time to purchase.	5/26/2016 5:22 PM
6	I have never personally seen a case where either an attorney or a client was benefitted by a LPL policy being in force. The attorneys with volume oriented practices seem to view the indemnification provided by their LPL coverage as a backstop that makes them comfortable providing "quick-and-dirty" legal service. More responsible attorneys put extra, often non-billable, time into their legal work to avoid mistakes that might otherwise result in professional liability. If LPL coverage were made mandatory, then that approach would no longer be feasible due to increased overhead costs. The quality and quantity of needed legal services rendered to the public would be reduced, especially pro bono services. Potential personal professional liability provides a potent incentive to provide high quality services. Mandatory LPL coverage would make careful and responsible attorneys pay for the mistakes of those attorneys who view professional negligence as an expected cost of business that should be budgeted for. Mandatory LPL coverage would work against professionalism in practice, and in the net, would be contrary to the public interest. The attorneys who as a matter of public policy we want to have LPL coverage already have it, with very few exceptions. The practice of law should not be considered as equivalent to driving a car with respect to "financial responsibility." True professional responsibility is far broader, and cannot be converted to dollars.	5/25/2016 6:16 PM

7	Questions 7 & 8 are similar to "have you stopped beating your wife?" I have full insurance coverage. All 5 "boxes have absolutely relation to someone who has insurance and nor a box for "inapplicable"	5/24/2016 6:35 PM
8	I am a contractor for a firm in Philadelphia and am covered by the firm's policy.	5/24/2016 6:05 PM
9	not worth the extremely high premium charged.	5/24/2016 5:49 PM
10	I retain my license, but don't practice.	5/24/2016 3:19 PM
11	I am semi-retired and only do state and federal public defender criminal defense work.	5/24/2016 12:51 PM
12	Carriers went thru a phase where they seemed to be unstable and going out of business. Forced me to wind down my practice. Now refer out all litigation to Certified Trial Attorney and mostly work in-house transactionally.	5/24/2016 12:42 PM
13	have not been able to find nor afford a policy that is designed for the per diem attorney. I handle very few matters, but would still like to have insurance.	5/24/2016 12:19 PM
14	Very few active clients (I'm 72 years old nearing retirement), low risk area of practice. In practice for almost 46 years, zero ethics complaints.	5/24/2016 11:54 AM
15	I don't make mistakes and can defend myself and have no assets.	5/24/2016 11:39 AM
16	Until recently have always had LPL. Currently dealing with stage 4 cancer. Have limited my practice to some pro bono work. Assuming I survive I would reinstate my insurance.	5/24/2016 11:29 AM
17	I have no more than two or three matters a year that have almost no exposure to legal malpractice. I	5/24/2016 11:23 AM
18	Maintained insurance for 20 years before allowing it to lapse.	5/24/2016 11:22 AM
19	Firm maintains LPL. I only work for the firm. I do not handle the engagement of clients or even intake of matters.	5/24/2016 11:17 AM
20	Income does not warrant spending.	5/24/2016 10:54 AM
21	Only take one or two cases per year. Do not make enough money to pay for insurance.	5/24/2016 10:35 AM
22	Do not practice NJ Law regularly. Only once or twice a year.	5/24/2016 10:33 AM
23	retiring. After more than 45 years, carrier denied coverage even though no claim had ever been made. Much too expensive to continue coverage and helped decision to retire.	5/24/2016 10:29 AM
24	Not only cost, but have had problems getting quotes.	5/24/2016 10:24 AM
25	I am a per diem contractor & only do document review work & do not ordinarily see clients.	5/24/2016 10:14 AM
26	Not enough information about this	5/24/2016 9:59 AM
27	I have researched coverage issues with regard to these claims made policies. Coverage is often denied for an alleged failure to timely notify an insurer of a claim. Claim is defined too broadly in these policies, and proving that there is no prejudice for late reporting of a claim is not permitted legally.	5/24/2016 9:40 AM
28	The expense is a serious issue for sole practitioners. Not only are we purchasing our own health insurance which costs more than $30,000, but have to cover every burdensome expense which makes it difficult to compete with big firms who charge their clients more. We keep our costs down and pass that savings on to the client. We may charge $975 for a closing whereas the larger office is charging typically $2500 plus. Additionally, we give one on one attention instead of a secretary handling most matters. We are trying to pay bills and make a living to support a family with children attending college, graduate school, etc. So, to add an additional expense might just put small offices out of business. Something will have to give. It might mean substituting quality health care insurance plan for cheap, terrible coverage just so we can obtain professional liability coverage even though we have never been sued by a client. Will the state give attorneys who cannot afford liability coverage subsidies for same? There is much to consider, and I hope you do.	5/23/2016 6:04 PM
29	Semi-retired. Very limited practice.	5/18/2016 12:43 PM
30	I retired last year from my in house position as an environmental insurance coverage litigator with a large insurance company. I have not practiced since my retirement. I intend to keep my options open, however, and I would consider accepting contract work in my speciality so long as I was covered by my employer's LPL insurance or self insurance.	5/17/2016 3:33 PM
31	I am in the process of opening my practice.	5/16/2016 11:00 PM
32	i do not practice law, but nj does not have any "inactive" attorney status like other states which would allow me to retain my license without being required to sit a second time for the nj bar. now, this additional proposed burden?	5/16/2016 9:54 PM
33	As a pool attorney for the Office of the Public Defender, I am indemnified by the state of NJ.	5/16/2016 2:05 PM

34	My practice is confined solely to acting as an arbitrator, or occasionally as a mediator, in commercial matters. I have no clients; parties appear before me represented by counsel. Since ceasing representation of clients more than 6 years ago, I have always carried arbitrators and mediators malpractice insurance and continue to do so.	5/16/2016 9:45 AM
35	I do not have clients. I am hired by an agency to code electronic discovery	5/15/2016 4:08 PM
36	Work solely as contract attorney for out of state law firm, and are covered under their LPL insurance.	5/13/2016 7:50 PM
37	In 56 years of practice, I have had one incident where I could possibly have had a malpractice situation. I recognized the problem, and I paid for that potential liability out of my own pocket for less than one year's premium on a malpractice policy. The client never realized nor cared about insurance as they, a couple, got more that they could possibly have gotten on a limited policy from the defendant.	5/13/2016 10:57 AM
38	I do very little legal work. When I ran a large practice I carried insurance.	5/13/2016 9:28 AM
39	Do not represent outside clients any longer.	5/12/2016 9:34 PM
40	I'm retired but maintain my license so I can refer clients to certified attorneys	5/12/2016 6:27 PM
41	TOO MANY EXCLUSIONS OF COVERAGE	5/12/2016 6:17 PM
42	One it is too expensive and too I only practiced criminal defense law	5/12/2016 6:06 PM
43	Cafefully select limited group of clients; self insured due to limited practice and municipal attorney work for which I am covered by municipal insurance policy.	5/12/2016 5:17 PM
44	Work for other attorneys who remain of counsel.and are insured.	5/12/2016 5:00 PM
45	I work as a full time pip arbitrator. I do not have clients.	5/12/2016 4:05 PM
46	While I maintain a practice, I in fact have no clients in NJ. IF I advise clients for my NY employer, I am covered by a seperate malpractice policy.	5/12/2016 3:42 PM
47	Only have family clients	5/12/2016 3:30 PM
48	i do very little legal work, mostly at the request of old clients or as a favor to friends or family	5/12/2016 3:05 PM
49	My practive involves mainly business contract review and drafting.	5/12/2016 2:14 PM
50	I am retired and have availed myself of my Carrier's "tail policy"; I act in an advisory capacity and refer clients.	5/12/2016 12:58 PM
51	Only do pool work for the Office of the Public Defender	5/12/2016 12:55 PM
52	I just started solo practice after being with a firm for over 40 years. In process of obtaining insurance,	5/12/2016 12:31 PM
53	Covered under policies of various temporary attorney agencies.	5/12/2016 12:16 PM
54	Very limited practice without any compensation.	5/12/2016 11:52 AM
55	I am currently and have been on disability. Although I am considered to be "in private practice" so I may maintain my license to practice law, I have no clients and have not been actively practicing. As such, I do not believe that malpractice insurance is necessary. Moreover, it would be too expensive for me. Paying for mandatory continuing legal education is costly enough for someone on disability.	5/12/2016 11:49 AM
56	I basically restrict myself to matters that are low risk: simple wills, uncontested divorces, and similar. Requiring me to obtain malpractice insurance would effectively force me out of the profession.	5/12/2016 11:24 AM
57	Owner of firm doesn't have it	5/12/2016 11:19 AM
58	I am 86 years of age and devote only a few hours a week to the practice of law. Of these few hours, more than half are devoted to mediation. For these reasons, it is not practical for me to maintain malpractice insurance.	5/12/2016 10:58 AM
59	I am retired and only take 1 to 3 cases a year. I refer out all other cases.	5/12/2016 10:54 AM
60	Recently began practicing in New Jersey and am in the process of obtaining insurance	5/12/2016 10:44 AM
61	I do not have any outside 3rd party clients.	5/12/2016 10:42 AM
62	Not enough volume of work to justify expense.	5/12/2016 10:41 AM
63	I only do legal work for family.	5/9/2016 9:33 AM
64	While I am technically engaged in the private practice of law, my firm employs me solely for in-house work and I do not perform any client-related services. My firm has LPL, but I do not require it for the type of work I perform.	5/9/2016 8:34 AM
65	Part time practice and clients are limited to family members and close friends.	5/8/2016 1:58 PM

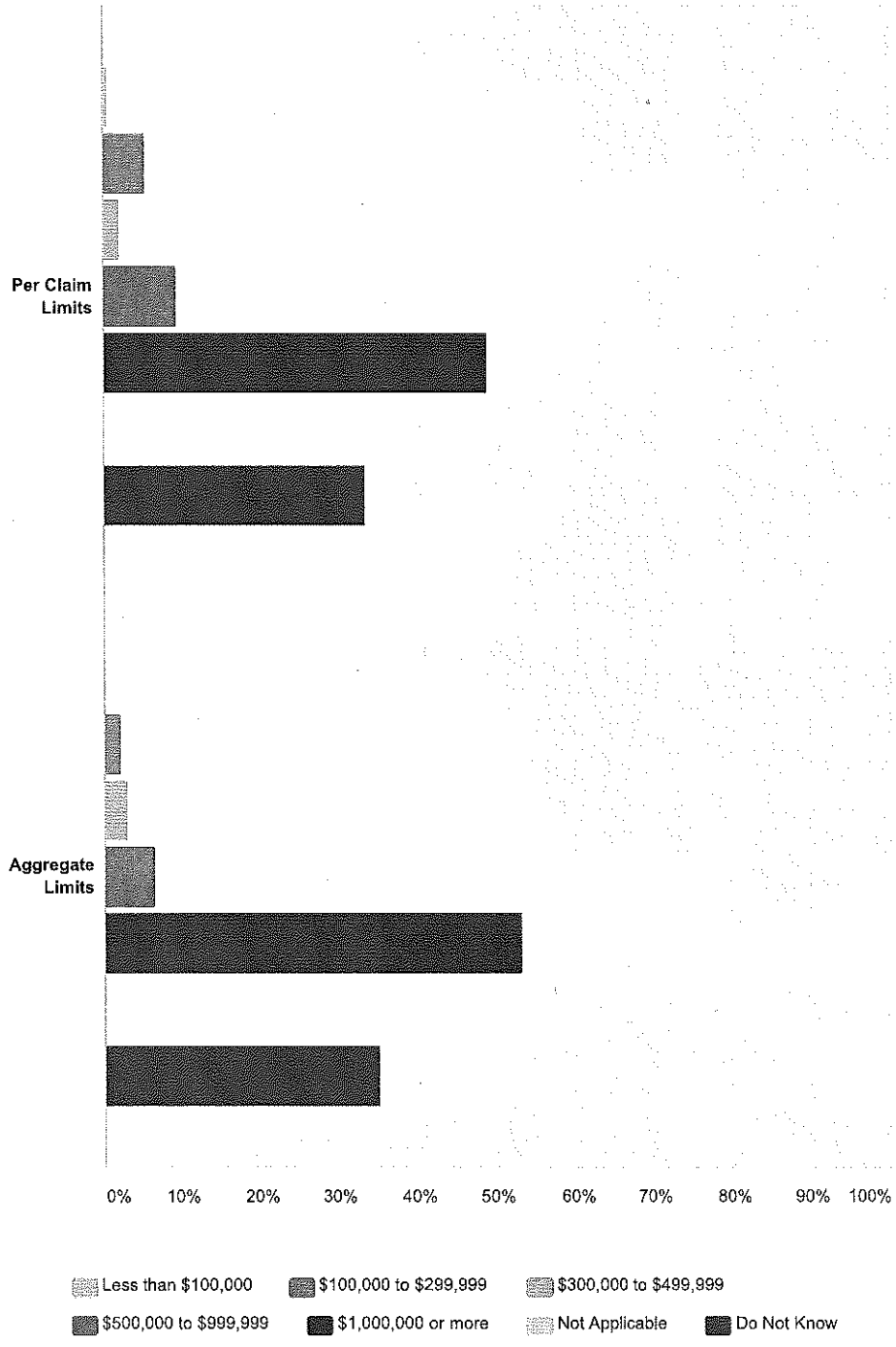
66	I am practicing on a very limited basis as I am retired. I only provide services to very good former clients, friends and family. To require that I obtain insurance would be an unreasonable burden in my situation, since most, if not all, my services are pro bono.	5/7/2016 3:48 PM
67	I would cease practicing law if insurance was required. My income is less than $5,000 from all NJ clients. It would make it not even worth it; in fact, even the requirement to have an attorney trust account is onerous, because I literally never have and never will be entrusted with any client money whatsoever. Lawyers are not licensed drivers. We are already tested and regulated to a much greater degree than any driver or even other professions where insurance is not required. In addition, we should be considered sophisticated enough to assess and appreciate the risk of lacking insurance and exposing our personal assets, and be trusted accordingly.	5/7/2016 12:50 PM
68	I am semi-retired and my only practice is serving as a court-appointed automobile and personal injury arbitrator and mediator.	5/6/2016 8:41 PM
69	An attorney who has retired but still looks over documents for others, must remain "active." I no longer collect fees. I confine my "practice" to helping nonprofit corporations in my community resolve organizational events, complete combinations, and adhere to proper corporate governance. I make no filings leaving the entities to do that on their own. I do not maintain any balances in my trust account other than the amount needed to open the account. I have been told that attorneys who do not collect fees in certain practices, cannot maintain malpractice insurance because the underwriters will not approve a non "business" practice because it look t them more like a hobby.	5/6/2016 1:24 PM
70	I have a home office practice.	5/6/2016 12:22 PM
71	I had LPL, when I was in "full time NJ" practice. Besides being very expensive; any profit made from my "part time practice" that profit would be gone and I would out of pocket pay in to be covered. For the limited amount of law related work I do, my agent suggested I either retire or become self insured. My practice involves pro bono and complex legal issues involving corruption by business and/or government. My clients are aware that I am not covered by malpractice insurance and so is it stated in the retainer agreement.	5/6/2016 12:06 PM
72	I only represent public defender clients pooled to me, and the OPD indemnifies me.	5/6/2016 10:39 AM
73	limited practice and volume of work	5/6/2016 9:31 AM
74	Mostly retired. Only assist one non-profit client.	5/5/2016 7:07 PM
75	Most of my work is contract work obtained through agencies. You consider this to be the practice of law. I say malpractice insurance is unnecessary for me.	5/5/2016 6:07 PM
76	I am covered by out of state carrier	5/5/2016 5:36 PM
77	Virtually all my work is as a pool attorney for the Public Defender, for which I am insured through that office.	5/5/2016 4:08 PM
78	Because I take low risk cases, and that I do thorough research before I take a case with some moderate possibility of exposure to malpractice claim. I do not take many cases a year.	5/5/2016 3:44 PM
79	I am a per diem attorney and insurance is provided for me.	5/5/2016 2:51 PM
80	I am only working part-time at present. I disclose to clients that I do not have insurance, and I generally only do work that does not create an opportunity for me to commit malpractice. I would strongly object to a requirement that I maintain LPL, when it would be superfluous to my modest practice.	5/5/2016 2:48 PM
81	I do a very small volume and stay to areas of law with which I am competent.	5/5/2016 2:39 PM
82	I do not represent clients and only work as a Dispute Resolution Professional as an independent contractor of Forthright handling NJ PIP Arbitrations exclusively.	5/5/2016 1:51 PM
83	I am a retired career Public Defender and I only take assigned public defender conflict cases. Those cases are covered by the State Public Defender	5/5/2016 1:49 PM
84	After over 40 years working as a legal services attorney, I retired from legal services and I maintain my law license to do pro bono work. I do not have private clients and when I do pro bono work I am covered by the malpractice policy of the legal services office. It would be a financial hardship for me to maintain my legal license. There may be some point in time when I would take private clients; however, since leaving legal services I have consciously chosen not to take private clients. I submit that if a mandatory requirement is developed, it should exempt licensed attorneys whose practice is limited to doing pro bono work with legal services and/or public interest law firms that cover their pro bono attorneys with malpractice insurance. There is a strong public policy in permitting such an exemption: The ability of very experienced attorneys to represent the poor where the legal services or other public interest law firm provides for malpractice insurance. At the present time I have to pay the yearly client security fund amount to maintain my license. The extra financial burden of a mandatory malpractice insurance premium would tip the scales for me to give up my license.	5/5/2016 1:41 PM
85	criminal defense	5/5/2016 1:30 PM

86	I had insurance many years ago and had a claim. The firm handling the case did not follow my instructions to file for summary judgment. At the end, the case against me was dismissed and they billed me for my deductible. I refused to pay and they relented but I cancelled my policy. Practicing almost 40 years and no other claims.	5/5/2016 1:29 PM
87	I am a retired corporate counsel and do not have a private practice. My legal work is limited to Pro Bono work where I am covered under group policies of the group for which I am performing the Pro Bono work.	5/5/2016 1:20 PM
88	My practice is too limited.	5/5/2016 1:13 PM
89	I no longer do outside work for any clients; thus I do not carry professional insurance due to its expense.	5/5/2016 1:03 PM
90	Practice limited to criminal defense	5/5/2016 12:53 PM
91	I maintain a law office solely to have an active license to practice but I do not practice at all.	5/5/2016 12:42 PM
92	My practice is part time and largely limited to appellate work or work as "of counsel".	5/5/2016 12:35 PM
93	Limited practice	5/5/2016 12:35 PM
94	Coverage declined because of per diem work	5/5/2016 12:29 PM
95	This survey does not anticipate my situation. I answered Yes to question 7 because I do not carry my own policy. My work is limited to pro bono work that I do under auspices of non-profit organizations. When I handle a case referred to me by such organizations, I am covered under their policies. So while I do not have my own personal policy, I am covered for the work I do by the organization's policy.	5/5/2016 12:24 PM
96	I only do pool work for public defenders office and they indicated that they cover me for this.	5/5/2016 12:24 PM
97	It is very expensive and my practice is limited.	5/5/2016 11:43 AM
98	I only take clients I know well on a personal basis, and are not likely to sue me.	5/5/2016 11:43 AM
99	I restrict the matters the legal work that I perform and handle everything personally. I earn limited income from my less than part time practice that I operate out of my home. Matters are very routine, such as simple wills and residential real estate closings. For real estate purchases I utilize a title company as settlement agent. I do not have a steady source of income or clients and most clients are friends, family members or neighbors.	5/5/2016 11:42 AM
100	I have no clients of my own...I only do per diem work for other attorneys and their clients	5/5/2016 11:41 AM
101	pool attorney	5/5/2016 11:35 AM
102	working part time in retirement doing few items per year	5/5/2016 11:31 AM
103	Do pool attorney work can't afford rates	5/5/2016 11:24 AM
104	I have a chronic illness that has severely limited the amount of time I can devote to client development. My 22 hospitalizations over the past five and a half years has caused me to lose two thirds of my practice with the resultant diminution in income. Mostly, my practice is limited to clients that I have had for 10 to 25 years (and their referrals) and they are familiar with my work ethic and competence.	5/5/2016 11:22 AM
105	My practice is primarily tax return prep and I have professional liability coverage for that. I do no litigation matrimonial or general practice.	5/5/2016 11:17 AM
106	I spend less than 5% of my working hours on law and only accept specific types of cases.	5/5/2016 11:09 AM
107	Do not really practice law in NJ. Maintain license but not accepting clients.	5/5/2016 11:08 AM
108	When I was in practice full time I carried insurance. The insurance companies became increasingly difficult requesting lots of information tax returns etc. and really wanted to dictate areas of practice. I'm a big believer in insurance but it is to the point where the insurance companies run the legal world based on whether or not they believe the area you practice in is claim prone.	5/5/2016 11:07 AM
109	Main practice , now 90% is criminal law and I have never had a claim in 37 years of practice in that area or any area. I previously had a personal injury practice that I stopped taking cases about 12 years ago-never a claim and a family law practice that I stopped taking cases about five years ago -never a claim.	5/5/2016 10:56 AM
110	not sure if we are insured by LPL	5/5/2016 10:54 AM
111	The cost of Malpractice insurance has become too expensive which then makes my pricing for clients outside the ability of the average person to pay for private counsel. The State must reduce the Statute of Limitations to two years so that small lawyers like me can sue to obtain unpaid fees. Two of the 3 times that I have been sued for malpractice (I had malpractice insurance) were counterclaims for fee complaints filed by me. The third time was dismissed by the Court.	5/5/2016 10:49 AM
112	My former malpractice insurance company provide me with a "Tail".	5/5/2016 10:39 AM

113	I do not actively practice but maintain my license. Since I do not practice, it makes no economic sense for me to maintain such costly insurance. Therefore, my answer to Question 7 is a bit misleading but there was no other choice.	5/5/2016 10:25 AM
114	Again, sit as an arbitrator in the mandator arbitration program only	5/5/2016 10:25 AM
115	I have tried to get it on several occasions over the years. My main area is entertainment transactions; no insurance company has wanted to insure me based on my practice area. I did have coverage for a few years but then that company stopped providing coverage - there were no claims against me, but they chose to no longer provide.	5/5/2016 10:23 AM
116	Not sure.	5/5/2016 10:16 AM
117	Practice limited to criminal defense.	5/5/2016 10:06 AM
118	Attorney Coverage is a total fraud; "when u shd know there is a claim" rather than claim triggering (like Dr) allows ins to disclaim routinely....total fraud	5/5/2016 9:57 AM
119	I handle commercial litigation maters where malpractice is not really an issue. The cost of malpractice insurance versus the potential exposure is not justified. I have been practicing for over 38 years and never had malpractice insurance. Making it mandatory would be extremely burdensome and likely result in me not practicing in New Jersey.	5/5/2016 9:45 AM
120	I do per diem work and am covered under my attorney clients' policies	5/5/2016 9:41 AM
121	Practice less that 10 hours per year and the cost outweighs the benefit.	5/5/2016 9:40 AM
122	Public interest lawyer. I do not charge the great majority of my clients, and my litigation does not involve damages or other monetary recovery.	5/5/2016 9:39 AM
123	My policy wouldn't cover when I was sick and working less than 26 hours a week, and I haven't had the funds to reinstate since increasing my practice hours.	5/5/2016 9:26 AM

Q9 Please set forth the per claim and aggregate coverage limits of the LPL insurance policy by which you are insured:

Answered: 2,120 Skipped: 509

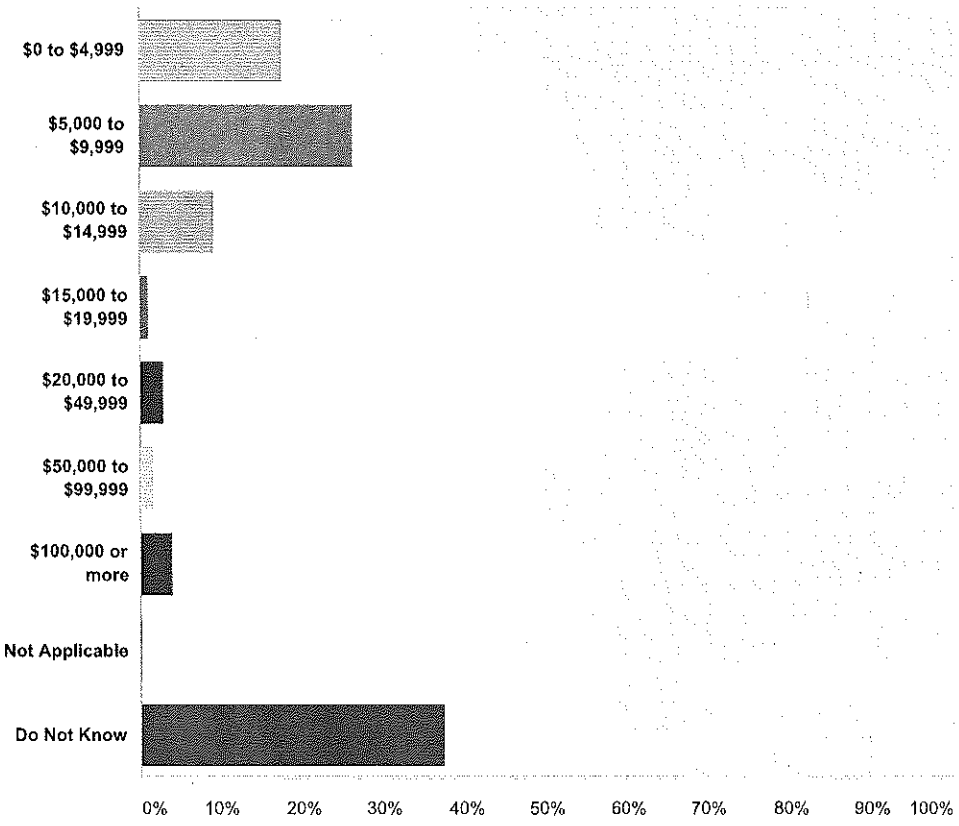


	Less than $100,000	$100,000 to $299,999	$300,000 to $499,999	$500,000 to $999,999	$1,000,000 or more	Not Applicable	Do Not Know	Total

Per Claim	**0.66%**	**5.42%**	**2.12%**	**9.39%**	**48.82%**	**0.14%**	**33.44%**	
Limits	14	115	45	199	1,035	3	709	2,120
Aggregate	**0.28%**	**2.12%**	**2.88%**	**6.56%**	**52.92%**	**0.24%**	**35.00%**	
Limits	6	45	61	139	1,122	5	742	2,120

Q10 What is the deductible/retention for the LPL insurance policy by which you are insured?

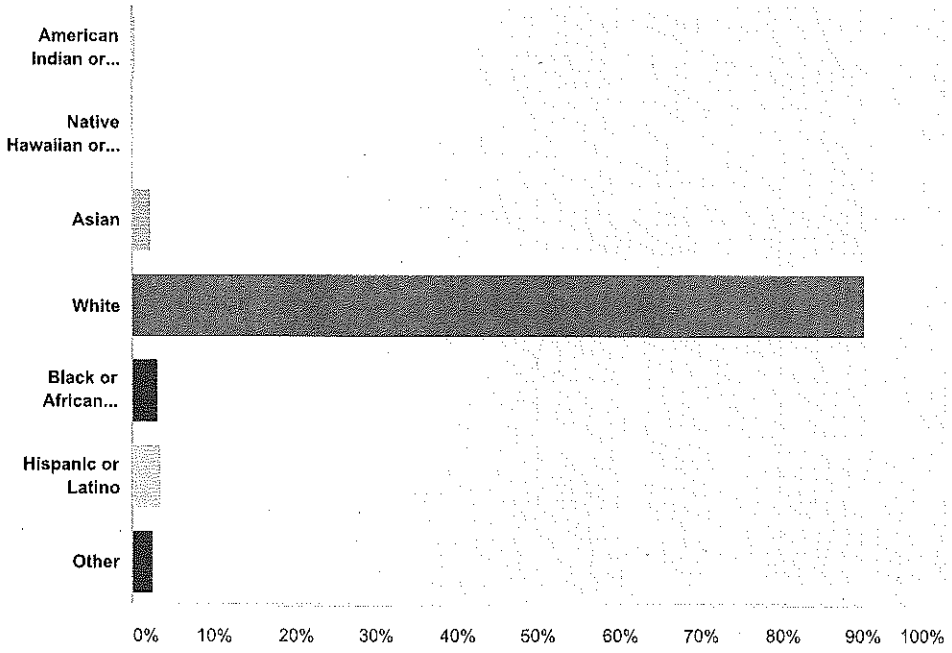
Answered: 2,120 Skipped: 509



Answer Choices	Responses	
$0 to $4,999	17.45%	370
$5,000 to $9,999	26.27%	557
$10,000 to $14,999	9.15%	194
$15,000 to $19,999	1.08%	23
$20,000 to $49,999	2.92%	62
$50,000 to $99,999	1.65%	35
$100,000 or more	3.96%	84
Not Applicable	0.19%	4
Do Not Know	37.31%	791
Total		**2,120**

Q11 How do you identify yourself? (Select all that apply)

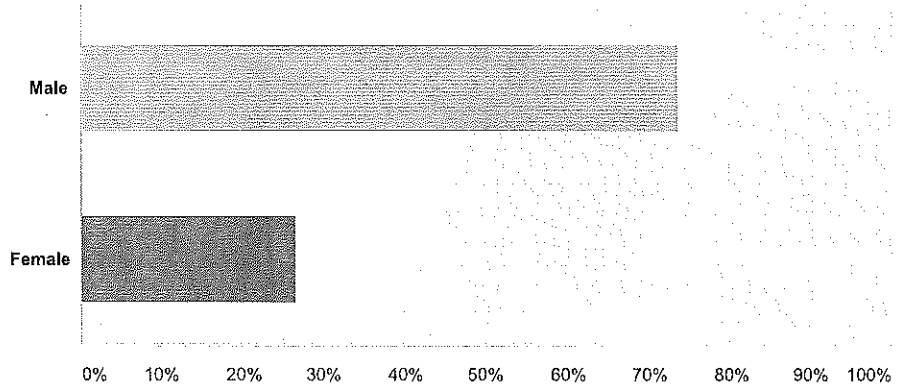
Answered: 2,267 Skipped: 362



Answer Choices	Responses	
American Indian or Alaskan Native	0.44%	10
Native Hawaiian or Other Pacific Islander	0.09%	2
Asian	2.29%	52
White	90.12%	2,043
Black or African American	3.13%	71
Hispanic or Latino	3.53%	80
Other	2.60%	59
Total Respondents: 2,267		

Q12 What is your gender?

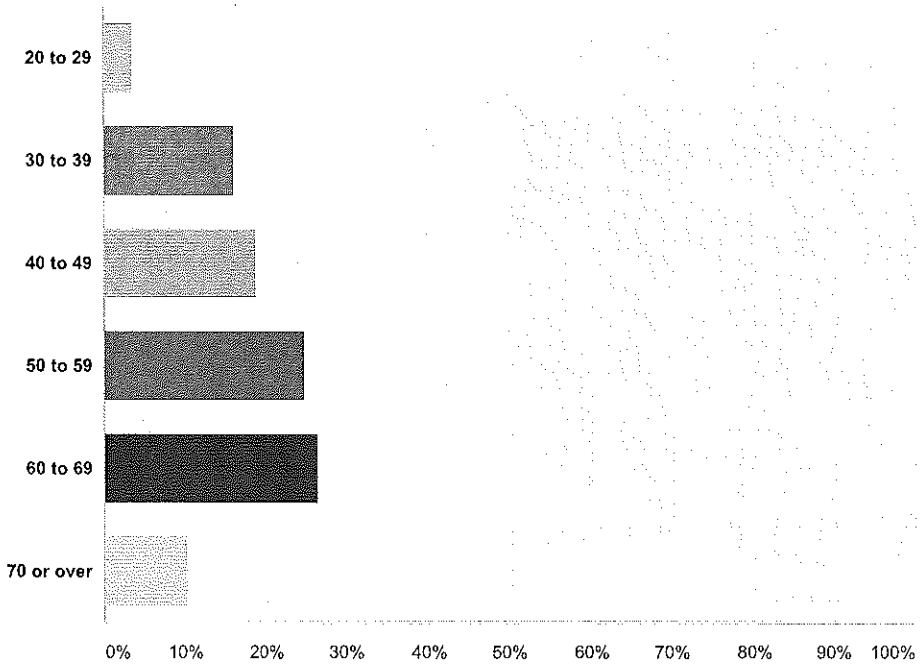
Answered: 2,295 Skipped: 334



Answer Choices	Responses	
Male	**73.51%**	1,687
Female	**26.49%**	608
Total		**2,295**

Q13 What is your age?

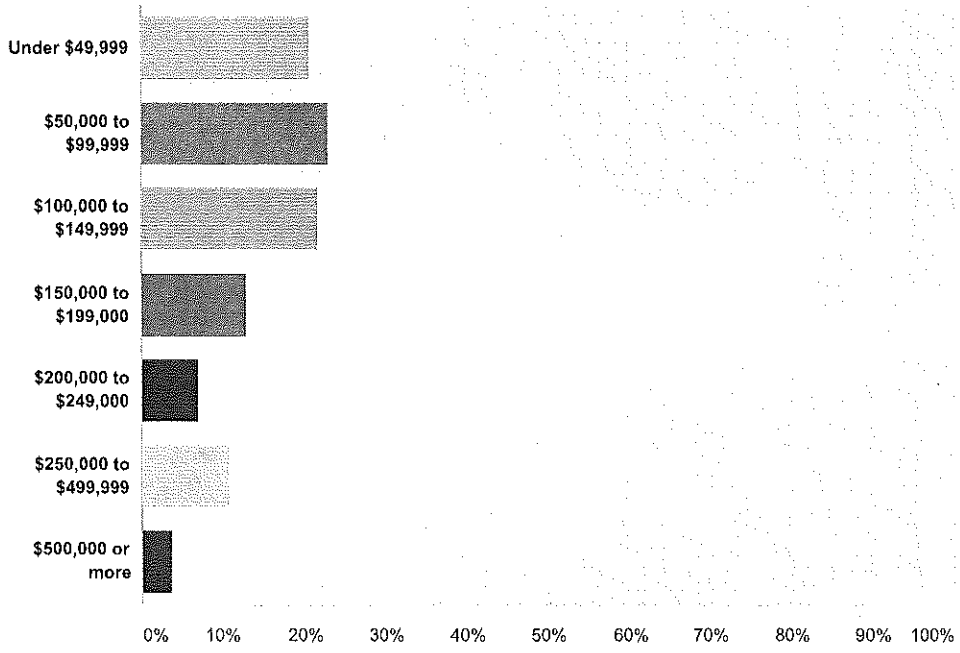
Answered: 2,307 Skipped: 322



Answer Choices	Responses	
20 to 29	**3.55%**	82
30 to 39	**16.04%**	370
40 to 49	**18.77%**	433
50 to 59	**24.88%**	574
60 to 69	**26.53%**	612
70 or over	**10.23%**	236
Total		**2,307**

Q14 What is your income obtained from the private practice of law?

Answered: 2,118 Skipped: 511

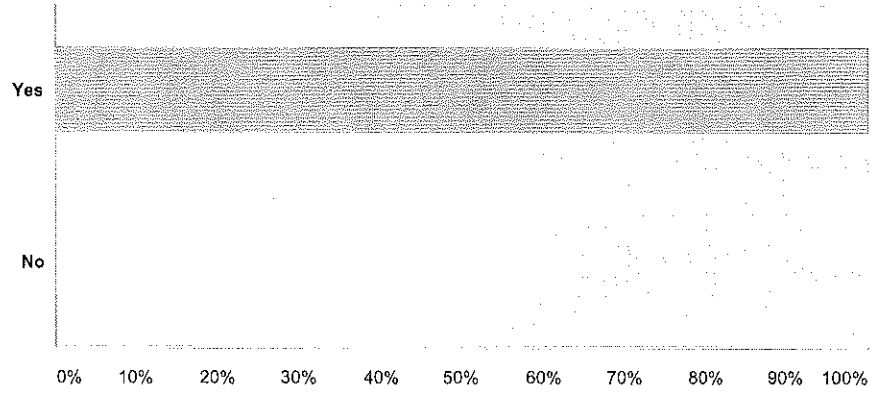


Answer Choices	Responses	
Under $49,999	20.63%	437
$50,000 to $99,999	22.95%	486
$100,000 to $149,999	21.62%	458
$150,000 to $199,000	13.03%	276
$200,000 to $249,000	7.13%	151
$250,000 to $499,999	10.81%	229
$500,000 or more	3.82%	81
Total		**2,118**

Survey Responses from
Attorneys Engaged in the Private Practice of Law
Who ARE Currently Insured

Q1 Are you engaged in the private practice of New Jersey law? (Please answer "No" if you are a lawyer admitted pro hac vice in a New Jersey matter, an employee of a public entity or non-profit organization, or corporate or insurance in-house counsel.)

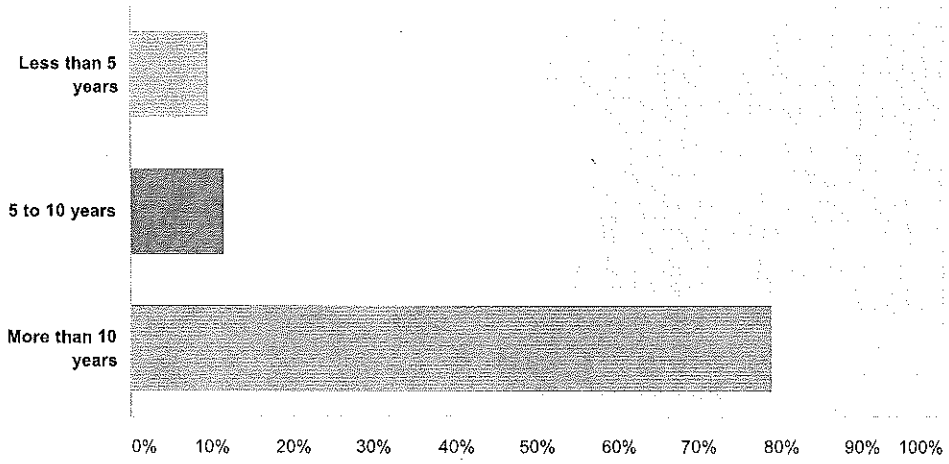
Answered: 2,233 Skipped: 0



Answer Choices	Responses	
Yes	100.00%	2,233
No	0.00%	0
Total		2,233

Q2 How many years have you been admitted to practice?

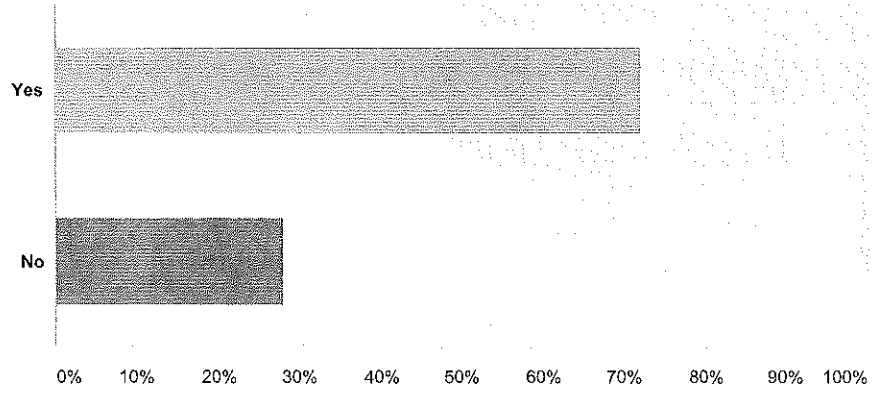
Answered: 2,233 Skipped: 0



Answer Choices	Responses	
Less than 5 years	9.58%	214
5 to 10 years	11.55%	258
More than 10 years	78.86%	1,761
Total		2,233

Q3 On average, do you dedicate more than 26 hours per week to the private practice of New Jersey law?

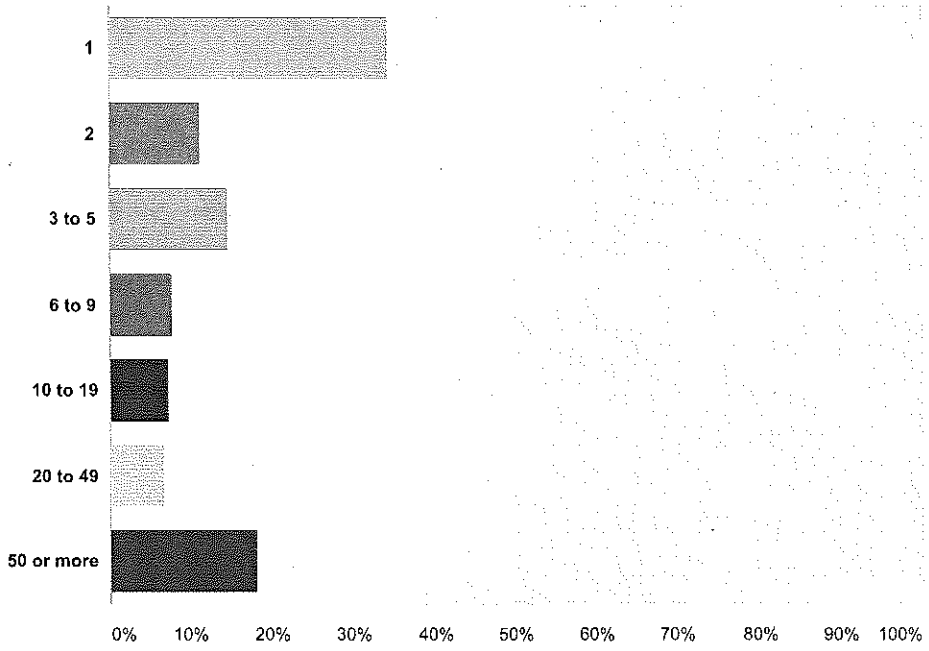
Answered: 2,233 Skipped: 0



Answer Choices	Responses	
Yes	72.10%	1,610
No	27.90%	623
Total		2,233

Q4 How many lawyers are in your firm?

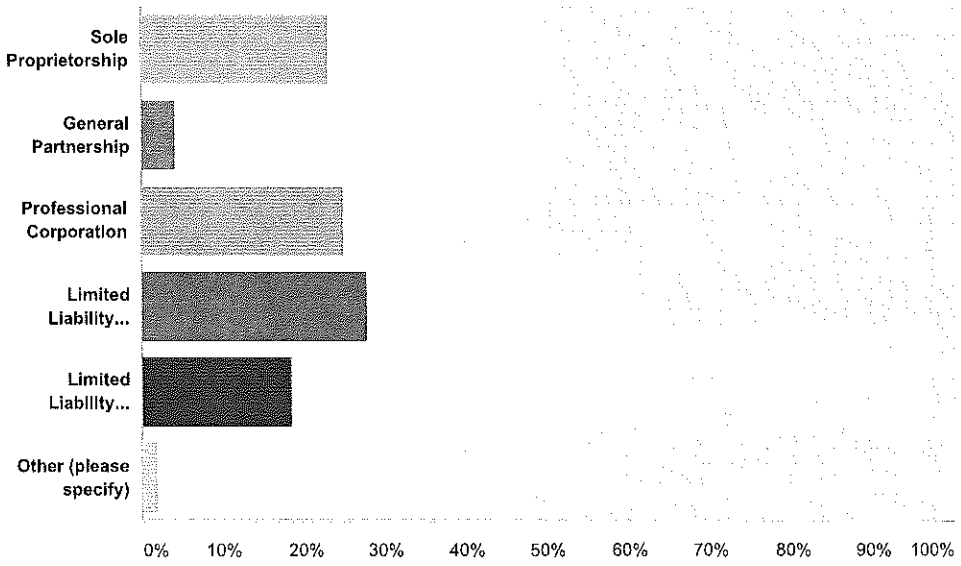
Answered: 2,233 Skipped: 0



Answer Choices	Responses	
1	34.30%	766
2	11.20%	250
3 to 5	14.60%	326
6 to 9	7.66%	171
10 to 19	7.39%	165
20 to 49	6.63%	148
50 or more	18.23%	407
Total		**2,233**

Q5 What type of legal entity do you practice under for your New Jersey practice?

Answered: 2,233 Skipped: 0



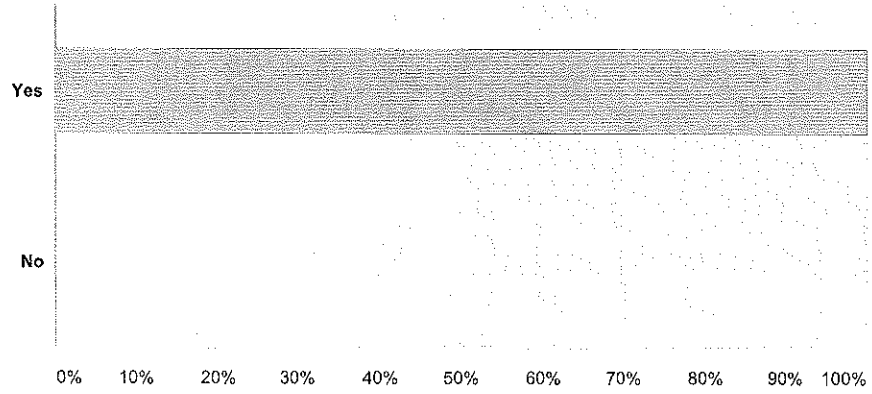
Answer Choices	Responses	
Sole Proprietorship	22.97%	513
General Partnership	4.08%	91
Professional Corporation	24.90%	556
Limited Liability Company	27.81%	621
Limited Liability Partnership	18.41%	411
Other (please specify)	1.84%	41
Total		2,233

#	Other (please specify)	Date
1	P.A.	5/29/2016 11:26 AM
2	Not certain.	5/24/2016 8:50 PM
3	PLLC	5/24/2016 5:06 PM
4	SOLO PRACTITIONER	5/24/2016 3:41 PM
5	Sole Prop.--independ. contractor for LLC--coverage by LLC	5/24/2016 11:56 AM
6	I am semi-retired and "of counsel" to two firms.	5/24/2016 11:47 AM
7	not sure of the type of entity	5/24/2016 11:05 AM
8	Partnership of Professional Corporations	5/24/2016 10:22 AM
9	P.A.I	5/24/2016 10:06 AM
10	associate	5/24/2016 10:03 AM
11	Professional Association	5/24/2016 9:44 AM

12	ltd	5/24/2016 9:42 AM
13	PLLC	5/24/2016 9:24 AM
14	Of counsel to general partnership firm	5/20/2016 11:42 AM
15	I am "Of Counsel" to sole proprietor	5/12/2016 9:41 PM
16	Professional Association	5/12/2016 8:52 PM
17	PLLC	5/12/2016 8:50 PM
18	Professional Association	5/12/2016 11:40 AM
19	P.A.	5/12/2016 10:35 AM
20	Sole propriorship & Independent contractor	5/12/2016 10:25 AM
21	Professional Limited Liability Company (NY)	5/12/2016 10:05 AM
22	of counsel	5/12/2016 10:03 AM
23	professional association	5/9/2016 9:06 PM
24	PA	5/6/2016 2:18 PM
25	teach law	5/6/2016 12:10 PM
26	Professional Association	5/6/2016 9:30 AM
27	Of Counsel	5/6/2016 7:38 AM
28	professional association	5/5/2016 4:26 PM
29	Professional Association formed under Maryland law	5/5/2016 3:29 PM
30	NY Professional Limited Liability Company reg in NJ	5/5/2016 2:21 PM
31	single member LLC	5/5/2016 1:03 PM
32	professional association	5/5/2016 11:45 AM
33	PA	5/5/2016 11:28 AM
34	S corp	5/5/2016 11:17 AM
35	Contract Attorney	5/5/2016 10:56 AM
36	PLLC	5/5/2016 10:28 AM
37	Professional Limited Liability Corporation	5/5/2016 10:26 AM
38	I am of counsel to a sole proprietor	5/5/2016 10:21 AM
39	PC	5/5/2016 9:39 AM
40	Professional Association	5/5/2016 9:35 AM
41	Professional Association	5/5/2016 9:19 AM

Q6 Are you currently insured by a Lawyers' Professional Liability (LPL) insurance policy?

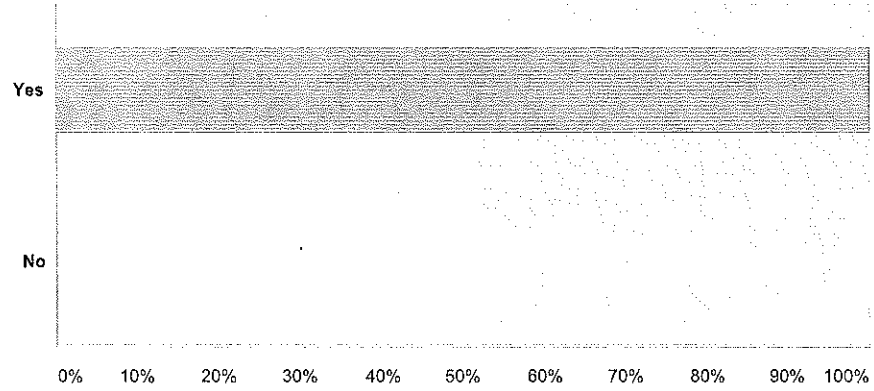
Answered: 2,233 Skipped: 0



Answer Choices	Responses	
Yes	100.00%	2,233
No	0.00%	0
Total		2,233

Q7 If you are not currently insured by a Lawyers' Professional Liability (LPL) insurance policy, do you routinely disclose to your clients that you do not have such insurance?

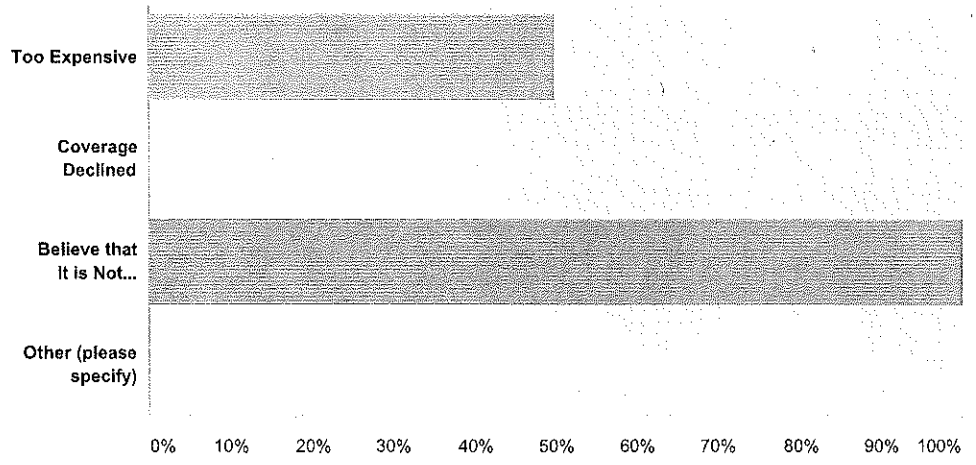
Answered: 2 Skipped: 2,231



Answer Choices	Responses	
Yes	100.00%	2
No	0.00%	0
Total		2

Q8 Why don't you have an LPL insurance policy?

Answered: 2 Skipped: 2,231

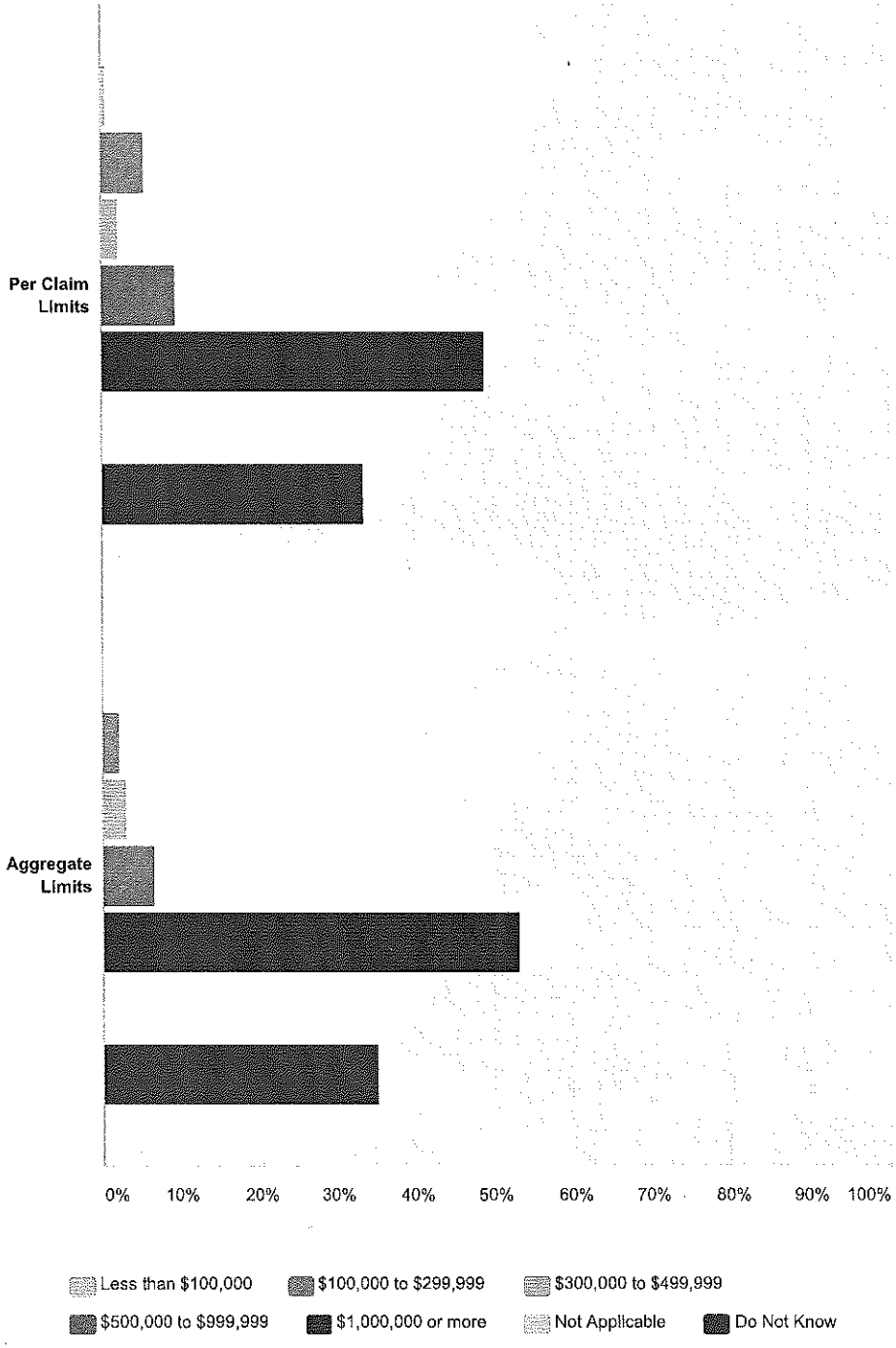


Answer Choices	Responses	
Too Expensive	50.00%	1
Coverage Declined	0.00%	0
Believe that it is Not Necessary	100.00%	2
Other (please specify)	0.00%	0
Total Respondents: 2		

#	Other (please specify)	Date
	There are no responses.	

Q9 Please set forth the per claim and aggregate coverage limits of the LPL insurance policy by which you are insured:

Answered: 2,120 Skipped: 113

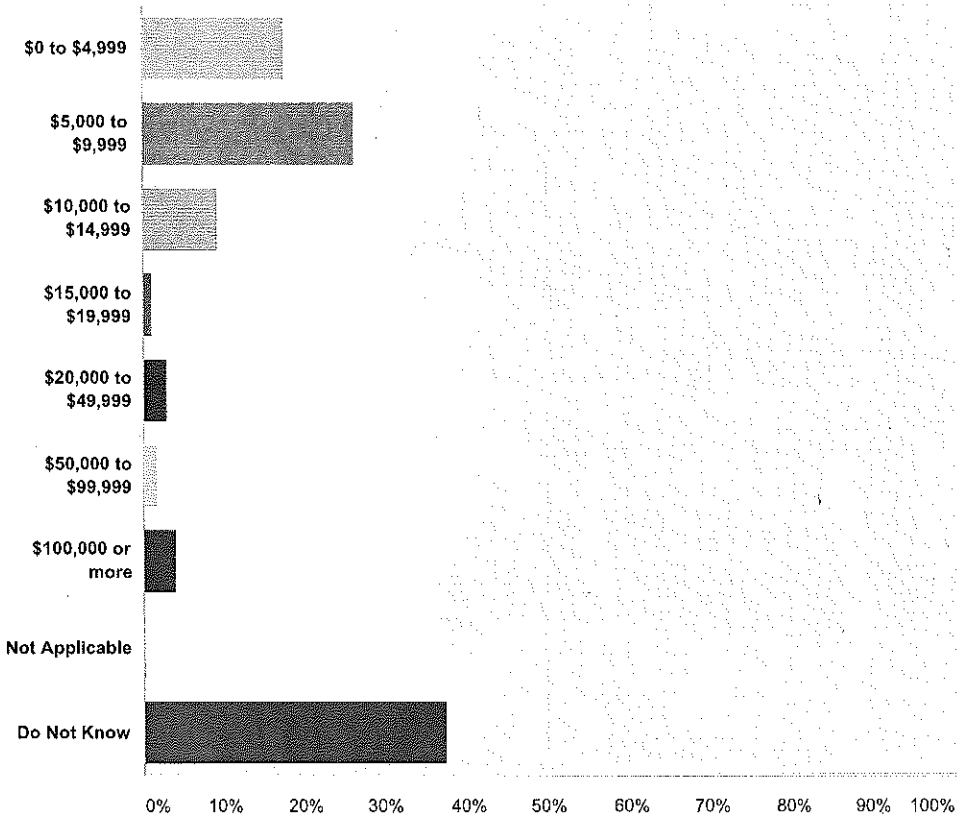


	Less than $100,000	$100,000 to $299,999	$300,000 to $499,999	$500,000 to $999,999	$1,000,000 or more	Not Applicable	Do Not Know	Total

Per Claim	**0.66%**	**5.42%**	**2.12%**	**9.39%**	**48.82%**	**0.14%**	**33.44%**	
Limits	14	115	45	199	1,035	3	709	2,120
Aggregate	**0.28%**	**2.12%**	**2.88%**	**6.56%**	**52.92%**	**0.24%**	**35.00%**	
Limits	6	45	61	139	1,122	5	742	2,120

Q10 What is the deductible/retention for the LPL insurance policy by which you are insured?

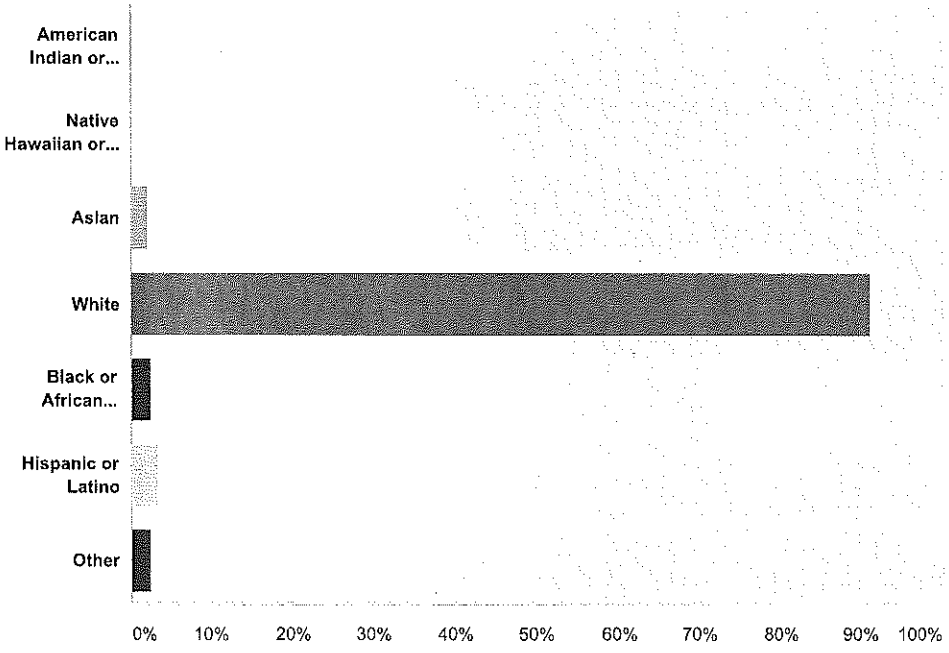
Answered: 2,120 Skipped: 113



Answer Choices	Responses	
$0 to $4,999	17.45%	370
$5,000 to $9,999	26.27%	557
$10,000 to $14,999	9.15%	194
$15,000 to $19,999	1.08%	23
$20,000 to $49,999	2.92%	62
$50,000 to $99,999	1.65%	35
$100,000 or more	3.96%	84
Not Applicable	0.19%	4
Do Not Know	37.31%	791
Total		**2,120**

Q11 How do you identify yourself? (Select all that apply)

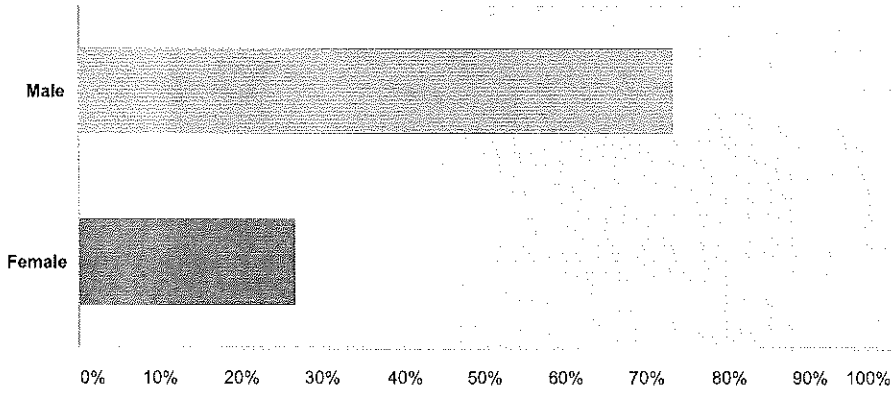
Answered: 1,971 Skipped: 262



Answer Choices	Responses	
American Indian or Alaskan Native	0.30%	6
Native Hawaiian or Other Pacific Islander	0.10%	2
Asian	2.18%	43
White	91.17%	1,797
Black or African American	2.54%	50
Hispanic or Latino	3.30%	65
Other	2.49%	49
Total Respondents: 1,971		

Q12 What is your gender?

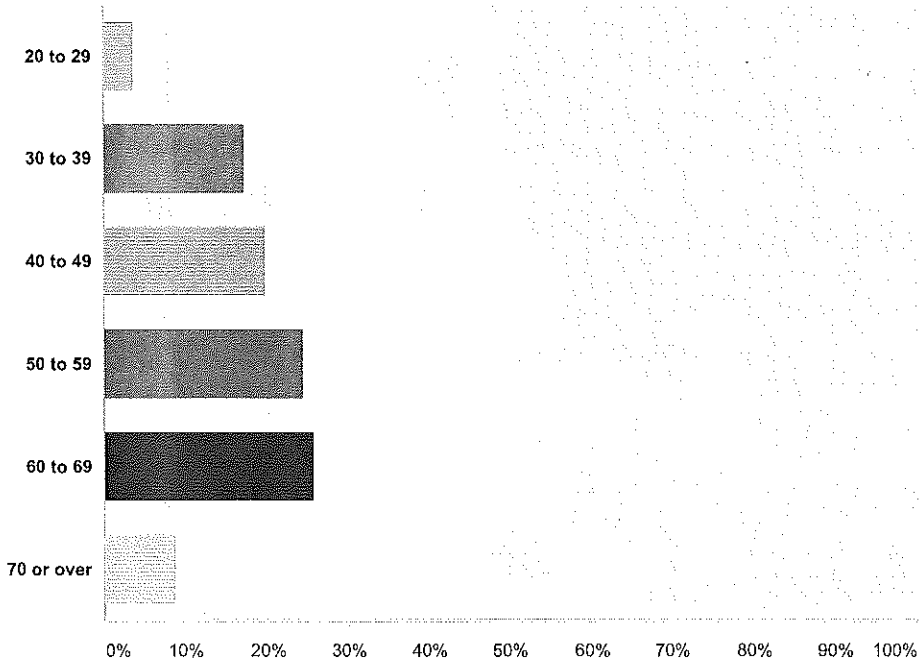
Answered: 1,997 Skipped: 236



Answer Choices	Responses	
Male	73.36%	1,465
Female	26.64%	532
Total		**1,997**

Q13 What is your age?

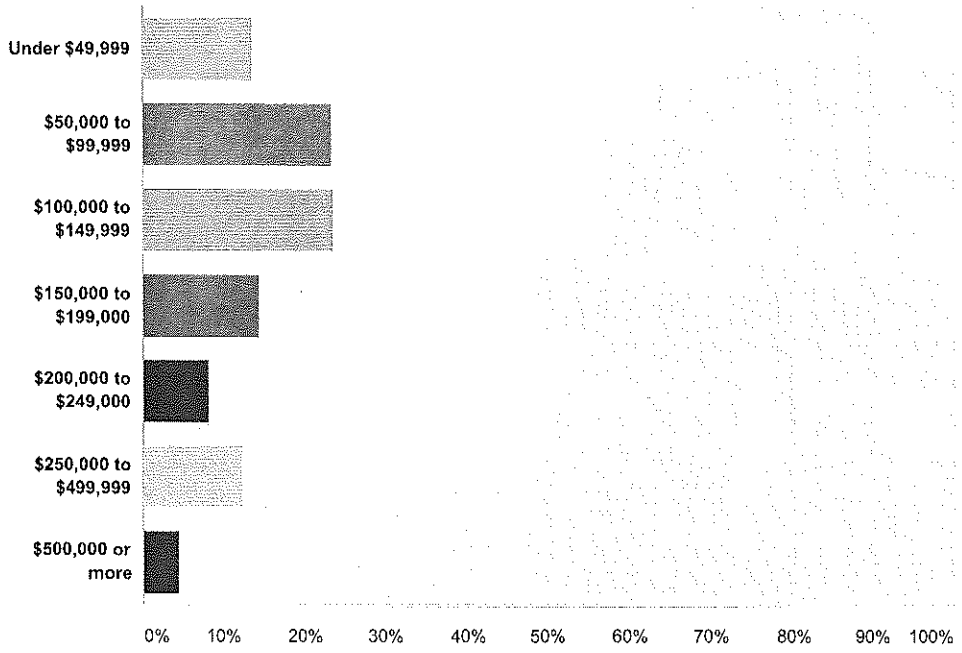
Answered: 2,007 Skipped: 226



Answer Choices	Responses	
20 to 29	3.74%	75
30 to 39	17.39%	349
40 to 49	19.88%	399
50 to 59	24.36%	489
60 to 69	25.76%	517
70 or over	8.87%	178
Total		**2,007**

Q14 What is your income obtained from the private practice of law?

Answered: 1,824 Skipped: 409

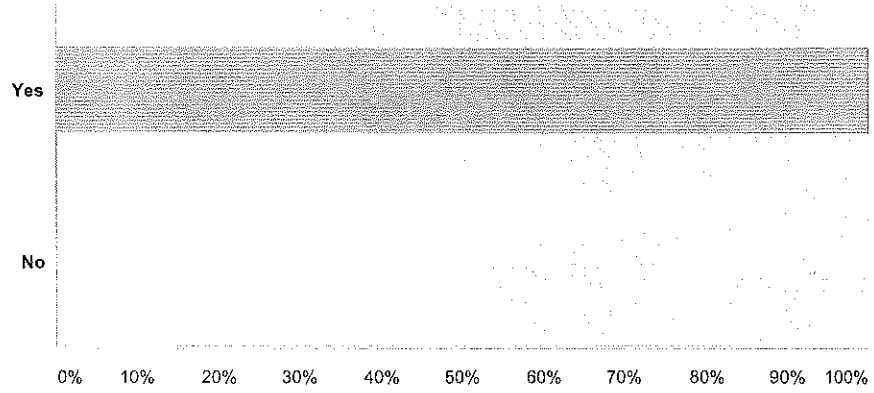


Answer Choices	Responses	
Under $49,999	13.60%	248
$50,000 to $99,999	23.41%	427
$100,000 to $149,999	23.68%	432
$150,000 to $199,000	14.42%	263
$200,000 to $249,000	8.17%	149
$250,000 to $499,999	12.28%	224
$500,000 or more	4.44%	81
Total		**1,824**

Survey Responses from
Attorneys Engaged in the Private Practice of Law
Who ARE NOT Currently Insured

Q1 Are you engaged in the private practice of New Jersey law? (Please answer "No" if you are a lawyer admitted pro hac vice in a New Jersey matter, an employee of a public entity or non-profit organization, or corporate or insurance in-house counsel.)

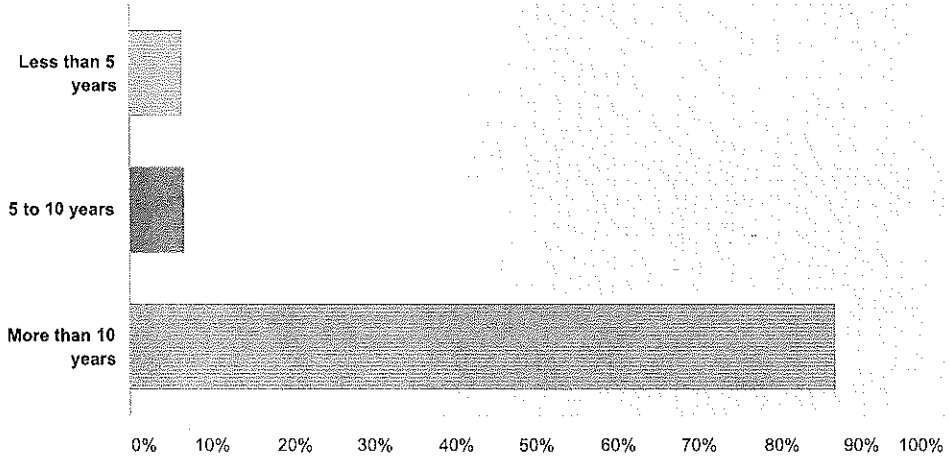
Answered: 326 Skipped: 0



Answer Choices	Responses	
Yes	100.00%	326
No	0.00%	0
Total		326

Q2 How many years have you been admitted to practice?

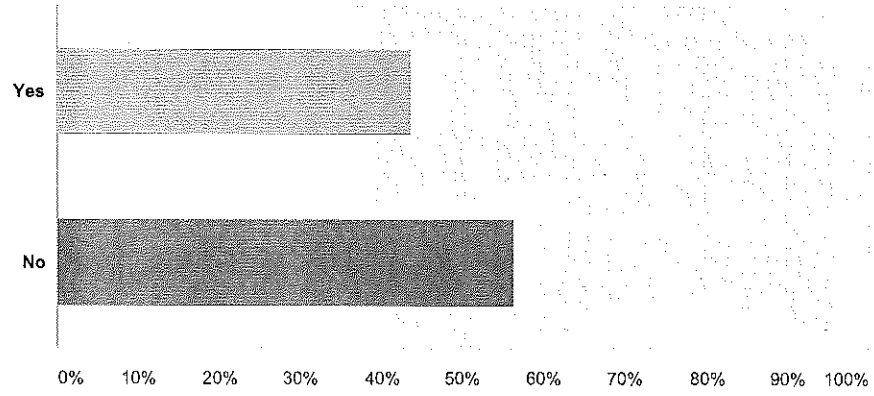
Answered: 326 Skipped: 0



Answer Choices	Responses	
Less than 5 years	6.44%	21
5 to 10 years	6.75%	22
More than 10 years	86.81%	283
Total		326

Q3 On average, do you dedicate more than 26 hours per week to the private practice of New Jersey law?

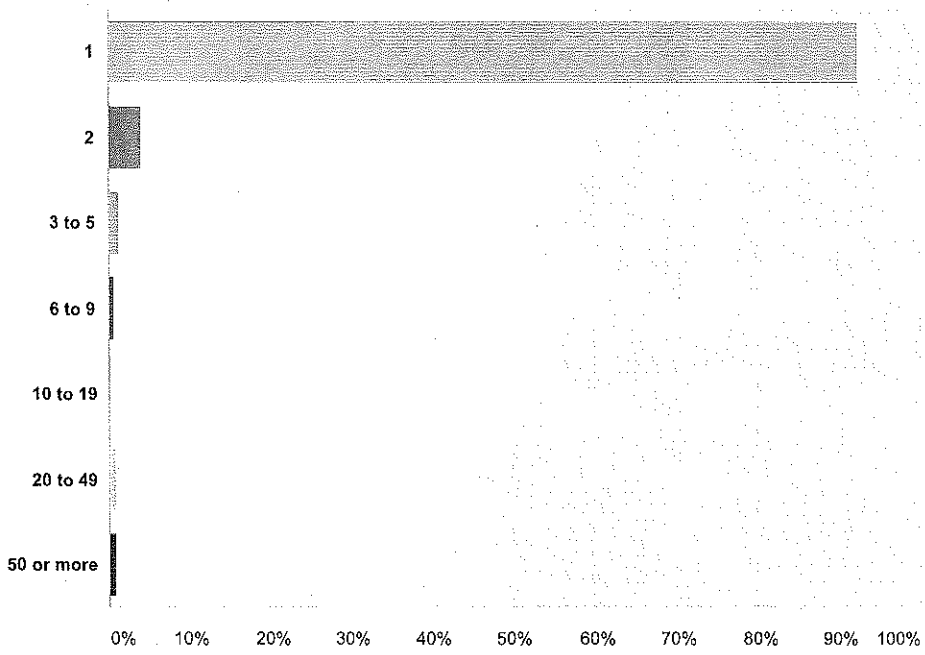
Answered: 326 Skipped: 0



Answer Choices	Responses	
Yes	43.56%	142
No	56.44%	184
Total		326

Q4 How many lawyers are in your firm?

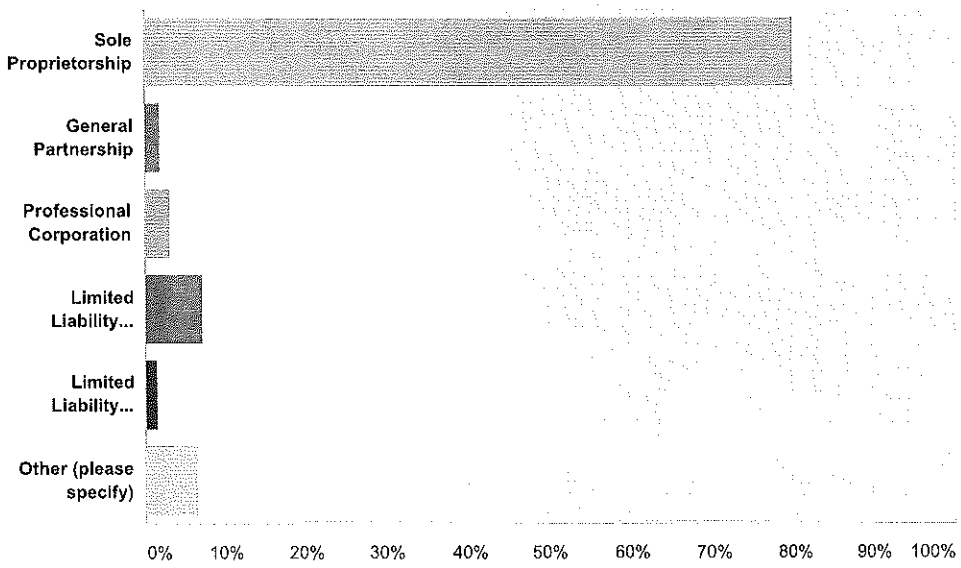
Answered: 326 Skipped: 0



Answer Choices	Responses	
1	92.33%	301
2	3.99%	13
3 to 5	1.23%	4
6 to 9	0.61%	2
10 to 19	0.00%	0
20 to 49	0.92%	3
50 or more	0.92%	3
Total		**326**

Q5 What type of legal entity do you practice under for your New Jersey practice?

Answered: 326 Skipped: 0



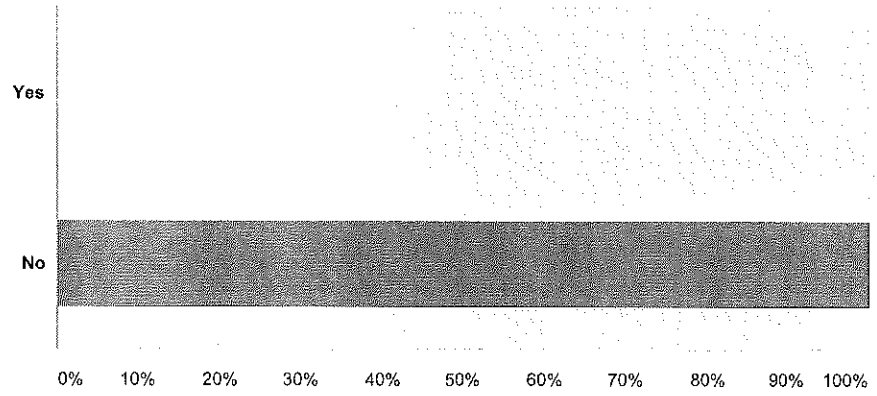
Answer Choices	Responses	
Sole Proprietorship	80.06%	261
General Partnership	1.84%	6
Professional Corporation	3.07%	10
Limited Liability Company	7.06%	23
Limited Liability Partnership	1.53%	5
Other (please specify)	6.44%	21
Total		326

#	Other (please specify)	Date
1	Nothing currently	5/25/2016 5:01 PM
2	Sole practitioner	5/25/2016 9:33 AM
3	independent contractor to law firm	5/24/2016 11:14 AM
4	Contract attorney	5/24/2016 10:37 AM
5	document review attorney	5/15/2016 4:08 PM
6	H	5/12/2016 6:04 PM
7	municipal attorney, municipal judge	5/12/2016 5:13 PM
8	Contract Attorney	5/12/2016 12:15 PM
9	I am retired but because I still look over corporate documents I am required to maintain my status as an active practioner even though I no longer receive any fees.	5/6/2016 1:15 PM
10	Contract Attorney	5/5/2016 6:05 PM

11	General Counsel at Private Corporation	5/5/2016 3:57 PM
12	Per diem	5/5/2016 1:46 PM
13	Retired- Doing only Pro Bono work	5/5/2016 1:18 PM
14	Part Time Sole Proprietorship	5/5/2016 1:13 PM
15	Per Diem practice for other law offices	5/5/2016 12:28 PM
16	My work is limited to pro bono work and I do so under auspices of non-profits that cover me for malpractice insurance when I handle cases referred to medo	5/5/2016 12:21 PM
17	LLC, but returning to sole prop.	5/5/2016 10:49 AM
18	prior to Sole Propietorship, I was a P.C.	5/5/2016 10:46 AM
19	Retired, but retain my license	5/5/2016 10:37 AM
20	Retired from active practice but for sitting as an arbitrator in two counties	5/5/2016 10:25 AM
21	Single Member LLC, so technically sole proprietorship	5/5/2016 10:14 AM

Q6 Are you currently insured by a Lawyers' Professional Liability (LPL) insurance policy?

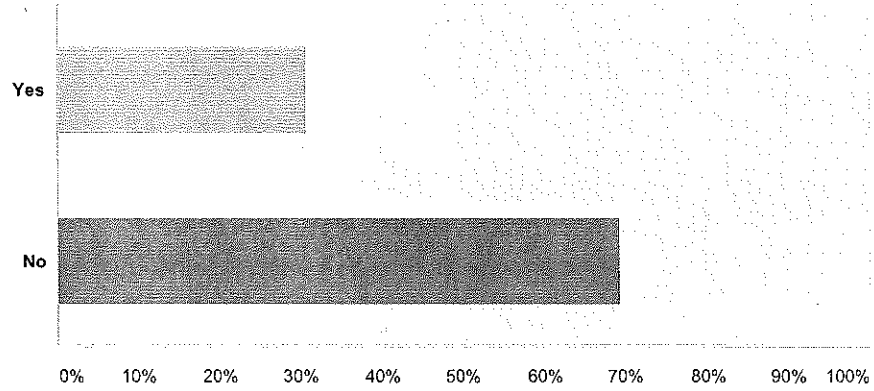
Answered: 326 Skipped: 0



Answer Choices	Responses	
Yes	0.00%	0
No	100.00%	326
Total		326

Q7 If you are not currently insured by a Lawyers' Professional Liability (LPL) insurance policy, do you routinely disclose to your clients that you do not have such insurance?

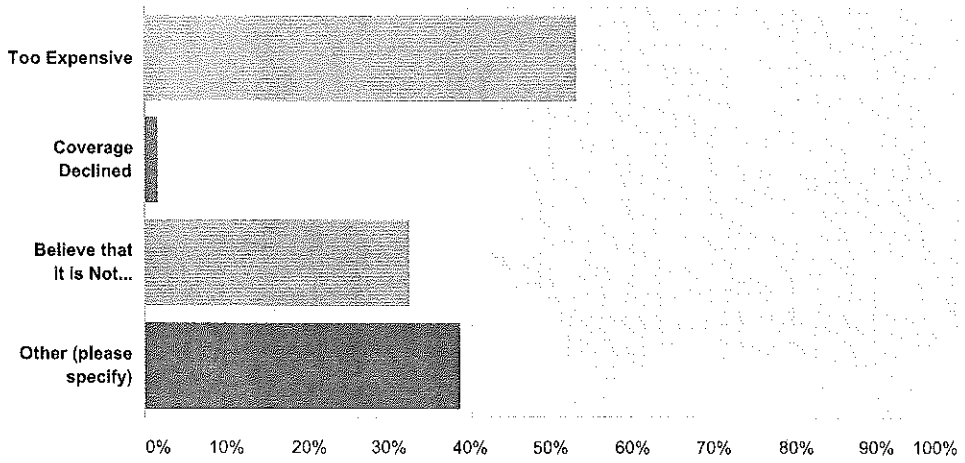
Answered: 316 Skipped: 10



Answer Choices	Responses	
Yes	30.70%	97
No	69.30%	219
Total		316

Q8 Why don't you have an LPL insurance policy?

Answered: 316 Skipped: 10



Answer Choices	Responses	
Too Expensive	53.16%	168
Coverage Declined	1.58%	5
Believe that it is Not Necessary	32.59%	103
Other (please specify)	38.92%	123
Total Respondents: 316		

#	Other (please specify)	Date
1	Not enough business to warrant the cost	5/29/2016 7:19 AM
2	I only do pool work for the office of the public defender. I am covered by them	5/27/2016 5:18 PM
3	I carry arbitrators and mediators malpractice insurance. My practice is limited to acting as an arbitrator or mediator in commercial matters. I do not represent clients in private practice and have not done so since 1996.	5/27/2016 1:56 PM
4	currently I only handle pro bono cases through Legal Services of NJ and other organizations for which I am covered by the organization's malpractice insurance	5/27/2016 11:55 AM
5	Haven't taken time to purchase.	5/26/2016 5:22 PM
6	I have never personally seen a case where either an attorney or a client was benefitted by a LPL policy being in force. The attorneys with volume oriented practices seem to view the indemnification provided by their LPL coverage as a backstop that makes them comfortable providing "quick-and-dirty" legal service. More responsible attorneys put extra, often non-billable, time into their legal work to avoid mistakes that might otherwise result in professional liability. If LPL coverage were made mandatory, then that approach would no longer be feasible due to increased overhead costs. The quality and quantity of needed legal services rendered to the public would be reduced, especially pro bono services. Potential personal professional liability provides a potent incentive to provide high quality services. Mandatory LPL coverage would make careful and responsible attorneys pay for the mistakes of those attorneys who view professional negligence as an expected cost of business that should be budgeted for. Mandatory LPL coverage would work against professionalism in practice, and in the net, would be contrary to the public interest. The attorneys who as a matter of public policy we want to have LPL coverage already have it, with very few exceptions. The practice of law should not be considered as equivalent to driving a car with respect to "financial responsibility." True professional responsibility is far broader, and cannot be converted to dollars.	5/25/2016 6:16 PM

7	Questions 7 & 8 are similar to "have you stopped beating your wife?" I have full insurance coverage. All 5 "boxes have absolutely relation to someone who has insurance and nor a box for "inapplicable"	5/24/2016 6:35 PM
8	I am a contractor for a firm in Philadelphia and am covered by the firm's policy.	5/24/2016 6:05 PM
9	not worth the extremely high premium charged.	5/24/2016 5:49 PM
10	I retain my license, but don't practice.	5/24/2016 3:19 PM
11	I am semi-retired and only do state and federal public defender criminal defense work.	5/24/2016 12:51 PM
12	Carriers went thru a phase where they seemed to be unstable and going out of business. Forced me to wind down my practice. Now refer out all litigation to Certified Trial Attorney and mostly work in-house transactionally.	5/24/2016 12:42 PM
13	have not been able to find nor afford a policy that is designed for the per diem attorney. I handle very few matters, but would still like to have insurance.	5/24/2016 12:19 PM
14	Very few active clients (I'm 72 years old nearing retirement), low risk area of practice. In practice for almost 46 years, zero ethics complaints.	5/24/2016 11:54 AM
15	I don't make mistakes and can defend myself and have no assets.	5/24/2016 11:39 AM
16	Until recently have always had LPL. Currently dealing with stage 4 cancer. Have limited my practice to some pro bono work. Assuming I survive I would reinstate my insurance.	5/24/2016 11:29 AM
17	I have no more than two or three matters a year that have almost no exposure to legal malpractice. I	5/24/2016 11:23 AM
18	Maintained insurance for 20 years before allowing it to lapse.	5/24/2016 11:22 AM
19	Firm maintains LPL. I only work for the firm. I do not handle the engagement of clients or even intake of matters.	5/24/2016 11:17 AM
20	Income does not warrant spending.	5/24/2016 10:54 AM
21	Only take one or two cases per year. Do not make enough money to pay for insurance.	5/24/2016 10:35 AM
22	Do not practice NJ Law regularly. Only once or twice a year.	5/24/2016 10:33 AM
23	retiring. After more than 45 years, carrier denied coverage even though no claim had ever been made. Much too expensive to continue coverage and helped decision to retire.	5/24/2016 10:29 AM
24	Not only cost, but have had problems getting quotes.	5/24/2016 10:24 AM
25	I am a per diem contractor & only do document review work & do not ordinarily see clients.	5/24/2016 10:14 AM
26	Not enough information about this	5/24/2016 9:59 AM
27	I have researched coverage issues with regard to these claims made policies. Coverage is often denied for an alleged failure to timely notify an insurer of a claim. Claim is defined too broadly in these policies, and proving that there is no prejudice for late reporting of a claim is not permitted legally.	5/24/2016 9:40 AM
28	The expense is a serious issue for sole practitioners. Not only are we purchasing our own health insurance which costs more than $30,000, but have to cover every burdensome expense which makes it difficult to compete with big firms who charge their clients more. We keep our costs down and pass that savings on to the client. We may charge $975 for a closing whereas the larger office is charging typically $2500 plus. Additionally, we give one on one attention instead of a secretary handling most matters. We are trying to pay bills and make a living to support a family with children attending college, graduate school, etc. So, to add an additional expense might just put small offices out of business. Something will have to give. It might mean substituting quality health care insurance plan for cheap, terrible coverage just so we can obtain professional liability coverage even though we have never been sued by a client. Will the state give attorneys who cannot afford liability coverage subsidies for same? There is much to consider, and I hope you do.	5/23/2016 6:04 PM
29	Semi-retired. Very limited practice.	5/18/2016 12:43 PM
30	I retired last year from my in house position as an environmental insurance coverage litigator with a large insurance company. I have not practiced since my retirement. I intend to keep my options open, however, and I would consider accepting contract work in my speciality so long as I was covered by my employer's LPL insurance or self insurance.	5/17/2016 3:33 PM
31	I am in the process of opening my practice.	5/16/2016 11:00 PM
32	i do not practice law, but nj does not have any "inactive" attorney status like other states which would allow me to retain my license without being required to sit a second time for the nj bar. now, this additional proposed burden?	5/16/2016 9:54 PM
33	As a pool attorney for the Office of the Public Defender, I am indemnified by the state of NJ.	5/16/2016 2:05 PM

34	My practice is confined solely to acting as an arbitrator, or occasionally as a mediator, in commercial matters. I have no clients; parties appear before me represented by counsel. Since ceasing representation of clients more than 6 years ago, I have always carried arbitrators and mediators malpractice insurance and continue to do so.	5/16/2016 9:45 AM
35	I do not have clients. I am hired by an agency to code electronic discovery	5/15/2016 4:08 PM
36	Work solely as contract attorney for out of state law firm, and are covered under their LPL insurance.	5/13/2016 7:50 PM
37	In 56 years of practice, I have had one incident where I could possibly have had a malpractice situation. I recognized the problem, and I paid for that potential liability out of my own pocket for less than one year's premium on a malpractice policy. The client never realized nor cared about insurance as they, a couple, got more that they could possibly have gotten on a limited policy from the defendant.	5/13/2016 10:57 AM
38	I do very little legal work. When I ran a large practice I carried insurance.	5/13/2016 9:28 AM
39	Do not represent outside clients any longer.	5/12/2016 9:34 PM
40	I'm retired but maintain my license so I can refer clients to certified attorneys	5/12/2016 6:27 PM
41	TOO MANY EXCLUSIONS OF COVERAGE	5/12/2016 6:17 PM
42	One it is too expensive and too I only practiced criminal defense law	5/12/2016 6:06 PM
43	Cafefully select limited group of clients; self insured due to limited practice and municipal attorney work for which I am covered by municipal insurance policy.	5/12/2016 5:17 PM
44	Work for other attorneys who remain of counsel.and are insured.	5/12/2016 5:00 PM
45	I work as a full time pip arbitrator. I do not have clients.	5/12/2016 4:05 PM
46	While I maintain a practice, I in fact have no clients in NJ. IF I advise clients for my NY employer, I am covered by a seperate malpractice policy.	5/12/2016 3:42 PM
47	Only have family clients	5/12/2016 3:30 PM
48	I do very little legal work. mostly at the request of old clients or as a favor to friends or family	5/12/2016 3:05 PM
49	My practive involves mainly business contract review and drafting.	5/12/2016 2:14 PM
50	I am retired and have availed myself of my Carrier's "tail policy". I act in an advisory capacity and refer clients.	5/12/2016 12:58 PM
51	Only do pool work for the Office of the Public Defender	5/12/2016 12:55 PM
52	I just started solo practice after being with a firm for over 40 years. In process of obtaining insurance,	5/12/2016 12:31 PM
53	Covered under policies of various temporary attorney agencies.	5/12/2016 12:16 PM
54	Very limited practice without any compensation.	5/12/2016 11:52 AM
55	I am currently and have been on disability. Although I am considered to be "in private practice" so I may maintain my license to practice law, I have no clients and have not been actively practicing. As such, I do not believe that malpractice insurance is necessary. Moreover, it would be too expensive for me. Paying for mandatory continuing legal education is costly enough for someone on disability.	5/12/2016 11:49 AM
56	I basically restrict myself to matters that are low risk: simple wills, uncontested divorces, and similar. Requiring me to obtain malpractice insurance would effectively force me out of the profession.	5/12/2016 11:24 AM
57	Owner of firm doesn't have it	5/12/2016 11:19 AM
58	I am 86 years of age and devote only a few hours a week to the practice of law. Of these few hours, more than half are devoted to mediation. For these reasons, it is not practical for me to maintain malpractice insurance.	5/12/2016 10:58 AM
59	I am retired and only take 1 to 3 cases a year. I refer out all other cases.	5/12/2016 10:54 AM
60	Recently began practicing in New Jersey and am in the process of obtaining insurance	5/12/2016 10:44 AM
61	I do not have any outside 3rd party clients.	5/12/2016 10:42 AM
62	Not enough volume of work to justify expense.	5/12/2016 10:41 AM
63	I only do legal work for family.	5/9/2016 9:33 AM
64	While I am technically engaged in the private practice of law, my firm employs me solely for in-house work and I do not perform any client-related services. My firm has LPL, but I do not require it for the type of work I perform.	5/9/2016 8:34 AM
65	Part time practice and clients are limited to family members and close friends.	5/8/2016 1:58 PM

66	I am practicing on a very limited basis as I am retired. I only provide services to very good former clients, friends and family. To require that I obtain insurance would be an unreasonable burden in my situation, since most, if not all, my services are pro bono.	5/7/2016 3:48 PM
67	I would cease practicing law if insurance was required. My income is less than $5,000 from all NJ clients. It would make it not even worth it; in fact, even the requirement to have an attorney trust account is onerous, because I literally never have and never will be entrusted with any client money whatsoever. Lawyers are not licensed drivers. We are already tested and regulated to a much greater degree than any driver or even other professions where insurance is not required. In addition, we should be considered sophisticated enough to assess and appreciate the risk of lacking insurance and exposing our personal assets, and be trusted accordingly.	5/7/2016 12:50 PM
68	I am semi-retired and my only practice is serving as a court-appointed automobile and personal injury arbitrator and mediator.	5/6/2016 8:41 PM
69	An attorney who has retired but still looks over documents for others, must remain "active." I no longer collect fees. I confine my "practice" to helping nonprofit corporations in my community resolve organizational events, complete combinations, and adhere to proper corporate governance. I make no filings leaving the entities to do that on their own. I do not maintain any balances in my trust account other than the amount needed to open the account. I have been told that attorneys who do not collect fees in certain practices, cannot maintain malpractice insurance because the underwriters will not approve a non "business" practice because it look t them more like a hobby.	5/6/2016 1:24 PM
70	I have a home office practice.	5/6/2016 12:22 PM
71	I had LPL, when I was in "full time NJ" practice. Besides being very expensive; any profit made from my "part time practice" that profit would be gone and I would out of pocket pay in to be covered. For the limited amount of law related work I do, my agent suggested I either retire or become self insured. My practice involves pro bono and complex legal issues involving corruption by business and/or government. My clients are aware that I am not covered by malpractice insurance and so is it stated in the retainer agreement.	5/6/2016 12:06 PM
72	I only represent public defender clients pooled to me, and the OPD indemnifies me.	5/6/2016 10:39 AM
73	limited practice and volume of work	5/6/2016 9:31 AM
74	Mostly retired. Only assist one non-profit client.	5/5/2016 7:07 PM
75	Most of my work is contract work obtained through agencies. You consider this to be the practice of law. I say malpractice insurance is unnecessary for me.	5/5/2016 6:07 PM
76	I am covered by out of state carrier	5/5/2016 5:36 PM
77	Virtually all my work is as a pool attorney for the Public Defender, for which I am insured through that office.	5/5/2016 4:08 PM
78	Because I take low risk cases, and that I do thorough research before I take a case with some moderate possibility of exposure to malpractice claim. I do not take many cases a year.	5/5/2016 3:44 PM
79	I am a per diem attorney and insurance is provided for me.	5/5/2016 2:51 PM
80	I am only working part-time at present. I disclose to clients that I do not have insurance, and I generally only do work that does not create an opportunity for me to commit malpractice. I would strongly object to a requirement that I maintain LPL, when it would be superfluous to my modest practice.	5/5/2016 2:48 PM
81	I do a very small volume and stay to areas of law with which I am competent.	5/5/2016 2:39 PM
82	I do not represent clients and only work as a Dispute Resolution Professional as an independent contractor of Forthright handling NJ PIP Arbitrations exclusively.	5/5/2016 1:51 PM
83	I am a retired career Public Defender and I only take assigned public defender conflict cases. Those cases are covered by the State Public Defender	5/5/2016 1:49 PM
84	After over 40 years working as a legal services attorney, I retired from legal services and I maintain my law license to do pro bono work. I do not have private clients and when I do pro bono work I am covered by the malpractice policy of the legal services office. It would be a financial hardship for me to maintain my legal license. There may be some point in time when I would take private clients; however, since leaving legal services I have consciously chosen not to take private clients. I submit that if a mandatory requirement is developed, it should exempt licensed attorneys whose practice is limited to doing pro bono work with legal services and/or public interest law firms that cover their pro bono attorneys with malpractice insurance. There is a strong public policy in permitting such an exemption: The ability of very experienced attorneys to represent the poor where the legal services or other public interest law firm provides for malpractice insurance. At the present time I have to pay the yearly client security fund amount to maintain my license. The extra financial burden of a mandatory malpractice insurance premium would tip the scales for me to give up my license.	5/5/2016 1:41 PM
85	criminal defense	5/5/2016 1:30 PM

86	I had insurance many years ago and had a claim. The firm handling the case did not follow my instructions to file for summary judgment. At the end, the case against me was dismissed and they billed me for my deductible. I refused to pay and they relented but I cancelled my policy. Practicing almost 40 years and no other claims.	5/5/2016 1:29 PM
87	I am a retired corporate counsel and do not have a private practice. My legal work is limited to Pro Bono work where I am covered under group policies of the group for which I am performing the Pro Bono work.	5/5/2016 1:20 PM
88	My practice is too limited.	5/5/2016 1:13 PM
89	I no longer do outside work for any clients; thus I do not carry professional insurance due to its expense.	5/5/2016 1:03 PM
90	Practice limited to criminal defense	5/5/2016 12:53 PM
91	I maintain a law office solely to have an active license to practice but I do not practice at all.	5/5/2016 12:42 PM
92	My practice is part time and largely limited to appellate work or work as "of counsel".	5/5/2016 12:35 PM
93	Limited practice	5/5/2016 12:35 PM
94	Coverage declined because of per diem work	5/5/2016 12:29 PM
95	This survey does not anticipate my situation. I answered Yes to question 7 because I do not carry my own policy. My work is limited to pro bono work that I do under auspices of non-profit organizations. When I handle a case referred to me by such organizations, I am covered under their policies. So while I do not have my own personal policy, I am covered for the work I do by the organization's policy.	5/5/2016 12:24 PM
96	I only do pool work for public defenders office and they indicated that they cover me for this.	5/5/2016 12:24 PM
97	It is very expensive and my practice is limited.	5/5/2016 11:43 AM
98	I only take clients I know well on a personal basis, and are not likely to sue me.	5/5/2016 11:43 AM
99	I restrict the matters the legal work that I perform and handle everything personally. I earn limited income from my less than part time practice that I operate out of my home. Matters are very routine, such as simple wills and residential real estate closings. For real estate purchases I utilize a title company as settlement agent. I do not have a steady source of income or clients and most clients are friends, family members or neighbors.	5/5/2016 11:42 AM
100	I have no clients of my own...I only do per diem work for other attorneys and their clients	5/5/2016 11:41 AM
101	pool attorney	5/5/2016 11:35 AM
102	working part time in retirement doing few items per year	5/5/2016 11:31 AM
103	Do pool attorney work can't afford rates	5/5/2016 11:24 AM
104	I have a chronic illness that has severely limited the amount of time I can devote to client development. My 22 hospitalizations over the past five and a half years has caused me to lose two thirds of my practice with the resultant diminution in income. Mostly, my practice is limited to clients that I have had for 10 to 25 years (and their referrals) and they are familiar with my work ethic and competence.	5/5/2016 11:22 AM
105	My practice is primarily tax return prep and I have professional liability coverage for that. I do no litigation matrimonial or general practice.	5/5/2016 11:17 AM
106	I spend less than 5% of my working hours on law and only accept specific types of cases.	5/5/2016 11:09 AM
107	Do not really practice law in NJ. Maintain license but not accepting clients.	5/5/2016 11:08 AM
108	When I was in practice full time I carried insurance. The insurance companies became increasingly difficult requesting lots of information tax returns etc. and really wanted to dictate areas of practice. I'm a big believer in insurance but it is to the point where the insurance companies run the legal world based on whether or not they believe the area you practice in is claim prone.	5/5/2016 11:07 AM
109	Main practice , now 90% is criminal law and I have never had a claim in 37 years of practice in that area or any area. I previously had a personal injury practice that I stopped taking cases about 12 years ago-never a claim and a family law practice that I stopped taking cases about five years ago -never a claim.	5/5/2016 10:56 AM
110	not sure if we are insured by LPL	5/5/2016 10:54 AM
111	The cost of Malpractice insurance has become too expensive which then makes my pricing for clients outside the ability of the average person to pay for private counsel. The State must reduce the Statute of Limitations to two years so that small lawyers like me can sue to obtain unpaid fees. Two of the 3 times that I have been sued for malpractice (I had malpractice insurance) were counterclaims for fee complaints filed by me. The third time was dismissed by the Court.	5/5/2016 10:49 AM
112	My former malpractice insurance company provide me with a "Tail".	5/5/2016 10:39 AM

113	I do not actively practice but maintain my license. Since I do not practice, it makes no economic sense for me to maintain such costly insurance. Therefore, my answer to Question 7 is a bit misleading but there was no other choice.	5/5/2016 10:25 AM
114	Again, sit as an arbitrator in the mandator arbitration program only	5/5/2016 10:25 AM
115	I have tried to get it on several occasions over the years. My main area is entertainment transactions; no insurance company has wanted to insure me based on my practice area. I did have coverage for a few years but then that company stopped providing coverage - there were no claims against me, but they chose to no longer provide.	5/5/2016 10:23 AM
116	Not sure.	5/5/2016 10:16 AM
117	Practice limited to criminal defense.	5/5/2016 10:06 AM
118	Attorney Coverage is a total fraud; "when u shd know there is a claim" rather than claim triggering (like Dr) allows ins to disclaim routinely....total fraud	5/5/2016 9:57 AM
119	I handle commercial litigation maters where malpractice is not really an issue. The cost of malpractice insurance versus the potential exposure is not justified. I have been practicing for over 38 years and never had malpractice insurance. Making it mandatory would be extremely burdensome and likely result in me not practicing in New Jersey.	5/5/2016 9:45 AM
120	I do per diem work and am covered under my attorney clients' policies	5/5/2016 9:41 AM
121	Practice less that 10 hours per year and the cost outweighs the benefit.	5/5/2016 9:40 AM
122	Public interest lawyer. I do not charge the great majority of my clients, and my litigation does not involve damages or other monetary recovery.	5/5/2016 9:39 AM
123	My policy wouldn't cover when I was sick and working less than 26 hours a week, and I haven't had the funds to reinstate since increasing my practice hours.	5/5/2016 9:26 AM

Q9 Please set forth the per claim and aggregate coverage limits of the LPL insurance policy by which you are insured:

Answered: 0 Skipped: 326

! No matching responses.

	Less than $100,000	$100,000 to $299,999	$300,000 to $499,999	$500,000 to $999,999	$1,000,000 or more	Not Applicable	Do Not Know	Total
Per Claim Limits	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0
Aggregate Limits	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0

Q10 What is the deductible/retention for the LPL insurance policy by which you are insured?

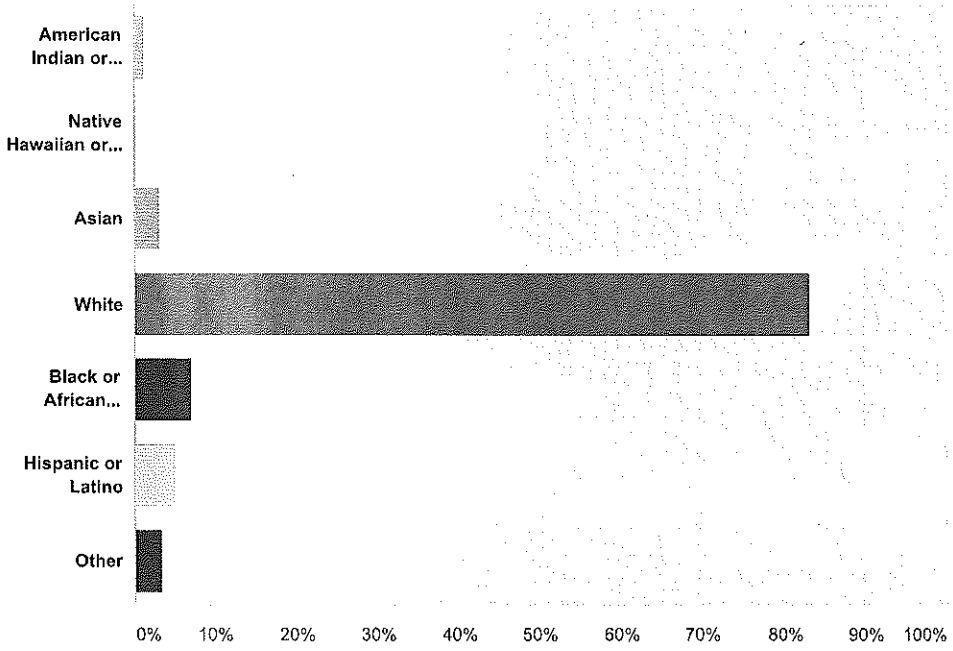
Answered: 0 Skipped: 326

! No matching responses.

Answer Choices	Responses	
$0 to $4,999	0.00%	0
$5,000 to $9,999	0.00%	0
$10,000 to $14,999	0.00%	0
$15,000 to $19,999	0.00%	0
$20,000 to $49,999	0.00%	0
$50,000 to $99,999	0.00%	0
$100,000 or more	0.00%	0
Not Applicable	0.00%	0
Do Not Know	0.00%	0
Total		**0**

Q11 How do you identify yourself? (Select all that apply)

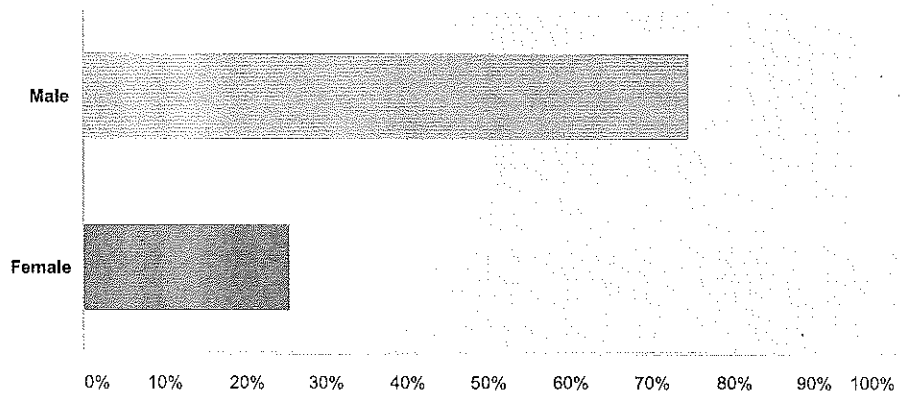
Answered: 296 Skipped: 30



Answer Choices	Responses	
American Indian or Alaskan Native	1.35%	4
Native Hawaiian or Other Pacific Islander	0.00%	0
Asian	3.04%	9
White	83.11%	246
Black or African American	7.09%	21
Hispanic or Latino	5.07%	15
Other	3.38%	10
Total Respondents: 296		

Q12 What is your gender?

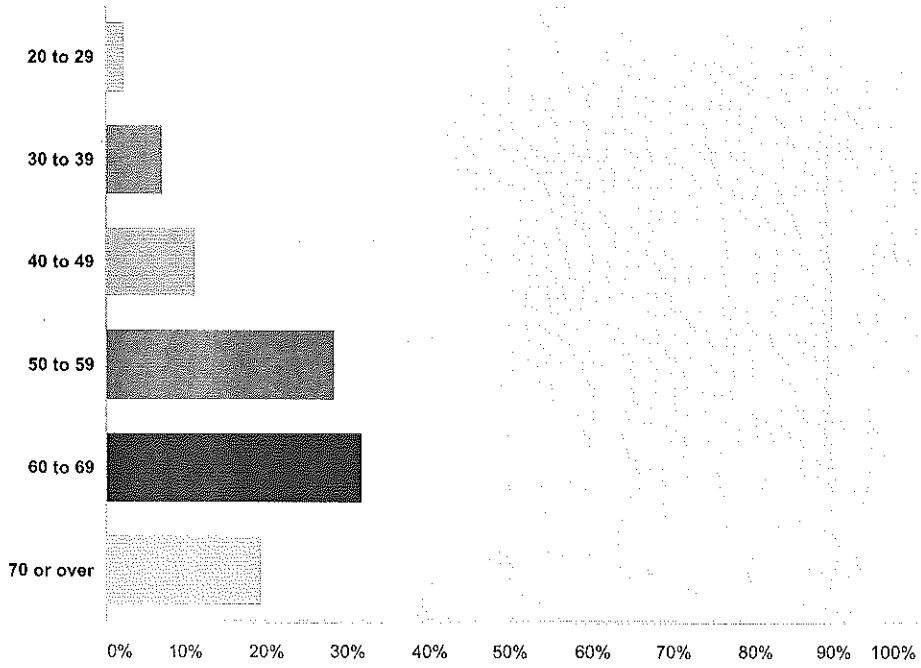
Answered: 298 Skipped: 28



Answer Choices	Responses	
Male	74.50%	222
Female	25.50%	76
Total		298

Q13 What is your age?

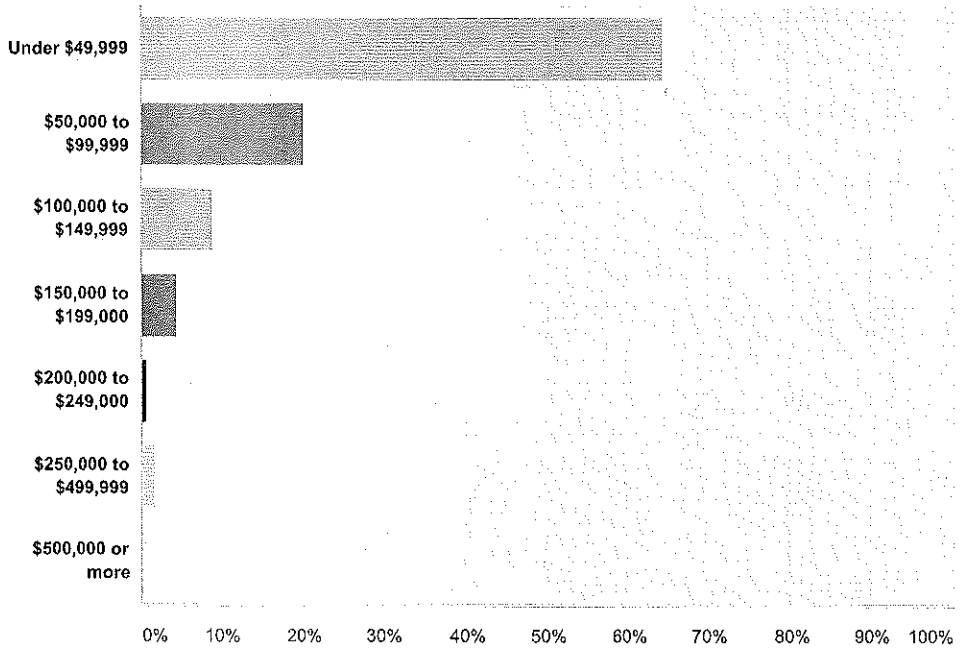
Answered: 300 Skipped: 26



Answer Choices	Responses	
20 to 29	2.33%	7
30 to 39	7.00%	21
40 to 49	11.33%	34
50 to 59	28.33%	85
60 to 69	31.67%	95
70 or over	19.33%	58
Total		**300**

Q14 What is your income obtained from the private practice of law?

Answered: 294 Skipped: 32



Answer Choices	Responses	
Under $49,999	64.29%	189
$50,000 to $99,999	20.07%	59
$100,000 to $149,999	8.84%	26
$150,000 to $199,000	4.42%	13
$200,000 to $249,000	0.68%	2
$250,000 to $499,999	1.70%	5
$500,000 or more	0.00%	0
Total		**294**

APPENDIX AA

IX. ATTORNEY REGISTRATION

A. ATTORNEY POPULATION

As of the end of December 2015, there were a total of 97,187 attorneys admitted to practice in the Garden State according to figures from the Lawyers' Fund for Client Protection **(Figure 12)**. Historically, New Jersey has been among the faster growing lawyer populations in the country. This may be attributable to its location in the populous northeast business triangle between New York, Philadelphia and Washington, D.C. The total number of lawyers added to the bar population increased by 1.44% in 2015. With a general population of 8,958,013, there is now one lawyer for every 92 Garden State citizens.

According to a July 1, 2015 survey compiled by the OAE for the National Organization of Bar Counsel, Inc., a total of 2,010,489 lawyers were admitted to practice in the United States. New Jersey ranked 7th out of 51 jurisdictions in the total number of lawyers admitted, or 4.77% of the July national total.

Attorneys Admitted

Year	Number
1948	8,000
1960	9,000
1970	11,000
1980	21,748
1990	43,775
2000	72,738
2010	87,639
2015	97,187

Figure 12

B. ADMISSIONS

As of December 31, 2015, the attorney registration database counted a total of 97,727[1] New Jersey-admitted attorneys. Forty-two percent (42%) were admitted since 2001 and 25% were admitted between 1991-2000. The other thirty-three percent (33%) were admitted in 1990 or earlier.

Breakdowns by periods are: 1950 and earlier - 170 (.17%); 1951-1960 - 796 (.81%); 1961-1970 – 2,843 (2.9%); 1971-1980 - 8,994 (9.2%); 1981-1990 - 19,178 (19.6%); 1991-2000 – 24,430 (25%); 2001-2010 – 25,859 (26.5%); and 2011-2015 – 15,457 (15.8%).

[1] This figure does not equal the total attorney population as calculated by the Lawyers' Fund for Client Protection because the Lawyers' Fund total does not include those attorneys who were suspended, deceased, disbarred, resigned, revoked or placed on disability-inactive status after the attorney registration statements were received and tabulated.

YEAR ADMITTED		
Year	Number	Percent
<1950	170	0.17%
1951-1955	281	0.29%
1956-1960	515	0.52%
1961-1965	915	0.93%
1966-1970	1,928	1.97%
1971-1975	4,052	4.14%
1976-1980	4,942	5.06%
1981-1985	7,784	7.97%
1986-1990	11,394	11.66%
1991-1995	12,779	13.08%
1996-2000	11,651	11.92%
2001-2005	11,576	11.85%
2006-2010	14,283	14.62%
2011-2015	15,457	15.82%
Totals	**97,727**	**100.00%**

Figure 13

C. ATTORNEY AGE

Of the 97,727 attorneys for whom some registration information was available, 97,417 (99.7%) provided their date of birth. A total of 310 attorneys (.3%) did not respond to this question.

Attorneys in the 30-39 age range comprised the largest group of attorneys admitted to practice in New Jersey at close to twenty-five percent (24.8% or 24,179). The 40-49 year category comprised 23.4% or 22,789 lawyers. Almost twenty-two percent (21.6% or 21,065) were between the ages of 50-59. The fewest numbers of attorneys were in the following age groupings: 29 and under (8% or 7,800), 60-69 (14.7% or 14,320) and 70 and older (7.5% or 7,264). **(Figure 14)**

AGE GROUPS		
Age	Number	Percent
< 25	98	0.10%
25-29	7,702	7.90%
30-34	12,653	12.99%
35-39	11,526	11.83%
40-44	10,323	10.60%
45-49	12,466	12.80%
50-54	11,157	11.45%
55-59	9,908	10.17%
60-64	8,010	8.22%
65-69	6,310	6.48%
70-74	3,681	3.78%
75-80	1,714	1.76%
> 80	1,869	1.92%
Totals	**97,417**	**100.00%**

Figure 14

D. OTHER ADMISSIONS

Close to seventy-nine percent (78.9%) of the 97,727 attorneys for whom some registration information was available were admitted to other jurisdictions. Twenty-one percent (21.06%) of all attorneys were admitted only in New Jersey.

OTHER ADMISSIONS		
Admissions	Attorneys	Percent
Only In New Jersey	20,581	21.06%
Additional Jurisdictions	77,146	78.94%
Totals	**97,727**	**100.00%**

Figure 15

ADMISSIONS IN OTHER JURISDICTIONS

Jurisdiction	Admissions	Percent	Jurisdiction	Admissions	Percent
New York	42,855	42.89%	Nevada	109	0.11%
Pennsylvania	25,658	25.68%	West Virginia	103	0.10%
District of Col.	6,687	6.69%	South Carolina	86	0.09%
Florida	3,313	3.32%	Vermont	85	0.09%
California	1,873	1.87%	Kentucky	82	0.08%
Connecticut	1,588	1.59%	Rhode Island	81	0.08%
Massachusetts	1,420	1.42%	New Mexico	73	0.07%
Maryland	1,188	1.19%	Hawaii	72	0.07%
Delaware	787	0.79%	Oregon	72	0.07%
Virginia	722	0.73%	Alabama	60	0.06%
Illinois	702	0.70%	Virgin Islands	52	0.05%
Texas	581	0.58%	Kansas	49	0.05%
Georgia	520	0.52%	Iowa	44	0.04%
Colorado	449	0.45%	Oklahoma	34	0.03%
Ohio	425	0.43%	Arkansas	33	0.03%
North Carolina	323	0.32%	Utah	31	0.03%
Michigan	278	0.28%	Puerto Rico	30	0.03%
Arizona	277	0.28%	Montana	27	0.03%
Minnesota	183	0.18%	Alaska	26	0.03%
Missouri	171	0.17%	Mississippi	26	0.03%
Washington	160	0.16%	Idaho	16	0.02%
Wisconsin	137	0.14%	North Dakota	15	0.02%
Tennessee	134	0.13%	South Dakota	7	0.01%
Louisiana	129	0.13%	Guam	4	0.00%
Maine	123	0.12%	Nebraska	0	0.00%
New Hampshire	113	0.11%	Wyoming	0	0.00%
Indiana	110	0.11%	Invalid Responses	7,796	7.81%
			Total Admissions	**99,919**	**100.00%**

Figure 16

E. PRIVATE PRACTICE

Of the 97,727 attorneys on whom registration information was tabulated, 37,440 stated that they engaged in the private practice of New Jersey law, either from offices within New Jersey or at locations elsewhere. For a detailed breakdown of the locations of offices (primarily New Jersey, Pennsylvania, New York and Delaware), see **Figure 17**. Thirty-eight percent (38.3%) of the attorneys engaged in the private practice of New Jersey law, while sixty-two percent (61.7%) did not practice in the private sector.

Of those who engaged in the private practice of New Jersey law, almost fifty-nine percent (58.5%) practiced full-time, nineteen percent (19.2%) rendered legal advice part-time and eighteen percent (18.1%) engaged in practice occasionally (defined as less than 5% of their time). Four percent (4.1%) of responses were unspecified.

Private Practice of New Jersey Law

PRIVATE PRACTICE OF NEW JERSEY LAW			
Response		**Number**	**Percent**
NO		60,287	61.69%
YES		37,440	38.31%
Full-time	21,912		
Part-time	7,193		
Occasionally	6,790		
Unspecified	1,545		
Total		**97,727**	**100%**

Figure 17

1. Private Practice Firm Structure

Of the 37,440 attorneys who indicated they were engaged in the private practice of New Jersey law, 95.5% (35,738) provided information on the structure of their practice. More than thirty-two percent (32.3%) of the responding attorneys practiced in sole proprietorships (sole practitioners (10,427) plus sole stockholders (1,127)). The next largest group were partners at 29% (10,357), associates at 28.5% (10,200), followed by attorneys who were of counsel with 6.7% (2,389) and other than sole stockholders with 3.5% (1,238).

Private Firm Structure

PRIVATE PRACTICE STRUCTURE		
Structure	**Number**	**Percent**
Sole Practitioner	10,427	29.18%
Sole Stockholder	1,127	3.15%
Other Stockholders	1,238	3.46%
Associate	10,200	28.54%
Partner	10,357	28.98%
Of Counsel	2,389	6.69%
Total	**35,738**	**100.00%**

Figure 18

2. Private Practice Firm Size

Ninety-five percent (35,551) of those attorneys who identified themselves as being engaged in the private practice of law indicated the size of the law firm of which they were a part. More than thirty-one percent (11,093) said they practiced alone; 9.4% (3,344) worked in two-person law firms; 13.9% (4,930) belonged to law firms of 3-5 attorneys;

27.1% (9,630) were members of law firms with 6-49 attorneys and 18.4% (6,554) worked in firms with 50 or more attorneys.

PRIVATE FIRM SIZE

Firm Size	Number	Percent
One	11,093	31.20%
Two	3,344	9.41%
3 to 5	4,930	13.87%
6 to 10	3,473	9.77%
11 to 19	2,660	7.48%
20 to 49	3,497	9.84%
50 >	6,554	18.43%
Total	**35,551**	**100.00%**

Figure 19

3. Private Practice Law Firm Number

No exact figures exist on the number of law firms that engage in the private practice of New Jersey law. Nevertheless, a reasonably accurate estimate can be made based on the 37,440 attorneys who indicated they engaged in the private practice of New Jersey law. A total of 35,551 (95%) indicated the size of their law firm. In each firm size category that was non-exclusive (i.e., other than 1 or 2), the total number of attorneys responding was divided by the mid-point in that category. For firms in excess of 50 attorneys, the total number of attorneys responding was divided by 50. Three-quarters of all law firms (74.8%) were solo practice firms, while just 5.7% had 6 or more attorneys.

NUMBER OF LAW FIRMS

Size Of Law Firm	Number Of Attorneys	Firm Size Midpoint	Number Of Firms	Individual Category %
One	11,093	1	11,093	74.75%
Two	3,344	2	1,672	11.27%
3 to 5	4,930	4	1,233	8.31%
6 to 10	3,473	8	434	2.93%
11 to 19	2,660	15	177	1.19%
20 to 49	3,497	35	100	0.67%
50 >	6,554	50	131	0.88%
Total	**35,551**		**14,840**	**100.00%**

Figure 20

4. Bona Fide New Jersey Offices

New Jersey attorneys are no longer required to maintain a bona fide office in New Jersey. Nevertheless, more than seventy-six percent (76.4%) of New Jersey attorneys (28,169) have a bona fide office in the state. Almost twenty-four percent (23.6%) of New Jersey attorneys (8,634) had offices located in other jurisdictions: New York 11.7% (4,300), Pennsylvania 10.2% (3,770), Delaware less than 1% (115), and various other United States jurisdictions represent 1.2% (449), while less than one percent (.20) failed to indicate their state.

BONA FIDE PRIVATE OFFICE LOCATIONS		
State	Number	Percent
New Jersey	28,169	76.39%
Pennsylvania	3,770	10.22%
New York	4,300	11.66%
Delaware	115	0.31%
Other	449	1.22%
No State Listed	73	0.20%
Total	36,876	100%

Figure 21

5. Bona Fide Private Office Locations

Of the 28,168 attorneys engaged in private practice of New Jersey law from offices located within this state, 99.9% (28,166) indicated the New Jersey County in which their primary bona fide office was located, while 2 attorneys did not. Essex County housed the largest number of private practitioners with 15.8% (4,444), followed by Bergen County with 12.7% (3,581). Morris County was third at 11.7% (3,287) and Camden County was fourth with 9.2% (2,588).

ATTORNEYS WITH BONA FIDE OFFICES					
County	Number	Percent	County	Number	Percent
Atlantic	644	2.29%	Middlesex	1,807	6.42%
Bergen	3,581	12.71%	Monmouth	2,064	7.33%
Burlington	1,391	4.94%	Morris	3,287	11.66%
Camden	2,588	9.18%	Ocean	755	2.68%
Cape May	166	0.59%	Passaic	856	3.04%
Cumberland	166	0.59%	Salem	54	0.19%
Essex	4,444	15.77%	Somerset	1,008	3.58%
Gloucester	386	1.37%	Sussex	227	0.81%
Hudson	1,050	3.73%	Union	1,471	5.22%
Hunterdon	320	1.14%	Warren	137	0.49%
Mercer	1,764	6.26%	No County Listed	2	0.01%
			Total	28,168	100.00%

Figure 22

APPENDIX BB

2016–2017

Standing Committee on

LAWYERS' PROFESSIONAL LIABILITY

Statistical consulting services donated by Milliman, a firm of actuaries and consultants.

In particular, the Committee thanks Susan Forray, FCAS, MAAA, and Jane Dake for their work on this study. Milliman is a firm of consultants and actuaries serving the full spectrum of business, governmental, and financial organizations. Founded in 1947, the firm has 48 offices in the United States as well as offices in the Asia-Pacific, Europe, and Latin America. Further information is available at www.milliman.com.

If you would like more information about the work of the Standing Committee on Lawyers' Professional Liability please contact us at:

Standing Committee on
Lawyers' Professional Liability
321 N. Clark Street
Chicago, IL 60654
Phone: 312.988.5754
www.ambar.org/lpliability

TABLE OF CONTENTS

V. THE 2012–2015 DATA AND COMPARISONS TO PRIOR DATA SETS

A. Table 1: Number of Claims by Area of Law

Table 1 presents the number of claims reported in each Area of Law with the relative frequency in each area stated as a percentage. Table 1 also contains the results of prior data sets. Throughout this edition of the study, the 2012–2015 data are collectively referred to as the "2015 Study." Similarly, data from prior editions are referred to as the "Study" of the last year covered in each period (e.g., the 1990–1995 data collection is called the "1995 Study"). Table 1 contains columns comparing changes in claims frequency among the studies. A negative number (in parentheses) means that insurers reported proportionately fewer claims in that area of law for the period. A positive number (no parentheses) represents an increase.

What is observed when comparing the 2015 Study with that of the prior period is what can be characterized as a return to the status quo in the distribution of claims across the top areas of law. Since the 1985 Study, Personal Injury—Plaintiff has been the top area of practice generating claims, but this changed in the 2011 Study where this area dropped to second-place behind Real Estate. In the 2015 Study, Personal Injury—Plaintiff claims rose 2.65 percent, while Real Estate declined by a significant 5.45 percent, which is, interestingly, nearly the same decrease in Personal Injury—Plaintiff claims that were observed in the 2011 Study.

Also of interest continues to be the Family Law area. Since the 1985 Study, this area has seen net positive increases in reported claims with only one exception, where the 1999 study saw about a half-percentage point decline (in line with declines in all top-five areas that year). Yet between 2007 and 2011, this area saw an uptick in claims of 1.81 percent, followed by another increase of 1.37 percent in the 2015 Study. This change is not enough to move Family Law from its traditional third-place position going back to the 1985 Study, but it does seem to illustrate a steady upward trend, now placing Family Law within less than 3.5 percent of moving into second place, which is by far the narrowest margin in the thirty years of data.

Finally, it is worth noting that the 2015 Study includes, for the first time, Insurance Defense as its own area. This appears to occupy a fairly small percentage of the overall claims picture, but it will be interesting to observe whether that changes in any appreciable way in future studies.

Table 1 Number of Claims by Area of Law: 1985 STUDY - 2015 STUDY

	2015 STUDY		2011 STUDY		Change 2011 to 2015	2007 STUDY	Change 2007 to 2011	2003 STUDY	Change 2003 to 2007	1999 STUDY	Change 1999 to 2003	1995 STUDY	Change 1995 to 1999	1985 STUDY	Change 1985 to 1995
AREA OF LAW	Number	Percent	Number	Percent		Percent		Percent		Percent		Percent		Percent	
Personal Injury – Plaintiff	8059	18.24	8,260	15.59	2.65	21.56	(5.97)	19.96	1.60	24.60	(4.64)	21.65	2.96	25.08	(3.44)
Real Estate	6577	14.89	10,772	20.33	(5.45)	20.05	0.28	16.46	3.59	16.97	(0.51)	14.35	2.62	23 29	(8.94)
Family Law	5970	13.51	6,432	12.14	1.37	10.33	1.81	9.58	0.75	10.13	(0.56)	9.13	1.00	7.88	1 25
Estate, Trust and Probate	5326	12.05	5,652	10.67	1.39	9.68	0.99	8.63	1.05	8.67	(0.04)	7.59	1.08	6.97	0.62
Collection and Bankruptcy	4680	10.59	4,876	9.20	1.39	7.27	1.93	7.92	(0.65)	8.00	(0.08)	7.91	0.09	10.49	(2.58)
Criminal	2474	5.60	2,996	5.65	(0.06)	5.08	0.58	4.19	0.89	4.15	0.04	3.82	0.34	3.34	0.48
Business Transaction Commercial Law	2343	5.30	2,176	4,11	1.20	4.70	(0.59)	3.18	1.52	3.62	(0.44)	10.66	(7.04)	3.04	7,62
Corporate/Business Organization	1961	4.44	3,597	6,79	(2.35)	4.94	1.85	6.37	(1.43)	8.57	(2.20)	8.87	(0.31)	5 32	3 56
Patent, Trademark, Copyright	1029	2.33	926	1.75	0.58	1.69	0.06	1.78	(0.09)	1.04	0.74	0.94	0.10	0.57	0.37
Personal Injury – Defense	889	2.01	1,727	3 26	(1.25)	2.93	0.33	9.96	(7.03)	4.10	5.86	3.27	0.84	3 22	0.04
Labor Law	845	1.91	1,160	2.19	(0.28)	1.41	0.78	1.55	(0.15)	2.22	(0.67)	1.41	0.81	0.66	0.75
Worker's Compensation	810	1.83	1,007	1.90	(0.07)	2.02	(0.12)	2.27	(0.25)	1.86	0.41	3.30	(1.43)	2.14	1.16
Civil Rights Discrimination	575	1.30	431	0 81	0.49	1.13	(0.32)	1.68	(0.55)	1.10	0.58	0.57	0.53	1.09	(0.52)
Taxation	508	1.15	612	1.16	(0.01)	1.41	(0.25)	1.41	(0.01)	1.12	0.29	1.59	(0.47)	1.57	0.02
Immigration/Naturalization	403	0.91	405	0.76	0.15	0.46	0.30	0.40	0.06	0.48	(0.07)	0.19	0.29	0.10	0.09
Insurance Defense	324	0.73			0.73										
Local Government	289	0.65	386	0.73	(0.07)	0.95	(0.22)	0.57	0.38	0.44	0.13	0.72	(0.28)	0.65	0.07
Securities (S.E.C.)	247	0.56	331	0.62	(0.07)	0.85	(0.23)	1.81	(0.95)	1.49	0.32	1.92	(0.43)	1.99	(0.07)
Government Contracts/Claims	230	0.52	359	0.68	(0.16)	0.33	0.34	0.35	(0.01)	0.21	0.14	0.22	(0.01)	0.35	(0.13)
Construction (Building Contracts)	214	0.48	390	0.74	(0.25)	0.50	0.23	0.32	0.19	0.25	0.06	0.69	(0.44)	0.78	(0.09)
Consumer Claims	194	0.44	235	0.44	(0.00)	0.33	0.12	1.22	(0.89)	0.36	0.86	0.28	0.08	0.66	(0.38)
Natural Resources	85	0 19	84	0.16	0.03	0.09	0.07	0.10	(0.01)	0.15	(0.05)	0.25	(0.10)	0.21	0.04
Environment Law	56	0.13	73	0.14	(0.01)	0.13	0.00	0.13	0.01	0.26	(0.13)	0.23	0.02	0.11	0.13
International Law	55	0.12	12	0 02	0.10	2.05	(2.02)	0.04	2 01	0.02	0.02	0 08	(0.06)	0.04	0.04
Admiralty	24	0.05	43	0.08	(0.03)	0.06	0.02	0.06	0.00	0.15	(0.09)	0.22	(0.08)	0.29	(0.07)
Antitrust	18	0.04	40	0.08	(0.03)	0.04	0.04	0.04	(0.00)	0.02	0.02	0.12	(0.10)	0.15	(0.03)
Total	44,185	100.00	52,982	100.00		100.00		100.00		100.00		100.00		100.00	

APPENDIX CC

USI AFFINITY

Memo

Mike Mooney
Senior Vice President – Professional Liability Practice Leader
USI Affinity
One International Plaza
Suite 400
Philadelphia, PA 19113
610-537-1441
Fax: 610-537-2057

From: Mike Mooney

Date: 3/14/17

Re: **NJ Legal Malpractice Landscape Brief**

New Jersey (NJ) is among the worst states when it comes to Legal Malpractice performance from a frequency and severity perspective. When I speak to performance, I am referring to the number of claims and the high payouts that insurance carriers in NJ have to routinely pay out. The high frequency and severity of these payouts lead to unprofitable business for carriers and an untimely exit from the NJ marketplace. In order for a carrier to participate in a state, they need to write their business to an underwriting profit. For many years in the NJ marketplace, carriers have not been able to write to an underwriting profit, which has led to a lack of competition. Ultimately, this results in high premiums for NJ attorneys. Logically, it is simple supply and demand.

As we look at NJ's performance, it is important that we compare our findings to that of similar states. With that comparison, we can draw educated conclusions regarding performance. For the comparison, I analyzed Pennsylvania (PA) and New York (NY) not only because of the geographic proximity, but a few other factors. I wanted to compare not only the legal environment but also the socioeconomic environment of the clients the attorneys represent. NJ, NY and PA all have similar unemployment rates (the variance between high and low is only 1.6%) and median household incomes over the national average. NJ, NY and PA all have divorce rates below 10%, which ranks each in the top ten lowest states. All three states also have similar distributions of education levels (high school completion in the upper 80%, bachelor degrees in the 30% range and advanced degrees in the low teens). The only main difference among the three states is the population numbers.

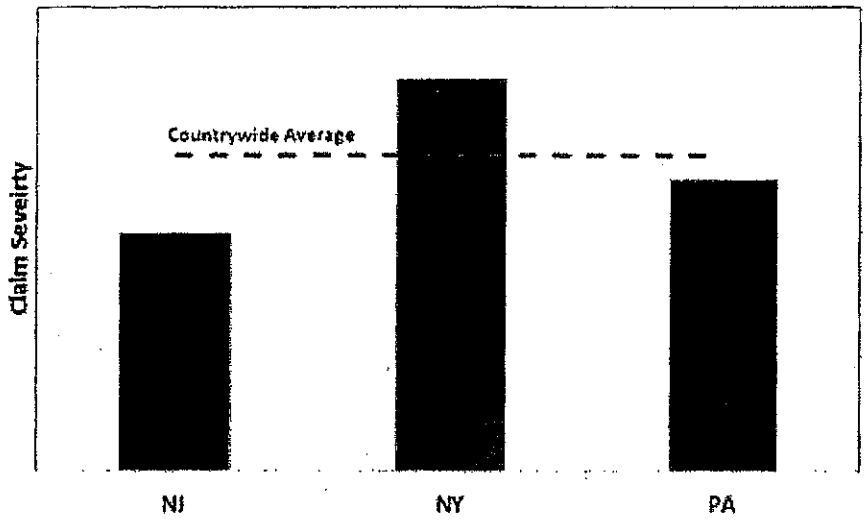
For comparative purposes, I looked at each states' claims data. As the largest writer of Legal Malpractice Insurance in NJ, NY and PA, USI Affinity have very credible data. First, I looked at the number of claims and found that NJ is only state of the three that is above the national average. NJ claims frequency is double that of both NY and PA. NJ has fewer attorneys in private practice compared to both NY and PA and, yet, they have more claims than both states. Next, I looked at the average claim costs per attorney and, again, NJ was the only state with an average above the countrywide average, which was roughly 50% higher than NY and almost double that of PA.

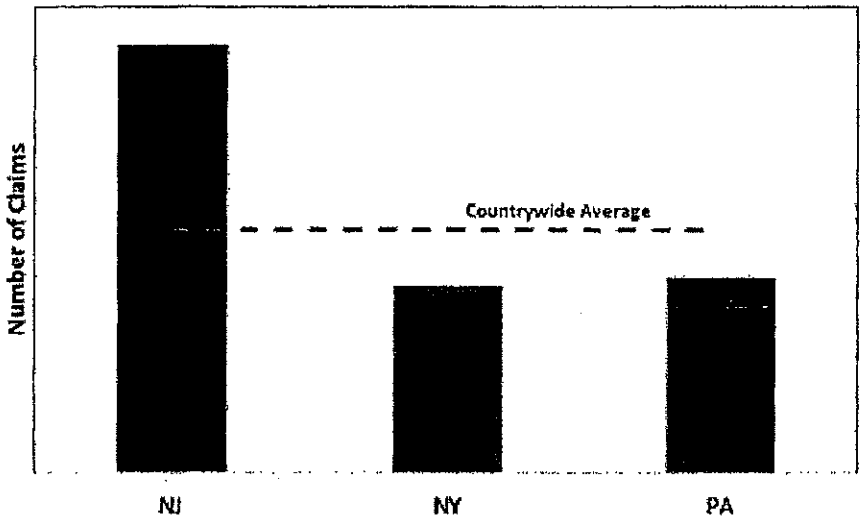
As I look at the claim relativity and the socioeconomic elements of the three aforementioned states, the only factors that make NJ unique from a Legal Malpractice perspective are the six-year statute of limitations and the Safer Fees. Generally, these factors make claims more expensive to settle and expose carriers to more claims due to the length of the statute.

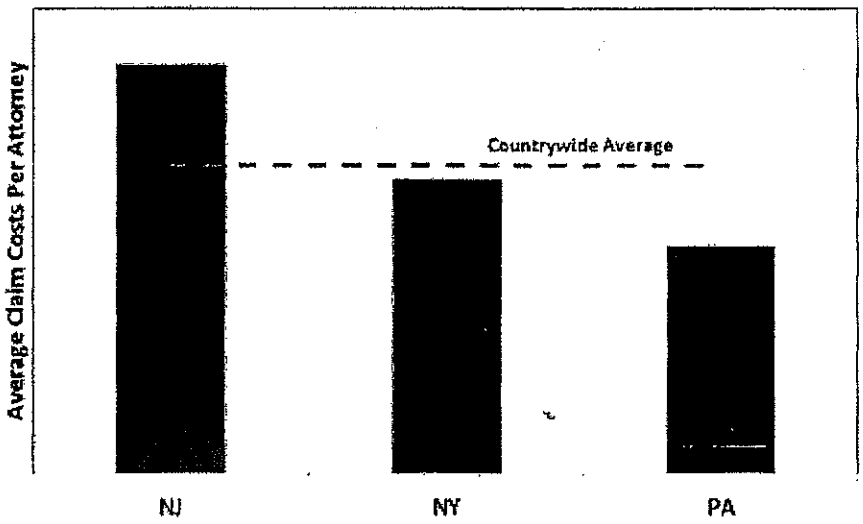
With NJ's heightened payout frequency and cost for Legal Malpractice compared to most other states, has greatly affected the competitive landscape for Malpractice Carriers. There has been more turnover in carriers within NJ than most other states as carriers enter and then quickly exit the marketplace. To give perspective, there are now more than twenty-five carriers admitted to write business in NJ, yet roughly only five are actually writing and renewing business.

APPENDIX DD

Bar Graphs Reflecting Average Claim Costs in New Jersey, New York, and Pennsylvania







APPENDIX EE

Rate Level History for Lawyers

Company	Filing #	Eff Date	Rate Change	Dollar Impact	# of policies
Amercian Alternate Insurance Corporation Amercian Family Insurance Company Amercian Southern Home Insurance Company	13 - 2618	2/6/2014	NEW		
Allied World Insurance Company	16 - 0611	8/1/2016	+13.00%	$603,903	379
	13 - 1717	3/1/2014	NEW		
Allied World National Assurance Company	08 - 2092	12/30/2008	NEW		
Allied World Specialty Insurance Company	08 - 2983	1/1/2009	+4.60%	$6,655	25
formerly Darwin National Assurance Company	08 - 0038	5/1/2008	-1.30%	-$3,641	40
	06 - 1378	5/1/2008	NEW		
American Guarantee & Liability Insurance Co	12 - 0006	3/15/2012	+7.40%	$165,025	313
	10 - 0785	6/1/2010	-21.30%	-$874,112	634
	09 - 1913	2/19/2010	0.00%	$0	737
	07 - 2681	2/19/2008	+25.00%	$9,878,249	1,530
	06 - 1059	3/1/2002	+12.00%	$0	0
American Safety Casualty Insurance Company	03 - 0505	2/10/2003	+14.20%	$200,033	243
	01 - 2254	11/15/2001	+12.50%	$51,596	80
Arch Insurance Company	09 - 0656	8/1/2009	+17.70% *	$795,569	598
	03 - 1485	10/29/2003	NEW		
Argonaut Insurance Company	14 - 2756	1/1/2015	NEW		
Atlantic Specialty Insurance Company	11 - 1927	10/17/2011	NEW		
Berkley Insurance Company	15 - 0156	5/1/2015	NEW		
Carolina Casualty Insurance Company	12 - 0021	3/6/2012	+12.90%	$22,403	20
	10 - 0368	7/28/2010	NEW		
Catlin Insurance Company, Inc.	09 - 1093	11/24/2009	NEW		
Chicago Insurance Company	03 - 1265	1/1/2004	+25.00%	$38,529	121
	01 - 1260	12/1/2001	NEW		
Clarendon National Insurance Company	03 - 1588	11/1/2003	+21.20%	$186,224	222
	02 - 0862	11/1/2003	+21.60%	$242,532	361
Continental Casualty Company	14 - 2608	3/1/2015	2.00%	$91,692	752
Continental Insurance Company of New Jersey	13 - 2888	2/1/2014	+4.10%	$197,587	880
	12 - 1959	1/1/2013	+6.00%	$296,093	1,014
	11 - 0772	4/1/2011	+10.20%	$552,348	1,103
	07 - 0268	5/1/2007	+6.40%	$513,000	2,319
	05 - 2445	3/1/2006	+25.00%	$336,000	755
	04 - 0441	6/1/2004	+19.00%	$1,895,000	2,984
	02 - 1046	11/1/2002	+52.70%	$497,925	258
General Star National Insurance Company	07 - 1708	12/4/2007	NEW		
Great American Insurance Company	06 - 1041	7/1/2006	+7.40%	$150,960	30
	03 - 3025	1/15/2004	+23.00%	$245,000	500
	02 - 0598	4/1/2002	+17.00%	$244,635	111
Greenwich Insurance Company	09 - 0102	4/9/2009	+5.00%	$10,962	17
	06 - 0579	6/1/2006	-18.80%	$90,342	66
	03 - 2624	6/1/2004	NEW		
Hanover Insurance Company	10 - 2029	12/21/2010	NEW		
Hartford Group (Spectrum Program)	08 - 1279	6/8/2008	+28.70%	$640,805	889
Ironshore Indemnity Corporation	15 - 0091	3/13/2015	+19.60%	$734,326	668
	09 - 1560	12/21/2009	NEW		

Rate Level History for Lawyers

Company	Filing #	Eff Date	Rate Change	Dollar Impact	# of policies	
Knightbrook Ins Co	10 - 2589	3/9/2011	NEW			
Liberty Insurance Underwriters, Inc.	08 - 2311	11/17/2008	NEW			
Medmarc Casualty Insurance Company	14 - 2870	8/1/2015	NEW			
MN Lawyers Mutal Insurance Company	02 - 0294	6/15/2003	NEW			
National Surety Corporation	14 - 2778	5/1/2015	NEW			
Navigators Insurance Company	11 - 0501	6/15/2011	NEW			
NCMIC Insurance Company	05 - 0489	3/1/2005	+20.00%	$152,427	88	
	04 - 0443	8/1/2004	NEW			
New York Marine and General Ins Co	10 - 2424	1/31/2011	NEW			
OneBeacon Insurance Company	11 - 1515	9/1/2011	+35.00%	$2,284,407	606	
	07 - 0494	5/4/2007	NEW			
ProAssurance Casualty Company	12 - 0681	8/1/2012	+5.00%	$133,890	1,005	Run-off?
	08 - 2006	10/20/2008	NEW			
Sentinel Ins Co Ltd. (Growing Spectrum Program)	09 - 0720	6/6/2009	NEW			
SPARTA Insurance Company	12 - 1092	9/7/2012	NEW			
Torus National Insurance Company	12 - 0065	5/11/2012	NEW			
Travelers Casualty & Surety Company of America	14 - 1344	2/1/2015	45.60%	$1,166,888	328	
	13 -0580	7/1/2013	+20.00%	$664,170	568	
	10 - 0119	6/1/2010	+15.00%	$681,923	636	
	08 - 1435	1/1/2009	NEW			
Twin City Fire Insurance Company	13 - 0138	3/1/2013	+66.40%	$2,155,178	529	
	11 - 2344	12/30/2011	+25.00%	$669,677	459	
	08 - 1222	6/5/2008	+12.60%	$434,807	632	
	05 - 0908	8/1/2005	NEW			
US Fire Insurance Company North River Insurance Company	10 - 1662	11/22/2010	NEW			
US Specialty Insurance Company	15 - 1697	9/9/2015	NEW			
Wesco Insurance Company	12 - 0643	7/15/2012	NEW			
Westport Insurance Corporation	12 - 0269	9/1/2012	+4.50%	$61,293	99	
	11 - 0284	9/1/2011	+7.50%	$177,423	202	
	10 - 0117	9/1/2010	+13.70%	$592,732	276	
	09 - 0439	9/1/2009	+5.00%	$252,140	291	
	08 - 1046	9/1/2008	-15.00%	-$801,750	340	
	06 - 0136	9/1/2006	+5.00%	$137,201	243	
	03 - 0310	6/1/2003	+10.00%	$298,257	290	
	01 - 1584	12/15/2001	+18.25%	$310,330	206	

APPENDIX FF

USI AFFINITY

Memo

Mike Mooney
Senior Vice President – Professional Liability Practice Leader
USI Affinity
One International Plaza
Suite 400
Philadelphia, PA 19113
610-537-1441
Fax: 610-537-2057

From: Mike Mooney

Date: 3/29/17

Re: **NJ Legal Malpractice – Base Rate**

As it relates to pricing on Legal Malpractice, New Jersey(NJ) base rates per attorney, on average, are significantly more costly than other states that are geographic situated near NJ. Compared to New York, NJ base rates are on average 49% higher per attorney. Compared to Pennsylvania, NJ based rates are, on average, 23% higher per attorney. Compared to Maryland, NJ base rates are, on average, 33% higher.