



**MINUTES
BOARD OF GOVERNORS MEETING
Las Vegas, NV
November 8, 2017**

A meeting of the Board of Governors of the State Bar of Nevada was convened on November 8, 2017.

The following members were in attendance:

Gene Leverty, President
Richard Pocker, President-Elect
Paul Matteoni, Vice President
Bryan Scott, Immediate Past President
Jeff Albregts
Paola Armeni
Julie Cavanaugh Bill
Doug Clark
Eric Dobberstein
Richard Dreitzer
Jack Howard
Cathy Mazzeo
Ann Morgan
Ryan Russell
Kari Stephens
Ryan Works

State Bar staff present:

Kimberly Farmer
Gale Skala
Lisa Dreitzer
Shelley Young
Marc Mersol
Stan Hunterton

Guests:

Rew Goodenow
Chris Newbold
Robert Eglet
Karl Riley
Elana Graham
Connie Akridge

CALL TO ORDER

President Gene Leverty called the meeting to order with a quorum present at 9:45 am.

PRESIDENT'S REPORT

Gene Leverty presented an overview of the annual meeting's rule of law theme and discuss various promotion ideas for the annual meeting.

SUCCESSION PLANNING

Kim Farmer reviewed the new publication, *Succession Planning in Nevada, 2017 Edition*. Ms. Farmer discussed how the Succession Planning Guide in Nevada is a resource book to help attorneys close their practice or plan for an unexpected medical crisis or death. Ms. Farmer gave a synopsis of how the state bar will let members know the guide is available, i.e. family law conference, section leaders and CLE programs.

STRATEGIC PLAN

Kim Farmer spoke about the 2013-2018 Strategic Plan of the State Bar. Ms. Farmer requested that Board members review the current Strategic Plan. A taskforce was formed to develop a draft of a new strategic plan. Members of the taskforce are Ann Morgan, Richard Dreitzer, Julie Cavanaugh Bill, Jeff Albregts, Richard Pocker and Gene Leverty.

DISCUSSION

Professional Liability Insurance (PLI) Taskforce

Gene Leverty reported on the recent meeting of the PLI taskforce.

The PLI Taskforce recommended the following:

- (1) Require all attorneys engaged in the practice of law (not government or corporate counsel) to carry a minimum insurance policy of \$250,000 per claim/\$250,000 annual aggregate. Attorneys must use Insurance carriers authorized to transact legal professional liability insurance in Nevada and who agree to report any lapse or termination of the policy to the state bar.
- (2) Make mandatory disclosure to clients the amount of insurance coverage the attorney has prior to engaging in representation.

Robert Eglet presented his views regarding requiring mandatory PLI. Mr. Eglet recommended that if the state bar does not make PLI mandatory, a disclosure should be in the attorney fee agreement noting that the attorney does not carry malpractice insurance.

Chris Newbold, ALPS, reported on the status of states that currently require attorneys to carry Professional Liability Insurance.

After much discussion, it was moved, seconded and carried to approve the recommendation of the taskforce that attorneys engaged in the practice of law (not government or corporate counsel) carry a minimum insurance policy of \$250,000 per claim/\$250,000 annual aggregate. Before submitting an ADKT to the Court reflecting this motion, a survey requesting the opinion of state bar members will be conducted.

It was moved, seconded and carried that an alternative plan can be proposed during the petition process that mandates that if an attorney does not carry professional liability insurance, he/she must disclose such in writing to clients.

Reciprocity

Ann Morgan gave a synopsis of the recent taskforce meeting on reciprocity. The following ADKTs are before the Board for review and approval to revise the Supreme Court Rules regarding certifications:

- Elimination of certification for State Bar of Nevada staff not licensed in Nevada (SCR 49.6)
- Elimination of certification for Nevada Attorney General staff (SCR 49.8)
- Addition of a certification of attorney spouses of active military.

It was moved, seconded and carried to approve the ADKT proposing certification of attorney spouses of active military.

It was moved, seconded and carried to table the ADKT proposing elimination of certification for Nevada Attorney General staff and State Bar of Nevada staff not licensed in Nevada.

SCR 214 CLE

Kim Farmer reviewed the proposed ADKT eliminating the SCR 214 (1)(d) provisions that exempts active members 70 and over from fulfilling CLE requirements. A draft petition was prepared after the Board approved moving forward in August 2016. Subsequently the Board directed tabling the submission of this ADKT. Ms. Farmer asked for the Board's direction regarding whether to submit the ADKT to the Court. It was moved, seconded and carried to table the submission of the ADKT.

DISCIPLINE REPORT

Stan Hunterton reported on the progress the Office of Bar Counsel (OBC) has made in the backlog cases. Mr. Hunterton noted that 74 orders have been received from the Supreme Court since January 2017.

Mr. Hunterton gave an overview of the training sessions with the individuals currently "chairing" disciplinary hearings on the amendments to the disciplinary Rules of Procedure. OBC has also created an ABA Standards training manual for the panels.

DISCIPLINE STATISTICS

HEARINGS COMPLETED:

2017	Total Respondents	Total Grievants	Total Grievants Over 6 Months from Investigation Opened
January	7	10	9
February	3	4	4
March	11	19	18
April	7	25	24
May	9	29	27
June	10	23	23
July	9	24	22
August	5	9	9
September	6	6	4
October	5	22	21
November Scheduled	7	19	17

INTAKE:

Grievances Pending in Intake	
January 2015	100
January 2017	81
February 2017	90
March 2017	100
April 2017	124
May 2017	113
June 2017	76
July 2017	67
August 2017	56
September 2017	57
October 2017	81

2 Grievances over ninety (90) days old

MATTERS IN INVESTIGATION:

	Grievances	Grievances Pending over 6 months
July 2014	538	377
January 2015	441	283
January 2016	243	89
January 2017	79	6
February 2017	73	8
March 2017	109	12
April 2017	90	4
May 2017	110	2
June 2017	119	10
July 2017	139	8
August 2017	142	12
September 2017	121	9
October	106	14*

* Of the fourteen (14) matters in investigation older than six (6) months, four (4) matters are general matters opened to monitor pending criminal convictions to file the required 111 Petitions; two (2) matters were opened on suspended attorneys to subpoena bank records and monitor transactions as required by the Supreme Court.

PROSECUTION/PENDING HEARING:

	Total Grievants	Total Respondents	Total Respondents Over 6 months from Complaint
July 2014	415	114	71
January 2015	268	89	61
January 2016	140	69	61
January 2017	123	59	23
February 2017	152	65	54
March 2017	149	62	57
April 2017	110	44	22
May 2017	107	48	19
June 2017	108	52	23
July 2017	82	42	15
August	87	46	17
September	75	38	9
October	71	45	16

Kim Farmer presented an overview of the proposed ADKT's 444 and 525. The public hearing regarding ADKT 444 (SCR111 Criminal Conviction) and ADKT 525 (SCR116 Reinstatement) was held on Monday, November 6, 2017. Because of questions and comments from the Court, and at their request, the proposed rule changes were revised. It was moved, seconded and carried to authorize the Executive Committee to review the final draft of the supplement to the ADKT's. Upon the Executive Committee approval, the supplements to ADKT 444 and 525 will be submitted to the Court.

REPORTSNational Mock Trial Competition

Paul Matteoni reported on the upcoming National Mock Trial Competition in Reno scheduled May 10-12, 2018. Mr. Matteoni highlighted that the program will require approximately 300 volunteers for the competition.

Diversity

Bryan Scott presented an overview of the Demographic Initiative (DI). State Bar staff has programmed the DI

questions into the license renewal system. This initiative will be communicated to the members in Nevada Lawyer, e-newsletter and through the Bar's social media outlets.

Past Presidents Club

Gene Leverty gave a synopsis of the proposed Past Presidents Club. This Club will consist of past presidents of the State Bar.

Young Lawyers Section Report

Karl Riley presented an overview of the recent events of the Young Lawyers Section (YLS). The membership of YLS has risen to over 800 members.

EXECUTIVE SESSION

The Board entered Executive Session at 11:25 am and concluded at 12:15 pm.

ACTION ITEMS

Financial Report

Marc Mersol reviewed the financial operations as of September 2017. It was moved, seconded and carried to accept the September 30, 2017 Financial Operations report.

Mr. Mersol presented the 2018 proposed budget. It was moved, seconded and carried to approve the proposed 2018 budget.

Kim Farmer discussed the designated funds and grant process of Lawyer Referral and Information Service (LRIS) grant program. After discussion it was moved, seconded and carried to cease the LRIS granting program for 2018.

Tenant Lease

Kim Farmer presented an overview of the tenants in the building. Two tenants are set to move out of 3100 West Charleston in the next year. Ms. Farmer noted that she is currently interviewing brokers to lease the space (Suite 210, aka the pediatrician and Suite 204, aka the eye doctor). Ms. Farmer gave an overview of the necessary tenant improvements (TI) for both spaces before leasing.

It was moved, seconded and carried authorize the Executive Committee to approve a tenant broker for marketing and leasing suites 204 and 210 and to approve TIs as recommended.

Random Trust Accounts Audit

Richard Dreitzer reviewed the recommendations of the Trust Account Audit taskforce. Kim Farmer gave a synopsis of the survey noting that comments range from full support to concerns over costs and process. At the time of the Board meeting, the survey was not closed. Upon discussion, it was moved, seconded and carried to table the proposed ADKT.

Fee Dispute Arbitration Rules of Procedure

Lisa Dreitzer discussed the proposed amendments to the Fee Dispute Arbitration Rules of Procedure which:

- (1) Limit the number of members on the Committee to 150; and
- (2) Establish lifetime term limits of 12 years.

It was moved, seconded and carried to approve the proposed amendments to the Fee Dispute Arbitration Rules of Procedure.

Personal Injury Specialization Rules

Gene Leverty presented to the proposed amendments to the Personal Injury Specialization Rules. The proposed changes are:

- Break the current rules into three separate sections: organizational structure, qualifications and recertification. This is just an administrative fix for us and will make it easier for applicants to find important information.

- Clarify the testing process will happen only one time per each calendar year, in the fall. We simply do not have the demand or resources to accommodate more testing. This is in section IV(F).
- Redraft section V(M) for purposes of clarity. We are adding bullets to ensure the specifications are readily understandable. Additionally, we are lowering the number of times substitutions can be used as there is an interpretation of the rules which could allow for too many substitutions.

It was moved, seconded and carried to approve the proposed amendments to the Personal Injury Specialization Rules

Workman's Compensation Specialization

The Nevada Justice Association is seeking the approval from the Board of Governors to implement a Workers' Compensation Specialization. Gene Leverty outlined the proposed rules and regulations of the Workers' Compensation Specialization. Upon making the following amendments to the rules and regulations, it was moved, seconded and carried to approve Workers' Compensation Specialization program.

- Applicants must have handled a minimum of fifty (50) contested workers' compensation hearings before a Nevada Department of Administration Appeal Officer.
- Each specialist must complete ten (10) or more hours per year at one or more CLE activities that meet the standards stated in Section VII.

Clients' Security Fund

Ryan Works presented an overview of the recent Clients' Security Fund (CSF) meeting. Mr. Works highlighted the summary of claims by former clients of Robert Graham.

Temporary Member to Judicial Selection

It was moved, seconded and approved to appoint Michael Large as a temporary member to the Judicial Selection Commission. Ann Morgan abstained from voting.

CONSENT AGENDA

Approved: Minutes for August 30-31, 2017 as corrected.

Approved Attorney Resignation

Margaret Gerbner
Ragnhild Reif

Approved Contracts

Board of Bar Examiners, La Jolla
Avis Budget Group
D&O Navigators Insurance

APPOINTMENTS

Section Appointments

Appellate Litigation Section - Approved

Chair: Anjali Webster

Vice Chair: Paul Ray

Treasurer: Jordan Smith

Secretary: Abraham Smith

Northern Member-at-Large: Adam Hosmer-Henner

Rural Member-at-Large: David Neidart

Southern Member-at-Large: Marshal Willick

ADR Section – Approved

Secretary: David Clayson

Paralegal Division – Approved
Southern District Board Member: Carl Morrison

Probate & Trust Section - Approved
Chair: Michaelle D. Rafferty
Vice Chair: Dana Dwiggin
Treasurer: Julia Gold
Secretary: Rob Telis

Fee Dispute Arbitration Committee

Approved: Three Year Term

Name	Effective Date
Mark Alden	August 2017
Peter Angulo	August 2017
Veronica Barisich	August 2017
Susan Brackney	August 2017
Kathleen Breckenridge	August 2017
Thomas Dillard	August 2017
Dianne Drinkwater	August 2017
Lewis Etkoff	August 2017
John Hope	August 2017
Kevin Kirkendall	August 2017
James Kohl	August 2017
Susan Krenzien	August 2017
Michael Langton	August 2017
Robert Larsen	August 2017
Akke Levin	August 2017
Evan Needham	August 2017
Mike Pavlakis	August 2017
Miriam Roberts	August 2017
Miriam Rodriguez	August 2017
Dan Royal	August 2017
Lane Swainston	August 2017
Janet Trost	August 2017
Charles Tucker	August 2017
Sheila Van Duyn	August 2017
S. Brent Vogel	August 2017
Nancy Yarbrough	August 2017
Cortney Young	August 2017

Officers approved:

State Chair	Peter Angulo	August 2017	August 2018
Reno/Rural Regional Chair	John Hope	August 2017	August 2018
Carson City Regional Chair	Mike Pavlakis	August 2017	August 2018

Advisory Commission for the Administration of Justice

It was moved, seconded and carried to approve Paola Armeni and Christine Brady for a two-year term to the Advisory Commission for the Administration of Justice.

Sentencing Commission

It was moved, seconded and carried to approve Dennis Cameron and Tegan Machnich for a two-year term to the Nevada Sentencing Commission.

Board of Continuing Legal Education

It was moved, seconded and carried to approve Richard Dreitzer for a three-year term expiring December 31, 2020.

We the People District Coordinator

It was moved, seconded and carried to reappoint Trey Delap expiring June 2018.

Standing Committee on Ethics and Professional Responsibility

It was moved, seconded and carried to appoint James Murphy for a two-year term.

ADJOURN

There being no further business before the Board, the meeting was adjourned at 3:45 pm.

VIA EMAIL VOTE, November 28, 2017

It was moved, seconded and carried to approve the Nevada Family Law Section sending out the proposed letter that informs the Senators of the FLS opposition to Section 1309 of the House Ways and Means Committee's version of the Tax Cuts and Jobs Bill of 2017, which ends the alimony tax deduction.



MEMORANDUM

To: Board of Governors
From: Professional Liability Insurance Taskforce
Date: October 30, 2017
Re: Mandatory Professional Liability Insurance

The Board of Governors established a Professional Liability Insurance (PLI) Taskforce to explore the concept of mandatory malpractice insurance for attorneys practicing in Nevada. Taskforce participants, including Gene Leverty, Chair; Connie Akridge; Doug Clark, Eric Dobberstein and Elana Graham, met on multiple occasions to explore various PLI models, examine survey results obtained from those Nevada attorneys who are uninsured, and to hear from subject matter experts.

RECOMMENDATION

The PLI Taskforce submits to the Board of Governors its recommendation to:

- (1) Require all attorneys engaged in the practice of law (not government or corporate counsel) to carry a minimum insurance policy of \$250,000 per claim/\$250,00 annual aggregate. Attorneys must use Insurance carriers authorized to transact legal professional liability insurance in Nevada and who agree to report any lapse or termination of the policy to the state bar.
- (2) Make mandatory disclosure to clients the amount of insurance coverage the attorney has prior to engaging in representation.

If the recommendation is adopted, the PLI Taskforce requests that the Board to grant authority to the Executive Committee to approve language that will be set forth in an ADKT. In developing the draft rule language, we propose:

- Conducting a survey available to all licensees to obtain feedback and so that we may address any concerns;
- Conduct a listening tour with interested licensees; and
- Exploring the practical implementation aspects of the program, including internal controls for ensuring compliance and developing communications to attorneys and potential professional liability carriers.

BACKGROUND/NEVADA DEMOGRAPHICS

One consideration for the Taskforce was the population of actively practicing Nevada attorneys who do not carry professional liability insurance. Based on the information collected in the bar's annual disclosures, which is not verified, 97% of attorneys in private practice carry malpractice insurance¹. However, it was determined in contacting the insurers that were listed by attorneys in private practice, as providing their coverage, many of those insurers are not providing malpractice insurance in Nevada.

The PLI Taskforce began its review by surveying those attorneys who indicated they do not carry professional liability insurance. The findings showed that, of those who acknowledge they do not carry professional liability insurance:

- More than 73% are solo practitioners;
- Nearly 80% are in private practice; and
- More than 55% have been in practice for 20 years or longer.

The most common practice areas of those who acknowledge they do not carry professional liability insurance are:

- General civil practice (29%)
- Other (28%)
- Criminal Defense (26%)
- Corporate/Business (24%)
- Personal Injury/Plaintiff (23%)
- Family Law (23%)

Additionally, the top reasons those attorneys surveyed provided for not carrying professional liability insurance were:

- Cost Prohibitive
- Confidence in Their Own Practice
- Their Practice Doesn't Require It

While the survey provided useful information, the data suggests that adequate public protection measures are not currently in place. (A full report of the Professional Liability Insurance Survey is attached to this recommendation.) Therefore, the Taskforce began a review of the various models in place and analyzed the strengths and benefits of each. The PLI Taskforce ultimately recommends a modified version of the open market model recently adopted by the State Bar of Idaho.

RECOMMENDED OPEN MARKET MODEL

This year, the State Bar of Idaho adopted an open market model (January 2018 implementation date), requiring attorneys to certify annually (1) whether they represent private clients and (2) if representing

¹ Attorneys who do not represent clients, who are engaged as a full-time government lawyer or judge, or who are employed by an organizational client only and do not represent clients outside that capacity are not required to report whether they carry malpractice insurance.

private clients, provide proof of current professional liability coverage at the minimum limit of \$100,000 per occurrence/\$300,000 annual aggregate. The Idaho Bar Commission Rule also requires the attorney to notify the bar if coverage lapses, is no longer in effect or terminates for any reason. The rule applies to all actively practicing attorneys who represent private clients, including those who take only a few cases a year and those who provide pro bono services.

After considering several models (see discussion below), the PLI Taskforce determined that the open market model best served the public without placing undue burden on those attorneys who would likely pay higher premiums if included in a shared risk pool. Additionally, this model was more appropriate considering the relatively small number of attorneys who reported they do not carry professional liability insurance and considering the number of uninsured attorneys is likely higher.

The Taskforce made three notable changes to its recommendation from the Idaho rule:

Minimum Policy Limits: The Taskforce was concerned that setting a low policy minimum may incentivize some attorneys who carry a higher policy limit to lower it to the minimum standard. Additionally, there is a relatively small difference in premiums as between a \$100,000 minimum and a \$250,000 minimum policy. For those reasons, the Taskforce recommended a \$250,000 per occurrence/\$250,000 annual aggregate minimum.

Reporting Lapses in Coverage: Rather than requiring attorneys to report to the state bar if coverage lapses or terminates, the Taskforce recommended the state bar take a more proactive approach to its regulatory responsibilities and require attorneys to purchase policies from those carriers who agree to voluntarily report lapses or termination of policies. Conceptually, the state bar would have a list of approved insurance carriers who have agreed to the reporting requirement, similar to the list of approved financial institutions for IOLTA accounts.

Disclosure to Clients: As a public protection measure, the Taskforce agreed that attorneys should disclosure to their clients, prior to retention, the amount of coverage they have. This process would give clients the opportunity to make an informed decision when retaining counsel.

OTHER PLI MODELS CONSIDERED

Before coming to its recommendation, the PLI Taskforce considered the three other models and received input from the following individuals:

- (1) Chris Newbold, ALPS;
- (2) Nevada practicing attorney Oliver Seebald;
- (3) Insurance Commissioner Barbara Richardson;
- (4) Cathy Sargent, Lawyers Mutual; and
- (5) Richard Butler, Medmarc.

Professional Liability Fund (PLF): Otherwise known as the “Oregon Model,” this model creates a legislatively enacted fund operated by a component unit of the state bar that is exempt from insurance regulations. This model provides a shared risk pool regardless of practice area or geographic location. In Oregon, the state bar automatically appends the \$3,500 annual assessment to the attorney’s annual license fee statement. The Oregon Professional Liability Fund provides a \$300,000 policy, plus \$50,000 in defense costs. Excess coverage may be purchased through the PLF or on the secondary market.

While the PLF model is enticing, as revenue from the Fund is used to support risk management educational services and the Oregon State Bar’s Lawyers Concerned for Lawyers program, establishment of that type of program in Nevada would require significant financial resources to provide initial funding, legislative approval, and the ramp up of a new organizational structure (the PLF employs nearly 50 staff). Additionally, Commissioner Richardson advised that it was best for us to access the existing market, as opposed to starting a captive carrier.

Captive Carrier: This Taskforce, as well as the State Bar of Washington, requested the assistance of ALPS to develop a proposal to provide a \$100,000 minimum policy on behalf of all Nevada attorneys. Chris Newbold submitted a draft proposal estimating a \$3,000 premium for a \$100,000 policy, and no deductible. ALPS typically charges a lower premium for individual policies because it can individually underwrite the insured.

This model provides greater oversight for the state bar, as we would be responsible for collecting premiums and ensuring compliance. However, by placing all attorneys under a shared risk pool, we may also drive up the cost of coverage for those attorneys who do not have a claims history. Additionally, while the state bar could “tinker” with the premium by adjusting how much it would cover, we would run the risk of developing a sub-standard product.

Management Based Regulation: This model was recently enacted in Illinois. Beginning in 2018, those attorneys who do not carry malpractice insurance will be required to complete a four-hour interactive online self-assessment regarding the operation of their law firms. The idea behind this model is to proactively educate attorneys about deficiencies identified during the self-assessment process and thus, avoid disciplinary grievances and malpractice claims.

The Taskforce ultimately rejected this model as it was not apparent that an educational model was sufficient for public protection.

OVERVIEW

In preparation for the Professional Liability Insurance Taskforce meeting, we attempted to gather information from attorneys who do not carry professional liability insurance about their reasons for electing against it. This survey also captures information including geographical demographics, years in practice, areas of practice, etc.

An electronic survey was sent to 976 attorneys in Nevada with active and active exempt status licenses. These attorneys indicated that they did not carry professional liability insurance on their 2016 mandatory license disclosures. Of those surveyed, responses were received from 232 individuals (24% of those surveyed).

Those surveyed were provided an “opt out” if they believed the information reported was incorrect and were provided an opportunity to make corrections to their disclosure statements. Fewer than a dozen attorneys indicated the information on their disclosure statements was incorrect.

SURVEY RESULTS SYNOPSIS

DEMOGRAPHICS

- The areas in the state where survey participants practice is statistically consistent with those surveyed.
- More than 55% of those surveyed have been in practice 20 years or longer, with the next largest segment being in practice for 10-19 years (26%).
- 96% maintain an active license.
- Nearly 80% survey participants indicated that they are employed in a private practice/law firm setting.
- More than 73% of survey participants are in private practice, with the next largest segment (15%) in small practices of 2-4 attorneys.
- The highest concentrations of practice areas are in: personal injury (plaintiff), family law, general civil (plaintiff), criminal defense, and corporate/business organization & transaction.

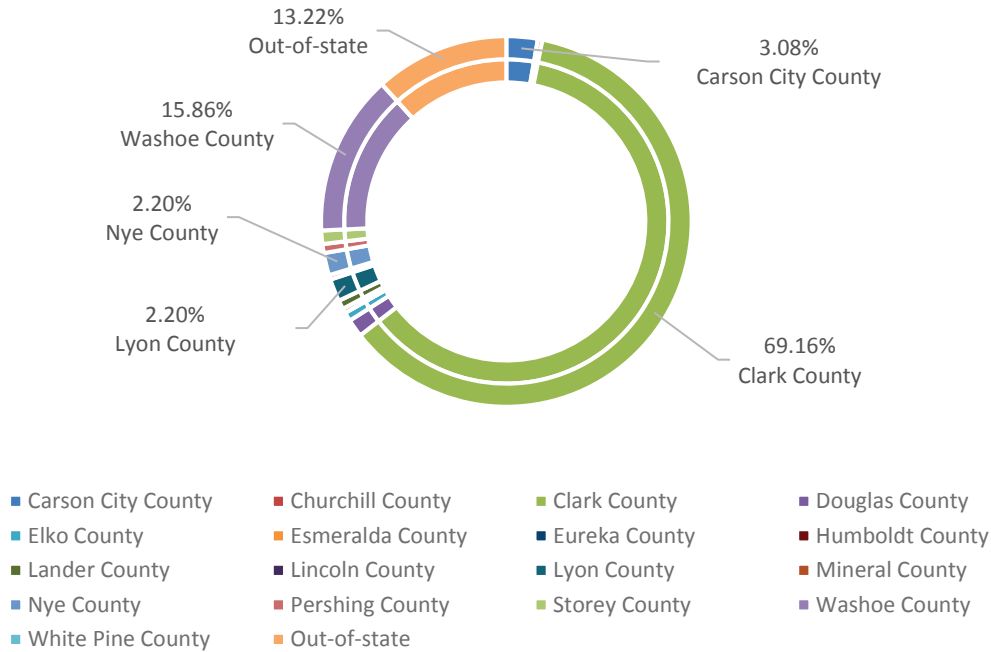
INSURANCE OPINIONS

- When asked why they elect to not carry professional liability insurance, the top reason was “cost prohibitive.”
- More than a third of the attorneys who responded stated they would elect to carry liability insurance if it was affordable.
- 72% of the survey participants stated that attorneys should not inform their clients that they do not carry insurance. (Of the 28% who responded affirmatively, disclosure by fee agreement was ranked as the best mechanism to inform clients.)
- More than half (56%) of survey participants stated that there is no reasonable expectation from the public that a lawyer maintains some amount of professional liability insurance.

DEMOGRAPHICS/AREA OF PRACTICE

- (1) **Practice Location:** Survey participants were asked to indicate which areas of the state they primarily practice. Participants were given the option of selecting more than one practice location. **The majority of those responding reside in either Clark (69%) or Washoe (16%) County or practice out of state (13%).**

Those counties not called out on the chart below made up fewer than 2% of the respondents.



- (2) Of those who responded that their practice was out-of-state, 93% do not carry professional liability insurance in that state.
- (3) **Years in Practice:** Survey participants were asked to indicate how many years they have been licensed to practice law. **More than 55% of those surveyed have been in practice 20 years or longer**, with the next largest segment being in practice for 10-19 years (26%).

Years in Practice	%	Total
Less than 4 years	5.83%	13
4-9 years	13.45%	30
10-19 years	25.56%	57
20-29 years	22.87%	51
30 years or longer	32.29%	72
Total	100%	223

- (4) **License Status:** Of those who responded, the majority (96%), maintain an active license to practice law.

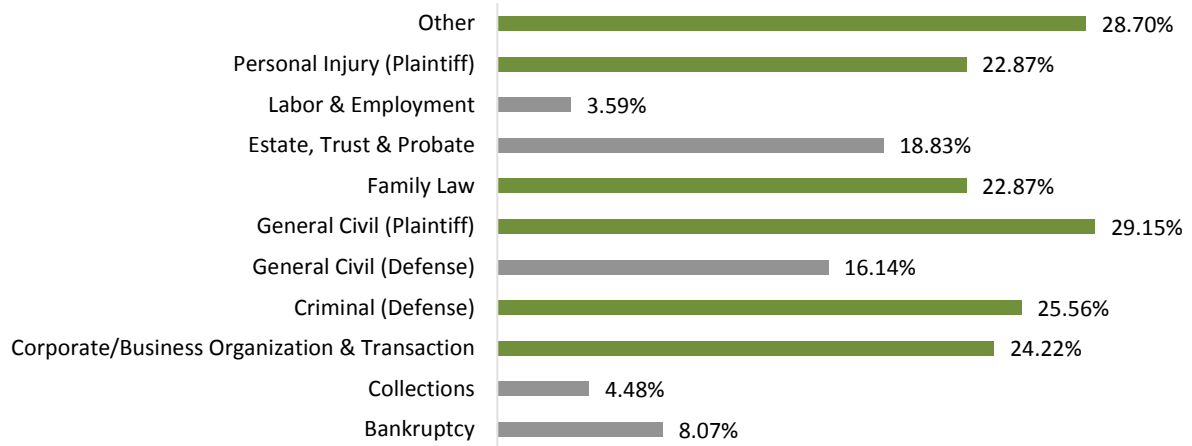
- (5) **Practice Setting:** The majority of survey participants indicated that they are employed in a private practice/law firm setting.

Practice Setting	%	Total
Private Practice (Law Firm)	79.82%	178
Corporate/In House	4.48%	10
Government/Government Agency	1.79%	4
Legal Services/Non-Profit	0.90%	2
Private Trials/Arbitration/Mediation	2.24%	5
Retired	5.38%	12
Not Employed as a Lawyer	3.59%	8
Unemployed	1.79%	4
Total	100%	223

- (6) Most survey participants (73%) indicated that they are in solo practice.

Firm Size	%	Total
Solo (1)	73.54%	164
2-4 attorneys	15.25%	34
5-14 attorneys	1.35%	3
15 attorneys or more	0.90%	2
N/A	8.97%	20
Total	100%	223

(7) **Areas of Law.** Survey participants were asked to indicate the area(s) of law that best describe their practice¹. **The highest concentrations of practice areas are in: personal injury (plaintiff), family law, general civil (plaintiff), criminal defense, and corporate/business organization & transaction.**



Those who indicated “other” were provided an opportunity to list their area of practice. A summary of the responses is below:

- Administrative (x 3)
- ADR (2)
- Appellate
- Automotive BI Defense
- Business litigation
- HOA Law
- Intellectual Property (x 4)
- Entertainment
- Freelance/Contract/Research and Writing (x3)
- Real Property/Real Estate (x 3)
- Insurance Coverage
- Immigration (x 8)
- Tax law (2)
- Not employed (x2)
- Labor Primarily
- State Bar Discipline and Admissions cases.
- No cases, but keep license (x2)
- Represent family members
- Pro Bono legal work (x2)
- Simple matters: sending out demand letters, pre-litigation, etc.
- Constitutional Law Impact Litigation
- Professional liability; professional privileges

¹ Suggested areas of practice were drawn from a 2013 study conducted by the Lawyers Mutual Insurance of Kentucky, which analyses the percentage of claims by areas of law.

LIABILITY INSURANCE OPINIONS

- (8) **Reasons for Not Carrying:** Participants were asked to rank their top three reasons for not electing to carry professional liability insurance. Participants were provided the option of selecting one of the reasons below or adding a different/other reason.

The primary reason cited by 166 survey participants was “cost prohibitive.” Other top reasons include:

- Confidence in practice/not needed;
- Practice doesn’t require it; and
- Other

	Primary Reason	Second Reason	Third Reason	Not a Reason	Total
Cost prohibitive	51% (85)	25% (41)	19% (31)	5% (9)	166
Other	47% (22)	17% (8)	26% (12)	11% (5)	47
Confidence in practice/Not needed	40% (55)	28% (38)	15% (21)	16% (22)	136
Practice doesn't require it	27% (30)	24% (27)	16% (18)	34% (38)	113
Prefer to defend myself against charges/pay claims directly	11% (11)	19% (19)	29% (29)	42% (42)	101
Confusion about what type of insurance to purchase	7% (5)	12% (9)	13% (10)	68% (52)	76
Other	6% (1)	25% (4)	38% (6)	31% (5)	16
Represent clients pro bono	3% (2)	12% (9)	14% (10)	71% (52)	73
Unable to obtain coverage	3% (2)	11% (8)	5% (4)	81% (60)	74

Reasons marked as “Other” are categorized and listed as follows:

Type of Practice

- Low-risk area and type of practice
- Private practice is limited in scope and type of work.
- Primarily engage in business not law practice
- Entertainment Law denied coverage
- Almost all clients are firms in which I own an interest, am an officer or a director. Typical policies exclude coverage under these circumstances.
- Type of practice
- Practice mostly in tribal courts
- Unable to obtain coverage due to representation of medical marijuana clients
- Employed in real estate where my law background is an asset but I do not practice per se - I do exercise risk management skills
- Stay within my knowledge of specific fields

Maintenance Not Justified

- Don't have enough clients for it to make sense
- Very small case load does not justify cost, risk is low
- I have limited clients and limited activities
- Judgment proof/No assets
- My one claim in my entire career, my malpractice insure. co. refused to accept, so I handled it myself successfully.
- Only do a small amount of law work over the course of the year, probably more expensive to buy insurance than the amount of money that work would even generate.
- I'm not representing anyone
- I work part time for only one client, which is my husband's company.
- Rarely practice as lawyer
- Confidence in clients
- Business' total worth is under \$2000.00
- Only active case is an appeal
- Insurance companies will not adjust rates for low volume practice.
- In the past when I inquired about malpractice insurance, they said I needed to be working mostly full-time.

Affordability:

- Don't make enough \$ to make it worth it.
- Can't afford it!
- Law school debt and housing crash renders me judgment proof
- Meager assets are judgment proof
- Can't afford!

History/Perception:

- 41 years without claim
- No client complaint about service given
- If you have a claim the insurance companies in my experience do[n't] want to provide coverage
- Will make me a target
- Insurance makes me a target.
- Insurance is an invitation to be sued
- Encourages claims
- Insurance Companies interests are not the same as the attorney's best interests

Employer:

- I'm just an associate/no authority
- Boss doesn't want it
- Boss prefers to pay claims himself

Obtained Elsewhere

- I have it through my employer
- Provided by other(s)
- Only do appearance work for attorneys who are insured
- Work for insurer, self-insured
- In House
- I have usually work for another law firm or lawyer which carry liability insurance.

Semi-Retired/Limited Practice:

- Semi-retired and limit what I will do to existing clients or referrals from one source where all parties have agreed in writing.
- Semi-retired/very few cases/clients
- Almost completely retired
- I don't practice very much and it would be cost prohibitive for me
- Too few clients
- Not in Active Practice
- Retired
- Part-time practice; semi-retired
- Practice limited to friends as clients
- I am 76; practice narrowly limited, mostly for friends without charge
- I have not been active recently however wish to keep my options open.
- Basically retired. No court work.
- Not full-time attorney (not even really a part-time attorney)
- Minimal practice
- Unemployed

Work Outside Nevada

- Not in NV
- Do not engage in substantial work in the State of Nevada

- (9) **Affordability.** Survey participants were asked if they would elect to carry professional liability insurance if affordable insurance was made available to them. **More than a third of the attorneys who responded stated they would elect to carry liability insurance if it was affordable.**

	%	Total
Yes	38%	81
Maybe	40%	86
No	22%	47
Total	100%	214

- (10) **Client Notification.** Survey participants were asked to state whether attorneys should inform their clients if they carry professional liability insurance. **The majority, 72%, stated that attorneys should not inform their clients.**

	%	Total
Yes	28.5%	59
No	71.5%	148
Total	100%	207

- (10)(A) **How to best inform.** Those attorneys who responded “yes” to question 10 were asked to rank the top three best mechanisms for informing their clients. Survey participants were given the option of selecting from the list provided below or giving another response. **Disclosure by fee agreement was ranked as the best mechanism to inform clients.**

	Best Mechanism	Second Best Mechanism	Third Best Mechanism	Total
Disclosure in Fee Agreement	71% (40)	20% (9)	8% (3)	52
Verbal Disclosure Prior to Retention	12% (7)	32% (14)	23% (8)	29
Posted on SBN Website/Attorney Profile	11% (6)	21% (17)	17% (6)	21
Posted Notice on Website	4% (2)	9% (4)	26% (9)	15
Posted Notice in Office	2% (1)	11% (5)	26% (9)	15
Other	0% (0)	7% (3)	0% (0)	3
Other	0% (0)	0% (0)	0% (0)	0

“Other” responses include:

- RE California Disclosure
- Written disclosure to client
- Tattoo on secretary's forehead

- (11) **Public Expectations.** Finally, survey participants were asked if, generally speaking, the general public seeking legal aid from an attorney have a reasonable expectation the lawyer maintains some amount of professional liability insurance. **More than half the respondents indicated that there was no reasonable expectation.**

	%	Total
Yes	8.02%	17
Maybe	35.85%	76
No	56.13%	119
Total	100%	212

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JOIN THE DISCUSSION:

SHOULD CARRYING MALPRACTICE INSURANCE BE MANDATORY FOR NEVADA ATTORNEYS?

BY ROBERT HORNE, PROGRAMS AND SERVICES MANAGER, STATE BAR OF NEVADA

The State Bar of Nevada's Board of Governors is considering a measure that would require all Nevada attorneys to maintain malpractice insurance as a condition of being licensed in the state of Nevada. The board looks forward to engaging with *Nevada Lawyer* readers on this topic; bar members can join the discussion by sending feedback to publications@nvbar.org.

Part of the State Bar of Nevada's mission is to protect the public. In order to study issues regarding mandatory malpractice insurance, the Board of Governors has established a Professional Liability Insurance Taskforce, which has been meeting regularly throughout 2017.

"The task force has learned that the public believes all lawyers have malpractice insurance," said Board of Governors President Gene Leverty. "Our lawyers are not required to have malpractice insurance." The task force plans to make a recommendation to the Board of Governors after exploring various concepts it has evaluated. Some options include:

- Requiring attorneys to disclose to clients whether or not they carry insurance;
- Requiring all Nevada attorneys to carry malpractice insurance, leaving the responsibility of retaining the insurance to each attorney or firm; or
- Adopting a single insurer through the state bar that would provide minimum limits to all Nevada lawyers, while still allowing lawyers to retain excess limits on the open market.

More States Adopting Mandatory Insurance Requirements

Arizona, Colorado, Delaware, Hawaii, Kansas, Massachusetts, Maine, North Carolina, North Dakota, Rhode Island, Virginia, Washington and West Virginia also require their attorneys to disclose whether or not they carry insurance to their respective state bars.

Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania and South Dakota currently require attorneys to disclose whether or not they have malpractice insurance to their clients.

Three states require malpractice insurance.

Oregon

Since the 1970s, Oregon has required the maintenance of a mandatory professional liability fund, operated by Oregon's state bar. All attorneys licensed in Oregon receive minimum coverage through the fund; premiums attach to their annual license fees. Oregon's Professional Liability Fund serves as the insurance provider for Oregon lawyers in private practice.

In 2016, the Oregon assessment was \$3,500, with a reduced rate for lawyers in their initial years of practice. The fund provides coverage of up to \$300,000 per claim with a \$300,000 aggregate, including defense costs, and a \$50,000 claims expense allowance.

Idaho

Idaho operates on an open-market model, which will soon require all attorneys to purchase minimum coverage through a professional liability insurance carrier. Idaho's rules become effective in January 2018, and require attorneys to maintain insurance coverage at a minimum limit of \$100,000 per occurrence, with a \$300,000 annual aggregate.

Illinois

Illinois has adopted a practice-management approach to liability insurance, requiring attorneys who choose not to carry insurance to undergo an online practice assessment that also provides four hours of CLE credit.

Taskforce Hearing Every Approach

Nevada's Current Coverage Statistics:

- Attorneys engaged in the private practice of law who do maintain malpractice insurance, either personally or through their firms: 5,301
- Attorneys engaged in the private practice of law who do not maintain malpractice insurance: 988
- Bar members not in need of malpractice insurance, such as judges, government attorneys and attorneys not representing clients: 4,012

There are 5,301 state bar members practicing private law who report on their mandatory disclosures that they either maintain malpractice insurance themselves or receive coverage through their firms (the state bar does not verify information reported by attorneys). There are 988 members engaged in the private practice of law who report they do not maintain insurance.

During the State Bar of Nevada's taskforce meetings, the bar has been exploring the models established by Oregon, Idaho and Illinois, to determine which, if any, model will be the best fit for the Silver State. Leverty, reports that the taskforce has also explored minimum limits of coverage ranging from \$100,000/\$100,000 to \$100,000/\$300,000.

“We heard from a lawyer who was against mandating any insurance, as he doesn’t carry insurance and he thinks he can provide services to his clients at a [reduced] cost to them without insurance,” Leverty said. “However, at that meeting, he had no problem with mandating disclosure of whether or not one had malpractice insurance. We also considered California and other states that mandate [disclosing] whether [an] attorney does or does not have malpractice insurance.”

Five Possibilities

The taskforce is considering four models of malpractice insurance:

- **Open Market:** Recently adopted in Idaho, this model requires all attorneys to purchase minimum coverage through a professional liability insurance carrier.
- **Mandatory Professional Liability Fund:** Oregon is the only state with such a fund. Operated by the Oregon bar, this model provides all Oregon attorneys with minimum coverage; premiums are attached to annual license fees.
- **Captive Insurance Carrier:** This model also provides minimum coverage to all the state’s attorneys; however, Nevada would contract with an open market carrier to provide the policy.
- **Risk Management Model:** This model was recently adopted in Illinois. It requires all Illinois attorneys to carry minimum liability insurance; however, if they elect not to do so, they must take a four-hour online course in risk management annually.
- **Association Group Captive Insurer Model:** In this model, an insurance company is owned by an association, its members or both. Nevada law allows captive insurers for associations, according to Nevada Revised Statute Chapter 694C.

On October 23, 2017, the task force held a round table discussion with some insurers currently providing malpractice insurance in Nevada and with Nevada Insurance Commissioner Barbara Richardson concerning various options under consideration by the task force. The insurers presented arguments to support certain options and recommended against others. The commissioner expressed concern over premium rates, should the bar lock into one insurance carrier for minimum limits coverage.

Minimum limits of coverage were also discussed. Attendees recommended considering minimum limits of \$250,000/\$250,000 rather than \$100,000/\$300,000. The price differential between the coverage should be minimal, but the effective coverage is much better with \$250,000/\$250,000 limits. The task force thanked the insurers and commissioner for participating in the round table discussion.

Next Steps

Any taskforce recommendations will go to the Board of Governors for review and approval. The board will then submit the matter to the Nevada Supreme Court for a rule change.

“[Any proposal] will be fully vetted before being implemented,” Leverty said. “The date of [implementation] will be expeditious ... to allow everyone to vent their full pros and cons of the concept [through the process].”

Weigh In

The Board of Governors invites members to participate in the discussion. Share your thoughts on the topic of mandatory malpractice insurance by emailing the state bar at publications@nvbar.org.

[SIDEBAR]

Random Trust Account Audit Program

The State Bar of Nevada’s Board of Governors has approved, subject to approval of the Nevada Supreme Court, the creation of a mandatory trust account audit program. This program will serve as another way to protect the public.

“Malpractice insurance does not cure against a lawyer stealing money or doing intentional acts,” Leverty explained. “It’s only applicable if a lawyer is negligent; therefore, the state bar has been looking at other ways to protect the public because of theft by lawyers of trust accounts. We have approved spot audits of attorney trust accounts and assets held in trust with their clients. Both of these endeavors are important to protect the public.”

The Board of Governors is also interested in members’ feedback on the topic of a mandatory trust account audit program. Look for an upcoming survey that will be sent to bar members or email your thoughts to Shelley Young at shelleyy@nvbar.org.

JOIN THE DISCUSSION: WHETHER MALPRACTICE INSURANCE SHOULD BE MANDATORY FOR NEVADA ATTORNEYS

Weigh in with your input to help shape these potential programs!

BY ROBERT HORNE, PROGRAMS AND SERVICES MANAGER, AND
JENNIFER SMITH, PUBLICATIONS MANAGER, STATE BAR OF NEVADA

On November 8, 2017, the State Bar of Nevada's Board of Governors approved moving forward with the next steps to require Nevada attorneys to maintain professional malpractice insurance as a condition of being licensed in the state of Nevada. The board invites responses from *Nevada Lawyer* readers on this topic; bar members can join the discussion by sending feedback to publications@nvbar.org.

Proposal

The initial concept of the proposal regards bar members in private practice, requiring them to maintain minimum coverage limits of \$250,000 per claim with a \$250,000 aggregate for all claims. Nevada attorneys will be permitted to purchase malpractice insurance from any provider they wish: a system known as the "open-market model."

Taskforce Evaluation

Part of the State Bar of Nevada's mission is to protect the public. In order to study issues regarding mandatory malpractice insurance, the Board of Governors established a Professional Liability Insurance Taskforce, which has been meeting regularly throughout 2017.

"The taskforce has learned that the public believes all lawyers have malpractice insurance," said State Bar of Nevada President Gene Leverty. "Our lawyers are not required to have malpractice insurance." The taskforce made its recommendation to the Board of Governors after exploring various concepts it has evaluated.

Some options they explored included:

- Requiring attorneys to disclose to clients whether or not they carry insurance;
- Requiring all Nevada attorneys to carry malpractice insurance, leaving the responsibility of retaining the insurance to each attorney or firm; or
- Adopting a single insurer through the state bar that would provide minimum limits to all Nevada lawyers, while still allowing lawyers to retain excess limits on the open market.

Approaches in Other States

Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania and South Dakota currently require attorneys to disclose whether or not they have malpractice insurance to their clients.

Three states require malpractice insurance.

Idaho

Idaho operates on the open-market model, and that state will also soon require all its attorneys to purchase minimum coverage through a professional liability insurance carrier. Idaho's rules become effective in January 2018, and they require attorneys to maintain insurance coverage at a minimum limit of \$100,000 per occurrence, with a \$300,000 annual aggregate.

Oregon

Since the 1970s, Oregon has required the maintenance of a mandatory professional liability fund, operated by Oregon's state bar. All attorneys licensed in Oregon receive minimum coverage through the fund; premiums attach to their annual license fees. Oregon's Professional Liability Fund serves as the insurance provider for Oregon lawyers in private practice.

In 2016, the Oregon assessment was \$3,500, with a reduced rate for lawyers in their initial years of practice. The fund provides coverage of up to \$300,000 per claim with a \$300,000 aggregate, including defense costs, and a \$50,000 claims expense allowance.

Illinois

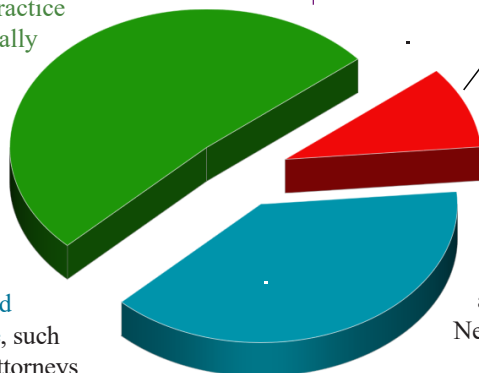
Illinois has adopted a practice-management approach to liability insurance, requiring attorneys who choose not to carry insurance to undergo an online practice assessment that also provides four hours of CLE credit.

Most Bar Members Already Covered

Nevada's Current Coverage Statistics:

- Attorneys engaged in the private practice of law who **maintain malpractice insurance, either personally or through their firms:** 5,301
- Attorneys engaged in the private practice of law who **do not maintain malpractice insurance:** 988
- Bar members **not in need of malpractice insurance**, such as judges, government attorneys and attorneys not representing clients: 4,012

Already, most state bar members practicing private law in Nevada report that they either maintain malpractice insurance themselves or receive coverage through their firms. A strong majority – 5,301 bar members – reported this information on their mandatory disclosures. (The state bar does not verify information reported by attorneys.) There are 988



members engaged in the private practice of law who report they do not maintain insurance.

Five Possibilities Considered

During its evaluation period, the taskforce considered five models of malpractice insurance, including:

- **Open Market:** Recently adopted in Idaho, this model requires all attorneys to purchase minimum coverage through a professional liability insurance carrier. This is the model the Board of Governors selected for Nevada.
- **Mandatory Professional Liability Fund:** Oregon is the only state with such a fund. Operated by the Oregon bar, this model provides all Oregon attorneys with minimum coverage; premiums are attached to annual license fees.
- **Captive Insurance Carrier:** This model also provides minimum coverage to all the state's attorneys; however, in this model, a specific carrier is selected to provide policies to all bar members.

- **Risk Management Model:** This model was recently adopted in Illinois. It requires all Illinois attorneys to carry minimum liability insurance; however, if they elect not to do so, they must take a four-hour online course in risk management annually.

- **Association Group Captive Insurer Model:** In this model, an insurance company is owned by an association, its members or both. Nevada law allows captive insurers for associations, according to Nevada Revised Statute Chapter 694C.

Participate in the discussion! Share your thoughts on the topic of mandatory malpractice insurance by emailing the state bar at publications@nvbar.org.

Expert Opinions Gathered

On October 23, 2017, the taskforce held a round table discussion with some insurers currently providing malpractice insurance in Nevada and with Nevada Insurance Commissioner Barbara Richardson concerning various options under consideration by the taskforce. The insurers presented arguments to support certain options and recommended against others. For example, the commissioner expressed concern over premium rates, should the bar lock into one insurance carrier for minimum limits coverage.

continued on page 31

WHETHER MALPRACTICE INSURANCE SHOULD BE MANDATORY FOR NEVADA ATTORNEYS

Minimum limits of coverage were also discussed. Attendees recommended considering minimum limits of \$250,000/\$250,000 rather than \$100,000/\$300,000. The price differential between the coverage should be minimal, but the effective coverage is much better with \$250,000/\$250,000 limits. The taskforce thanked the insurers and commissioner for participating in the round table discussion.

Next Steps

The Board of Governors is looking at all avenues with respect to the open market model as they work out details and specifics prior to considering submitting this matter to the Nevada Supreme Court for a rule change. “The consideration process will ... allow everyone to vent their full pros and cons of the concept [through the process],” Leverty said.

Weigh In

The Board of Governors invites members to participate in the discussion. Share your thoughts on the topic of mandatory malpractice insurance by emailing the state bar at publications@nvbar.org.

The price differential between the coverage should be minimal, but the effective coverage is much better with \$250,000/\$250,000 limits.

RANDOM TRUST ACCOUNT AUDIT PROGRAM

The State Bar of Nevada’s Board of Governors is studying the creation of a mandatory trust account audit program.

Program Overview

Under the initial concept for this program, each year, a set percentage of active attorneys would be selected at random to have their trust accounts audited by a professional auditor with experience specific to lawyer trust accounts. The audits would incur no fees or charges, involve minimal, if any disruption, and be conducted as desk audits at the state bar offices. In addition, bar dues would not increase as a result of this program; it is expected the audits will reduce costs for the Office of Bar Counsel.

At the onset, approximately 60 attorneys would be selected each year for random audits. Attorneys who do not handle client money are exempt from random audits. If a lawyer is randomly selected, the trust account records from that attorney’s entire firm will be audited. At the conclusion of the audit, the attorney and/or firm will be provided with a written report of the auditor’s findings.

Purpose and Benefits

This program, designed to improve the state bar’s mission to protect the public, will provide three important benefits to both attorneys and their clients, including:

- **Education:** Attorneys subject to the random audit will receive a hands-on critique and evaluation of their trust account management. In addition, a similar program in North Carolina has been successful at encouraging members to engage in self-study and monitor their voluntary compliance.
- **Deterrence:** The use of external audits is a common practice in other fields, such as banking, security and taxation. This compliance protocol provides a deterrent aspect, leading to the prevention of possible violations.
- **Detection:** Many of the issues reported to the Office of Bar Counsel involve trust account violations. The ability to proactively detect deficiencies will help the state bar protect the public through self-regulation.

It is believed that the presence of a random trust account audit program will not only reduce the number of safekeeping complaints made to the state bar, but it will also encourage attorneys to be more proactive when managing their trust accounts, helping them self-detect minor infractions before they become substantial deficiencies that negatively impact clients and the public at large.

Your Feedback Matters

A survey was distributed via email to nearly 9,000 active and active exempt bar members to gather input related to the implementation of a random trust account audit program. Members’ feedback is already helping shape the program, and survey responses have also identified the need to avoid misconceptions by more fully informing bar members about the program’s concepts.

More input is invited! The Board of Governors is interested in members’ feedback on the envisioned random trust account audit program. Email your thoughts to publications@nvbar.org. **NL**

Professional Liability Insurance (PLI) Taskforce

Meeting Highlights

April 24, 2017

Members in attendance: Gene Leverty, Chair; Connie Akridge; Doug Clark; Eric Dobberstein; Elana Graham; Chris Newbold, ALPS; and Kim Farmer and Lisa Dreitzer, State Bar of Nevada.

The Taskforce reviewed the statistics regarding attorneys who carry liability insurance in Nevada, the survey results of the ten percent of attorneys who reported they do not carry insurance, and the rule requiring mandatory disclosures to the state bar.

ALPS: Chris Newbold provided information about the policies ALPS writes in Nevada. On average, attorneys pay premiums of \$4,000 per year. Premiums in Clark County are higher than other parts of the state, largely due to the severity of claims, potential exposure and the judicial climate. Premiums in Clark County average \$5,600 per year vs. \$3,000 per year for those practicing elsewhere. Additionally, ALPS provides a special option to new lawyers: \$500 the first year; \$1,000 for the second year in practice; and \$1,500 in the third year. The rates are tiered to reflect the increased rate of exposure with more years in practice.

Other Models: The Taskforce reviewed other state models including Oregon, Idaho and Illinois, the challenges of each, and the impact on the profession/public. For example:

- The Oregon model required legislative authority exempting it from insurance regulations.
- States with bar-related insurance companies (NABRICO) required significant capitalization and surplus contributions from insureds, in addition to premiums, during the first years of operation.
- Idaho adopted a free market model requiring attorneys to provide proof of coverage as a condition of licensure. This may be problematic as it puts licensing decisions in the hands of insurance companies. Additionally, free market models do not address claims of attorney theft or underinsurance.
- Illinois adopted a practice-management approach to liability insurance, requiring attorneys who elected to not carry insurance to undergo an online practice assessment (which also provides 4 hours CLE credit).

Other Considerations:

- Can the Nevada Supreme Court require proof of insurance coverage as a condition of reinstatement (indefinitely)?
- Can insurance companies, such as ALPS, serve as a Third-Party Administrator (TPA) under which all attorneys must be insured?
- What are the pressures we can place on attorneys who do not carry insurance to do so? (i.e. disclosure requirements, practice assessments, requiring a bond with an IOLTA bank, etc.)

Future Taskforce Discussion Topics:

1. Disclosure requirements to the state bar, including proof of policy and mandatory notification of lapses in insurance.
2. Disclosure requirements to clients. Do clients have an expectation that attorneys have insurance? How to best disclose (letterhead, advertising, SBN website, fee agreement, etc.)
3. Mandatory insurance models: open market/Oregon model/exclusive insurer to provide coverage.
4. Illinois/practice management approach.

The Taskforce asked Chris Newbold to continue participating in future Taskforce meetings. A representative from the Oregon program will also be invited to join us for the next meeting. The Taskforce also requested from ALPS an estimate, using ALPS current insureds as a basis, to provide insurance for all State Bar of Nevada licensees with \$300,000 in coverage plus defense costs.

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Volume 20, Number 3

April/May 2003

Should Disclosure of Malpractice Insurance Be Mandatory?

Pro

By James E. Towery

James E. 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 in the firm of Hoge, Fenton, Jones & Appel in San Jose, California.

If you apply to the state where you live for a vehicle registration, 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: 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. Clients often discover the fallacy of that assumption for the first time when they attempt to sue their uninsured lawyers.

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 un-

insured 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. Approximately 7,000 lawyers in private practice are covered by the Oregon fund. It is unlikely that this model would work as well in a state like California, which has more than 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, premium levels would be prohibitive for many lawyers, especially those in solo or small firms 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 their lack of insurance. California first adopted this approach in 1988 by including such a disclosure in written fee contracts, as required by California Business and 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 1990s 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 it 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 had 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, it must be reported that, 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 to clients the disclosure of lack of insurance.

In April 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 became 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 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. More than 25,000 hits were received on the bar's website within the first week after that information was posted.

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) 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 elected not to forward any such proposal to the ABA House of Delegates.

Objections to Mandatory Reporting

As the debate on this issue of mandatory reporting has spread during 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. Where is the evidence that uninsured lawyers are currently harming clients? Where is the evidence of malpractice judgments that are uncollectible owing to lack of

insurance?

It is a fair criticism that no study exists providing data on these points. The entity within the ABA that most logically could conduct such a study, the Standing Committee on Lawyers' Professional Liability, has never conducted one.

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 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; 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 owing 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.

One technical objection is 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 factors 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

Law school professors commonly offer the warning, "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 difficult 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 their 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 you put that question to a cross-section of your own clients. You may be surprised by the response.

Con

By Edward C. Mendrzycki

Edward C. Mendrzycki chairs the ABA Standing Committee on Lawyers' Professional Liability. Formerly a litigation partner at Simpson, Thacher & Bartlett in New York, Mendrzycki is currently of counsel to the firm. He wishes to acknowledge Glenn Fischer, Assistant Staff Counsel to the Committee, for his assistance in preparing this article. Mandatory disclosure rules address a problem they cannot really solve. Should a lawyer's failure to disclose his or her insured status violate the canons of professional ethics? While several states have answered "yes" to this question, others are actively debating it. In this writer's view, an ethical rule requiring lawyers to disclose whether they have malpractice insurance may sound like a good idea on its face, but, realistically, it provides no actual protection mechanism for clients, while engaging a disciplinary response to a challenge that does not truly involve legal ethics.

But let us first approach the issue with some frankness; having malpractice insurance is almost always better than not having it. Even if you do not need it, it certainly cannot hurt you. We learn early in our careers that we are expected to

supply “both a belt and suspenders” to our clients when practicing our craft. Of all professionals, lawyers are probably the most aware that there are no guarantees in life and that things can and do go wrong. In fact, our clients often seek our services specifically to help prevent the things that can and do go wrong, or to help deal with the consequences when a lack of foresight leads to a hard lesson learned by hindsight. Many times we advise our clients to obtain insurance to cover their automobiles, their businesses, their homes, and their lives. Should lawyers not follow their own advice?

The answer is, of course, they should. But “should” is not the equivalent of an ethical “shall.” And that is the real question at hand, whether our code of ethics should require lawyers to have insurance or to inform their clients when they do not. That is the question that requires a negative answer.

Before explaining that answer and the reasons behind it, it is important to have a basic understanding about the nature of lawyers’ professional liability (LPL) insurance. LPL insurance is not the same as many other types of insurance lawyers recommend their clients buy to protect their homes, cars, and other interests. At the outset, then, a client’s understanding of what it means when a lawyer “has insurance” is very likely to be inaccurate. In point of fact, many practicing lawyers do not fully understand the nature and scope of their professional liability coverage.

LPL policies are “claims-made” policies, meaning that coverage is triggered only if a claim is actually made during a particular policy period (typically one year). This sounds simple enough, but consider that claims are rarely made in the same year that a negligent act occurred. Because of the nature of the work many lawyers perform (real estate, probate and estate planning, and protracted litigation, to name a few) errors may not be discovered until many years after they occurred.

Therefore, if a lawyer has insurance on the day he or she commits an error, it does not necessarily mean that same coverage (or any coverage) will be in effect when a claim is made years later. If the original LPL insurance policy was not renewed, it does not matter that the lawyer was insured at the time the error was made. In addition, even if a lawyer purchased a new or different policy from the one in force at the time of the error, coverage will be excluded unless the replacement coverage specifically covers “prior acts,” or errors that occurred before the inception of the new policy. To make matters even more complicated, coverage can also depend upon the interplay of a number of other factors, such as the size of the deductible (it is not uncommon for some policies to have minimum deductibles of \$5,000), the number and nature of prior claims (LPL policies are subject to limits of liability), the size of claims, and the type of malfeasance alleged (intentional acts are generally not covered).

Because the existence of a policy today may have no real impact on events surrounding coverage for a claim that is made sometime in the future, disclosure of that insurance policy to a potential or existing client may not amount to much useful knowledge. It may even be harmful. Giving the public the impression that they are almost unquestionably protected by insurance, when they may not be, is likely to cast the profession in a bad light. In the eyes of many, lawyers already have a reputation for “working the system” to avoid responsibility for their clients’ actions as well as their own. Why contribute to this perception, especially when one of the purposes behind a mandatory disclosure rule is to instill greater confidence in the legal profession?

But besides being potentially misleading, there is an even more fundamental problem with a mandatory disclosure rule. It invokes the disciplinary system to solve a problem that is neither moral nor ethical in nature. Ethics rules, in general, exist both as a set of practice guidelines and as an enforcement mechanism to protect clients from potential abuse by lawyers. But can LPL insurance coverage really stop the types of abuses the ethical rules are meant to prevent? LPL insurance typically will not cover the most flagrantly blameworthy types of conduct lawyers are capable of—intentional acts of misconduct or behavior that, in the legal field, would typically support a disciplinary charge (such as lying to or stealing from clients). On the contrary, LPL insurance, by and large, only covers lawyers for their acts of negligence, but negligence generally has little to do with an attorney’s moral character and conduct, and it is these that disciplinary rules are intended to monitor.

The truth is that neither the purchase of insurance nor the failure to purchase insurance implicates the ethical tenets described in the Model Rules. Buying insurance is unquestionably a “best practice” in most situations, but a best practice that is aspirational and does not necessarily involve an ethical underpinning. Quite simply, there is no tenable

link between insured status and conduct requiring discipline. Although purchasing insurance may be a sound business practice, it does not implicate the traditional notions of morally “right” and “wrong” behavior that the disciplinary rules were designed to address. There is no empirical evidence or objective data to show that a lawyer who has insurance is more likely to act ethically than a lawyer who has no insurance.

And this is an important point when it comes to those lawyers who choose not to carry insurance or who choose to be self-insured. A mandatory disclosure rule is a distinct disadvantage to those lawyers whose practices function on a fixed or very limited budget, or on a part-time or limited-scope-representation basis. These lawyers may choose to be uninsured because they choose their cases and clients specifically to avoid risk. Many of these lawyers offer services to particularly underserved segments of society because they can do so inexpensively without sacrificing quality. If these lawyers are now forced to purchase expensive insurance policies in order to remain competitive (or in the market at all), it could potentially drive them out of their established practice area or the legal field altogether. This is because of a fear that the potential client will draw some negative inference about their abilities to deliver quality representation based upon their uninsured status. In effect, the lack of insurance becomes a stigma (manufactured by the profession) that has almost no bearing on a lawyer’s ability to effectively serve a particular client.

We should not lose sight of the fact that professional liability insurance is generally purchased to protect the covered lawyer. And, although insurance may provide an injured client with a source of compensation in the event that a lawyer commits malpractice, there is no objectively verifiable data indicating that malpractice claims are significantly more prevalent among uninsured attorneys than among insured attorneys. There is hardly a strong enough impetus to warrant invoking the disciplinary system as an enforcement mechanism; it is not as if the profession is facing a widespread epidemic of malpractice. Even if it were, having insurance will not eliminate the source of either substantive or administrative errors. Only education, conscientious risk management, and loss-prevention techniques will accomplish 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. In fact, it may be of no use at all, unless the lawyer launches into a lengthy explanation of the type described above about the nature of LPL coverage. There are many other “material” facts that are probably more important in determining whether a client hires a particular lawyer, such as a lawyer’s past disciplinary history, how much experience a lawyer has in a particular area of law, and the generally high investment of money and time that litigation requires. No one proposes making these disclosures mandatory, although they are likely to have a significant impact on the overall outcome of the representation.

Educating the public to inquire intelligently about the significance of LPL insurance is likely the better approach. We accept the principle of caveat emptor in all manner of other business transactions, and hiring a lawyer should be no different. Merely stating on one’s letterhead, or in one’s retention agreement, that the firm does not carry liability insurance is not a productive dialogue. And if clients do not know or care to inquire about insurance, how can we be assured that they will truly grasp the import of the mandatory disclosure required by the rules?

Overall, a mandatory disclosure rule would fail to address the problem it tries to solve. And, at the same time, it would confound the very purpose it is meant to serve. To many of our clients, the law is complex and nebulous, and there is no need to further complicate the attorney-client relationship or negatively affect the perception of the profession.

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Mandatory professional indemnity insurance & a mandatory insurer:

A global perspective



The recent lawyers' malpractice insurance crisis in the United Kingdom offers a stark reminder of the value of Ontario's scheme of universal access to professional liability insurance.

Crisis in the UK

In the spring of 2010, UK bar associations warned members that the fall insurance renewal deadline was expected to be "difficult."¹ As many lawyers already knew from their dealings with insurers over the previous year, this warning would turn out to be a colossal understatement. Lack of access to affordable professional indemnity insurance for the 2009/2010 and 2010/2011 insurance years has since forced dozens of law firms in England, Ireland and Wales to shut their doors.

Like Ontario lawyers, UK lawyers are required, as a condition of remaining licensed, to obtain a malpractice insurance policy with set minimum terms. Coverage limits are

prescribed for UK firms as a whole, not for individual lawyers: a firm that is not a corporation must have coverage of at least £2,000,000 (almost \$3.3 million CAD) per claim; and an LLC must have £3,000,000 (more than \$4.8 million CAD) coverage per claim. Defence costs must also be covered, and no aggregate limit is permitted.² Unlike their Ontario counterparts, UK lawyers must look to the open insurance market (actually, to a list of approved providers) to obtain this coverage.

The UK mandatory insurance requirement dates to 1975. Between 1975 and 1986, UK lawyers purchased insurance from commercial providers through a specialized broker. By 1984, only one provider was offering

coverage. In 1987, to ensure access to insurance for the profession, the open-market system was replaced by the Solicitors Indemnity Fund (SIF). The SIF was the exclusive provider of insurance to the profession until 2000, but it struggled, running up a potential £450 million (roughly \$720 million CAD) shortfall by 1997, and imposing an expensive seven-year top-up to stabilize itself. Disillusioned with the fund, members of the profession voted in 2000 to decide its fate: A 70 per cent majority supported a return to buying insurance in the open insurance market.³

That market proved volatile. In the wake of the recent global recession, property values plunged, and there was a spike in mortgage fraud and money laundering activity. The insurance market responded by hardening dramatically. Estimates were delayed; the window of time for accepting insurance offers contracted; and premiums swelled, in some cases to over 400 per cent of 2007 levels.

Leading up to the fall 2009 mandatory insurance renewal deadlines, it became clear that a large number of UK firms – especially small and mid-sized – would be forced to shut their doors even if permitted to join the national Assigned Risks Pools (ARPs) – facilities offering punitively-priced coverage for the hard-to-insure. And then the Irish ARP folded.

While the English ARP continued coverage for existing clients for the 2009/2010 insurance year, it capped contracts at 12 months and closed the door to new applicants. The English ARP will be discontinued in time for the 2013 renewal. When the dust finally settles, it is likely that the loss of ARP coverage in Ireland and England will have dealt a fatal blow to at least two hundred firms.⁴ The rest of the profession and the commercial insurance market will share responsibility for the claims orphaned by the loss of the ARPs, with insured lawyers on the hook for the first £10 million in aggregated claims. Going forward, when firms that would have been destined for the ARP are forced to cease operations due to lack of access to coverage, each defunct firm's last insurer will be required to provide tail coverage for six years.⁵

For the firms that have managed to weather the storm, survival has come at a high price. In a September 2009 article in the *English Law Gazette*, a London lawyer working in a two-partner firm reported that he would be closing his practice after receiving a quoted premium of £110,000 (nearly \$200,000 CAD, and equivalent to 25 per cent of the firm's annual turnover).⁶ Premium increases were triggered in part by the need to subsidize the ailing ARPs, and were especially galling in the face of reductions in the scope of coverage. Insurers have also become less generous in their acceptance of claims, refusing coverage in situations where lawyers other than the insured (but working in the same firm) have been dishonest. In the September 2010 edition of its newsletter, English insurance law firm Legal Risk LLP took a bleak view of the developments, lamenting that "the small high street firm may be all but gone forever."⁷

Lessons for Canada

Could a similar fate ever threaten Canadian firms?

It's easy to point out that if it were not for the UK's mandatory insurance scheme, some of the defunct firms could have foregone unaffordable insurance and soldiered on. This suggestion, however, ignores the reality that the insurance crisis was not fabricated, but rather was triggered by a recession-driven spike in fraud, falling real estate values and associated claims. A more rigorous post-mortem analysis makes it clear that problems with access to coverage – and not the coverage mandate itself – led to the calamity in the UK. Without the compulsory coverage, many of the same firms would likely have collapsed under the weight of claims, leaving the public unprotected and a spreading stain on the reputation of the surviving bar.

It would be irresponsible not to view the UK situation as a reminder to reflect on our choices here in Canada and more particularly, in Ontario. Should lawyers here be required to carry professional indemnity insurance? And if so, what kind of professional indemnity insurance arrangement should be in place to accommodate legal practitioners?

These are questions considered around the world by regulators and law associations.

In most common law jurisdictions, professional indemnity insurance for lawyers is made mandatory by law or by law society or bar association regulation.⁸ Besides requiring that practising lawyers have liability insurance, these law societies typically prescribe and/or implement various types of insurance arrangements to help lawyers comply. This article provides a global perspective on the benefits of a mandatory professional indemnity insurance program and a mandatory insurer regime for lawyers.

Mandatory professional indemnity insurance: background

A review of approaches elsewhere shows that requiring practising lawyers to buy professional indemnity insurance with minimum terms is popular among many jurisdictions. Some of the reasons that have prompted regulators in different jurisdictions to implement the compulsory insurance programs include:

Protecting the public interest

Many law associations have faced the challenge of balancing their duties to the public and to the legal profession. In doing so, many noticed that some lawyers were either not purchasing errors and omissions insurance, or were under-insured, resulting in clients being unable to collect on losses they suffered as a result of successful lawsuits against lawyers.

Legal regulatory leaders have also expressed concern about the varied policy terms available in a voluntary insurance market. Even where lawyers obtain insurance on their own initiative, differences among policies can expose some lawyers and their clients to potentially dangerous gaps in coverage.

Mandating that lawyers hold professional indemnity insurance that incorporates a minimum set of terms has been promoted as one way to provide some protection to the public. In offering this protection,

mandatory insurance helps maintain public confidence in the legal profession.

Mandatory insurance also helps redress certain inequities in the insurance status of lawyers practising in the same jurisdiction. Critics have suggested that those lawyers who might otherwise remain uninsured but for the requirement that they carry professional indemnity insurance would "free-ride" on the profession's reputation and liability standards.

When "caught" with a claim that these lawyers could not satisfy, these "free-riders" could negatively affect the reputation of the profession. Scandinavian regulators, for example, cited this as a problem for the profession, offering it as one reason for requiring that members be insured.⁹

Protecting lawyers' financial interests

Of course, protection of lawyers' financial interests is another important benefit of compulsory insurance. It is important to provide some protection against forcing a lawyer into bankruptcy, either due to the financial burden of judgments or settlements or from the cost of defending meritless claims. In a litigious environment and with an increasing number of self-represented claimants, this is of particular importance to lawyers. Fostering a financially healthy and diverse bar is also promoting – indirectly – access to justice.

Legal profession as group risk

In deciding to introduce compulsory insurance, the Malaysian law society explained that mandatory insurance allowed Malaysian lawyers to view themselves as a cohesive profession, and not as stand-alone risks. The Law Society of Malaysia found that before malpractice insurance became compulsory, insurers offering this form of insurance favoured the larger firms – a problem because, in 2010, 66 per cent of the lawyers in the country practised either as sole practitioners or in two-lawyer firms. In addition, lawyers practising in high-risk areas such as conveyancing would have difficulty obtaining and sustaining professional indemnity insurance if it were not made mandatory.¹⁰

Even playing field regardless of firm size

The Malaysian bar has also asserted that mandatory insurance helps level the playing field as it helps sustain a range of firm sizes, giving clients more choice in the marketplace.¹¹ There is a suggestion that before the mandatory insurance requirement, clients were more likely to gravitate toward larger, more established, and more often insured firms, resulting in small-firm lawyers having difficulty competing for business.

Even playing field regardless of jurisdiction

The Hong Kong and Singapore bars both view compulsory professional indemnity insurance for their lawyers as essential to maintaining competitiveness in financial, trade and commercial services, and to being on equal footing with firms in other mandatory insurance jurisdictions. Since most common law jurisdictions require mandatory insurance for lawyers, clients will expect the same level of protection for inter-jurisdictional trade and commerce.¹²

The U.S. experience

Calls for the introduction of mandatory malpractice insurance for lawyers arise regularly in jurisdictions without the requirement, including in many areas of the United States. Opinions about the issue are typically divided, with critics warning that compulsory insurance would drive fees higher, and that other programs (for example, funds to compensate the victims of lawyers' criminal acts) provide adequate protection.

For example, in an article in the *Connecticut Law Tribune*, lawyer and blogger Susan Cartier-Liebel, a business consultant for solo and small firms, warned that malpractice insurance is designed to protect the assets of the (lawyer) policyholder as much as it is for the protection of the public, and that having insurance will not curb the insured's criminal behaviour: "[i]f you have a criminal mind, you have a criminal mind." In Cartier-Liebel's view, especially where a lawyer has few assets to protect, making an independent decision about the purchase of insurance is "the right and privilege of each attorney

and business owner based upon their own risk-tolerance."¹³

However, when Cartier-Liebel posted her article to her blog, visitors countered that client claims are often based not on a lawyer's criminal acts, but rather on innocent errors. (Many professional indemnity insurance policies exclude coverage for losses caused by a lawyer's dishonest or fraudulent acts anyway.) While the Connecticut bar has a fund in place to compensate victims of lawyer dishonesty, clients with claims based on innocent error are unprotected. When clients find themselves unable to collect in these cases, the reputation of the entire bar suffers.

Just as controversial in the U.S. is the question of insurance status disclosure requirements. Many states have passed legislation requiring uninsured lawyers to disclose, in writing, that they do not have insurance coverage.¹⁴ Critics of this requirement argue that the rule draws unwelcome attention to insured lawyers' coverage, which these critics suggest is tantamount to inviting the client to sue in negligence any time a legal action is unsuccessful. However, there is scant evidence, either in the U.S. or in any other jurisdiction, that this threat has actually materialized in the form of an increase in frivolous claims.

American bar associations will likely continue to grapple with the issue of mandatory insurance. However, the trend toward requiring disclosure of lack of insurance (disclosure is now required by law, either at the outset of the retainer or in response to client inquiry, in approximately 50 per cent of states) suggests that interest in mandatory insurance is growing in the U.S.

While only the state of Oregon has so far made insurance coverage mandatory, other states are looking seriously at the issue, including New Jersey, where certain kinds of legal service providers – professional corporations, limited liability companies, and limited liability partnerships – must carry a minimum of \$100,000 worth of coverage for each member. In an article in the *New Jersey Law Journal*,¹⁵ legal analysts Bennett

J. Wasserman and Krishna J. Shah urged that the New Jersey mandatory insurance provisions be extended to all lawyers, not only for the protection of the public, but to make malpractice insurance more affordable: “[M]ore 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 typical range for U.S. legal malpractice premiums in many states is currently \$5,000 to \$10,000 per year.

With mandatory insurance, who will be the insurer?

In compulsory insurance jurisdictions, regulators generally designate, endorse or establish an insurance scheme to achieve the objectives of the program. Law societies in many common law jurisdictions have moved toward self-insurance schemes for the primary compulsory layer. The structure and the operating procedures for these programs vary depending on the circumstances of each jurisdiction and the terms of the governing legislation under which the lawyers and the law societies operate.

The mandatory captive insurer regime

Some jurisdictions have implemented mandatory captive insurer regimes.

Australia

In New South Wales, Australia, all lawyers obtain insurance through LawCover Pty Limited, a wholly owned subsidiary of the Law Society of New South Wales.¹⁶ In Queensland, Lexon Insurance Pte Ltd is a wholly owned subsidiary of the Queensland Law Society, and is the captive insurer providing professional indemnity insurance to members of the Queensland legal profession.¹⁷ In Victoria, lawyers are required to maintain professional indemnity insurance with the Legal Practitioners’ Liability Committee.¹⁸

United States

Oregon is currently the only state that requires lawyers to carry liability insurance.

Oregon lawyers must purchase their primary insurance through the Oregon bar’s Professional Liability Fund.¹⁹ In an article for *Law Practice TODAY*, the newsletter of the Law Practice Management section of the American Bar Association, law practice management expert, Ed Poll praised the Oregon program for its affordable premiums and universal coverage, noting that the premiums paid by Oregon lawyers “are much less than the nationwide average [voluntary] payment for malpractice insurance,” and that universal coverage in Oregon means that “[t]he playing field between large and small firms is at least manageable. And the public is truly protected.”²⁰ Jeff Crawford of the Oregon bar’s Professional Liability Fund confirmed that the base premium for the current insurance year is \$3,500 (for coverage of \$300,000 per claim and \$300,000 in the aggregate, plus a defence costs allowance of \$50,000), a premium amount that, he notes, “if you consider inflation, has remained quite stable over the past several years.”

Canada

In British Columbia, a practising lawyer must purchase compulsory insurance through the LSBC Captive Insurance Company Ltd., a wholly owned subsidiary of the Law Society of British Columbia.²¹

In Quebec, the Professional Liability Insurance Fund of the Barreau du Quebec was established to provide insurance for the bar.²² LAWPRO is the mandatory insurer for practising lawyers in Ontario and is a subsidiary of the Law Society of Upper Canada.

Lawyers in all other Canadian jurisdictions effectively insure each other by participating in a reciprocal inter-insurance exchange called the Canadian Lawyers’ Insurance Association (CLIA).



Benefits of a single mandatory insurer

The advantages of requiring all practising lawyers in a jurisdiction to acquire errors and omissions insurance from a single mandatory insurer are significant.

Robert Andrew Scott, past president of the Law Institute of Victoria, Australia, once observed that if lawyers were forced to find insurance on the open market, commercial insurers would likely insure only those lawyers they considered worth the risk. Even where lawyers found coverage, small mistakes leading to a large claim might, he predicted, impact a solicitor’s premiums so substantially that he or she would no longer be able to practise law. Commercial insurers, he concluded, would *de facto* decide who may or may not practise law.²³

As explained at the beginning of this article, Scott’s warning has proven prophetic with respect to the UK insurance market. When factors such as the collapse of the housing market caused the professional indemnity market in Europe to harden,²⁴ many lawyers were forced out of practice when they became unable to obtain or afford coverage.

This result would likely have been avoided had the UK chosen instead to designate or create a single mandatory insurer. Reliance on

a captive insurer can protect the profession from adverse economic conditions and the vagaries of the cyclical insurance market. While captive insurers may be permitted to refuse insurance to a small percentage of lawyers with very poor claims histories, these programs generally are not at liberty to turn away lawyers considered higher-than-average risk from an underwriting standpoint.

In a mandatory insurance jurisdiction, being the insurance provider for all lawyers allows a captive insurer to rely on a predictable pool of clients. If the captive insurer is well-managed, that predictability, along with access to a critical mass of clients, can make it easier for the insurer to determine adequate funding levels, which helps to stabilize premiums.

Commercial insurers, on the other hand, focus on maximizing profit and will charge their premiums accordingly.²⁵ The Queensland Law Society prides itself on its insurance

scheme that has protected its lawyers from increases in professional indemnity premiums of up to 1,000 per cent, as seen in other professions.²⁶

Perhaps the greatest benefit of a captive insurer, however, is that its management focus targets the needs of a specific profession within a particular jurisdiction. In serving all insurance clients in a jurisdiction, the captive professional liability insurer can have at its disposal a complete picture of the different types of claims experience in a particular jurisdiction and in all areas of law. This focus promotes accurate identification and analysis of claim trends. Data analyzed in this manner is invaluable in support of the development of carefully-tailored risk management strategies that can be communicated to the profession through education initiatives.²⁷ Implementing risk management strategies helps to reduce claims costs and to keep premiums relatively stable.

Successful profession-specific insurers do not focus only on historical claims trends, but also take a prospective view of future changes and challenges likely to affect the profession. Because their mandate is to make insurance accessible to all lawyers regardless of market conditions, captive insurers must show leadership and foresight if they expect to live up to their commitment to protect lawyers and their clients throughout the insurance cycle. Focused research and analysis allows these insurers to plan accurately and early for contingencies, to adapt quickly to developing problems, and to tailor products and services to client needs within a specific jurisdiction.

Mandatory insurance program and a mandatory insurer: Ontario lawyers, we've got you covered. ■

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¹ The Law Society (of England and Wales); "Practice Note: Professional Indemnity Insurance"; June 8, 2010; available at: <http://www.lawsociety.org.uk/productsandservices/practicenotes/piinsurance/4527.article>

² Solicitors Indemnity Insurance Rules 2010 (established by the Solicitors Regulation Authority; last updated October 2010); Appendix 1: Minimum Terms and Conditions of Professional Indemnity Insurance for Solicitors and Registered European Lawyers in England and Wales; available online at <http://www.sra.org.uk/solicitors/code-of-conduct/professional-indemnity/indemnity-insurance-rules.page#appendix-1>

³ See "History of Solicitors' Professional Indemnity Insurance" prepared by Lawyers Defence Group, available at: <http://www.lawyersdefencegroup.org.uk/solicitors-professional-indemnity-insurance/>

⁴ According to *Legal Futures*, a UK website and blog dedicated to educating lawyers about regulatory compliance and other issues, 138 English and Welsh firms closed after joining the English ARP between 2009 and 2011, and several other firms are considered to be at risk. An additional cohort of firms have failed in Ireland, where the ARP closed in 2009. See: <http://www.legalfutures.co.uk/latest-news/138-law-firms-in-the-arp-close-down-as-solicitors-face-bankruptcy-action>

⁵ See explanation of arrangements after ARP closure in Lockton Solicitors' Blog at: <http://solicitors-blog.co.uk/tag/arp/>

⁶ Dean, James "Firms shut down ahead of PII renewal", *The Law Gazette*, September 16, 2009

⁷ In "The Renewal" in *Risk Update*, September 2010 edition, a publication of Legal Risk LLP. *Risk Update* is available at: www.legalrisk.co.uk

⁸ Refer to Table 1: "Professional Indemnity Insurance Requirements Around the World" at www.lawpro.ca/magazinearchives

⁹ G. Skogh, "Professional Liability Insurance in Scandinavia: The Liability of Accountants, Barristers and Estate Agents" in *The Geneva Papers on Risk and Insurance*, 14 (No. 53,

1989), 360 at 364, online: [http://www.genevaassociation.org/PDF/Geneva_papers_on_Risk_and_Insurance/GA1989_GP14\(53\)_Skogh.pdf](http://www.genevaassociation.org/PDF/Geneva_papers_on_Risk_and_Insurance/GA1989_GP14(53)_Skogh.pdf)

¹⁰ R. Kesevan "Malaysian Bar PII: A Mandatory Scheme" (The Malaysian Bar, 2010), online: http://www.malaysianbar.org.my/professional_indemnity_insurance/malaysian_bar_pii_a_mandatory_scheme.html

¹¹ R. Kesevan, "The Malaysian Experience: The Way Forward" (Address to the 1st Malaysian Professional Indemnity Insurance Workshop, 17 and 18 November 2005) [unpublished], online: (<http://www.jltinteractive.com/ecCover/Attachment/Malysian%20Experience%20-%20The%20Way%20Forward.pdf>)

¹² "Hong Kong Solicitors Indemnity Scheme Review of Insurance Arrangements Review Report" (28 November 03), LC Paper No. CB(1)730/03-04(04), online: The Legislative Council of Hong Kong, <http://www.legco.gov.hk/yr03-04/English/panels/ajls/papers/aj0129cb2-1092-1e-scan.pdf> at 121

¹³ Cartier-Liebel, Susan, "Mandatory Malpractice Insurance Only Hurts Law-Abiding Lawyers", *The Connecticut Law Tribune*, February 12, 2007

¹⁴ See, for example, the January 4, 2010 press release titled "Legal Professional Liability Insurance Disclosure Required in Many States" from the Brunswick family of insurance companies, available at: <http://www.brunswickcompanies.com/pr-pl-legal-malpractice-insurance-disclosure-20100104.html>

¹⁵ Wasserman, Bennett J. and Krishna J. Shah, "Mandatory Legal Malpractice Insurance: The Time Has Come", *New Jersey Law Journal*, Vol CXCI No.2 Index 58, January 14, 2010

¹⁶ online: <http://www.lawcover.com.au/topup/default.asp?ContentItemID=85>

¹⁷ online: <http://www.lexoninsurance.com.au/content/lwp/wcm/connect/Lexon/About+Lexon/>

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²¹ online: http://www.lawsociety.bc.ca/licensing_membership/membership/status_changes/insurance.html

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²³ A. Scott, "Playing the ball not the man" (Law Institute of Victoria, President's LIJ Column, Jun 1998), online: <http://www.liv.asn.au/About-LIV/Media-Centre/President-s-Page/Playing-the-ball-not-the-man>

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²⁵ Law Council of Australia, Law Council Submission to the Potts Review, "Review of Regulation of Discretionary Mutual Funds and Direct Offshore Foreign Insurers" (2006) at 9, online: http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=8C755089-1C23-CACD-22CC-8316BEC40307&siteName=lca

²⁶ online: <http://www.qls.com.au/content/lwp/wcm/connect/QLS/Your+Legal+Career/Practice+Support/Professional+Indemnity+Insurance/>

²⁷ M. Gill, "Lawyers' Professional Indemnity: New South Wales", (Address to the 1st Malaysian Professional Indemnity Insurance Workshop, 17 and 18 November 2005) [unpublished], online: <http://www.jltinteractive.com/ecCover/Attachment/New%20South%20Wales%20-%20Lawyers%20Professional%20Indemnity.pdf>; see Law Council of Australia, *supra* note 14 at 9; see Scott, *supra* note 12; A. Flanrin, G. Durange, L. Halper, t. al., "Professional Indemnity for Lawyers - A Worldwide Review and Comment" (2005) PartnerRe at 6, online: http://www.partnerre.com/App_Assets/Public/4dd14bd9-48a6-4e32-820a-200c9bdb6c98/PIforLawyers.pdf

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THE LAW: BUSINESS OF PROFESSION? THE CONTINUING
RELEVANCE OF JULIUS HENRY COHEN FOR THE PRACTICE OF
LAW IN THE TWENTY-FIRST CENTURY

Law as a Profession: Examining the Role of Accountability

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LAW AS A PROFESSION: EXAMINING THE ROLE OF ACCOUNTABILITY

*Susan Saab Fortney**

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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.”¹ As members of a profession, Cohen asserts that lawyers may be brought to prompt and summary accountability through a collective enterprise.²

* 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.

1. JULIUS HENRY COHEN, *THE LAW, BUSINESS OR PROFESSION?* 109 (1924) (referring to the “germ of the American guild-idea”).

2. *Id.* at 22–23 (asserting that one destroys the basis of professional discipline if one makes the law a business).

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.³

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.⁴ 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.”⁵ 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.⁶ 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.

3. 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.

4. *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.*

5. *Id.*

6. See generally *id.* at 3–22.

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.⁷ In lawyers' campaign for limited liability, public protection was largely a secondary concern.⁸ 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.⁹ 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.

7. 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.

8. 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).

9. 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.

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.¹⁰ 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.¹¹ 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.¹² In various cases, the amount of damages that the government alleged far exceeded the amount of legal malpractice insurance available to the defendant firms.¹³

To many, the government appeared to have both an unlimited war chest and zeal to recover as much as possible, even if it meant

10. 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).

11. 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).

12. 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.*

13. 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 Jenkins & 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.

pursuing the personal assets of partners who were not directly involved in this representation of the failed financial institutions.¹⁴ This was dramatically played out in litigation against Jenkins & 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.¹⁵

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.¹⁶ 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.¹⁷

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.¹⁸ Because this was an established principle of partnership law, the CDM lawyers evidently recognized that it would take legislative action to eliminate unlimited liability for partners' malpractice.¹⁹ 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.²⁰ 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

14. 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").

15. *Id.* at 1071.

16. *Id.* (referring to the thousands of lawyers who watched the litigation unfold with the "but for the grace of God go I" reaction).

17. See Burger, *supra* note 11, at 178 (describing the confluence of events that motivated lawyers to seek liability protection).

18. See Hamilton, *supra* note 10, at 1066-74 (tracing the origin of the LLP concept and legislative initiatives).

19. *Id.* at 1072-73.

20. See *id.*; see also BROMBERG & RIBSTEIN, *supra* note 9, at 3.

of the partnership by another partner, employee, or representation of the partnership.²¹

The bill that created a “limited liability partnership” structure passed the Texas Senate with little attention or comment.²²

The initial reception in the Texas House of Representatives was far more negative.²³ 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.²⁴

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.²⁵ 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 \$100,000.²⁶

With these changes, the revised bill was “quietly attached” to an omnibus bill proposed by the Texas Business Law Foundation, a not-

21. BROMBERG & RIBSTEIN, *supra* note 9, at 3.

22. *Id.* at 4.

23. Hamilton, *supra* note 10, at 1073 (identifying some of the criticisms).

24. BROMBERG & RIBSTEIN, *supra* note 9, at 4.

25. *See* Hamilton, *supra* note 10, at 1073–74.

26. BROMBERG & RIBSTEIN, *supra* note 9, at 4.

for-profit corporation organized by a group of corporate lawyers from major Texas law firms.²⁷

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.²⁸ 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.²⁹

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."³⁰ After some changes were made, the legislator withdrew his opposition.³¹ 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.³²

27. 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.*

28. See BROMBERG & RIBSTEIN, *supra* note 9, at 12 ("In 1994, 13 states adopted LLP provisions . . . [and] [a]bout 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.

29. 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.").

30. 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.*

31. BROMBERG & RIBSTEIN, *supra* note 9, at 4.

32. 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").

As the limited liability movement spread across the nation, the protection that legislation provided actually expanded.³³ As noted above, the first proposed legislation initially only protected professionals.³⁴ 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.³⁵ 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.³⁶ 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.”³⁷ Subsequently, other states eliminated the provisions that preserved vicarious liability for acts and omissions of supervised persons.³⁸ By 2008, eighty percent of the states had adopted “full-shield” statutes, providing a liability shield for all debts and obligations of the partnership.³⁹

Bar association groups eagerly supported LLP legislation that eliminated “even the moderate restrictions on limited liability.”⁴⁰ 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

33. 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).

34. See *supra* note 20 and accompanying text.

35. 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, “[i]n 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).

36. For a discussion of the unresolved issues related to supervisory liability, see BROMBERG & RIBSTEIN, *supra* note 9, at 126–28.

37. *Id.* at 10–11.

38. See *id.* at 165–69 tbl.3-1 (outlining the different approaches to supervisory liability).

39. *Id.* at 15.

40. *Id.* at 14.

Revised Uniform Partnership Act.⁴¹ These provisions limited vicarious liability for all kinds of debts and extended protection to persons other than practicing professionals.⁴²

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.⁴³ At the 1997 annual meeting, ALI members rejected this approach, adopting a version that recognized lawyers' ability to limit their liability.⁴⁴ 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.⁴⁵ 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."⁴⁶

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

41. *Id.*

42. *Id.*

43. Fortney, *supra* note 12, at 360 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Tentative Draft No. 7, 1994)).

44. *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.

45. 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).

46. *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.

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.⁴⁷ Disappointingly, few opinions urged lawyers to take additional steps to communicate their limited liability status to clients and prospective clients.⁴⁸

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.⁴⁹ Rather, lawyers operated out of self-interest.⁵⁰ 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

47. 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).

48. 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 “[i]nclude a written designation of the limited liability structure as part of its name.” *Id.* In addition, the firm must “[p]rovide 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.*

49. See Wolfram, *supra* note 8, at 362 (noting that the bar played a pivotal role in pushing for limited liability legislation).

50. *Id.*

threatening, the bar sought and obtained immediate legislative action in many states.⁵¹

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.⁵² The vast majority acceded to the popular will of lawyers, doing little to stem the tide.⁵³ In contrast to many, the Illinois Supreme Court resisted the pressure to simply bless allowing lawyers to practice in limited liability firms.⁵⁴ 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.⁵⁵

51. Roger C. Cramton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 *FORDHAM L. REV.* 1599, 1613 n.48 (2002).

52. “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.

53. *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.”).

54. 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).

55. 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

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.⁵⁶ 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.⁵⁷ 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.⁵⁸ 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

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).

56. 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).

57. *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.

58. *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").

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.⁵⁹ 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.⁶⁰ 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.⁶¹ 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.⁶²

Regulators from other countries share this perspective in asserting that PII protects consumers as well as lawyers.⁶³ 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.⁶⁴ Requiring minimum limits and types of insurance protects lawyers and clients from gaps in

59. Jennifer Ip & Nora Rock, *Mandatory Professional Indemnity Insurance and a Mandatory Insurer: A Global Perspective*, 10 LAWPRO MAG. 2, 10–11 (2011).

60. *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/ProfessionalIndemnity_AroundWorld.pdf (last visited Aug. 23, 2012).

61. *Professional Liability Insurance*, L. SOC'Y § 3.2 (July 4, 2012), <http://www.lawsociety.org.uk/advice/practice-notes/professional-indemnity-insurance/>.

62. *Id.*

63. “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)).

64. *Id.*

coverage.⁶⁵ 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.⁶⁶ Finally, mandatory insurance may improve the accessibility and affordability of insurance.⁶⁷

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.⁶⁸ 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.⁶⁹ Lawyers became keenly interested in obtaining insurance in the 1970s when legal malpractice claims increased substantially.⁷⁰ Many insurers responded to these claims by changing their approaches to underwriting and by sharply raising premiums.⁷¹ Other insurance companies simply discontinued writing legal malpractice insurance in certain states.⁷² Because of these changes, the coverage provided decreased and the cost of insurance increased.⁷³

65. *Id.* (explaining that lawyers who obtain insurance on their own initiative expose themselves and their clients to “potentially dangerous gaps in coverage”).

66. *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).

67. 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.*

68. See *supra* notes 66–67 and accompanying text.

69. 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).

70. See Cohen, *supra* note 69, at 308 (tracing developments that contributed to the expansion of lawyers’ liability exposure).

71. 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.*

72. “In some jurisdictions, such as California, insurers started dropping out of the legal malpractice insurance market and focusing on more profitable and stable

By the late 1970s, the market in various states became very restrictive, making legal malpractice insurance cost prohibitive for many and unavailable to others.⁷⁴ Lawyer organizations around the United States evaluated options to deal with the tough and expensive insurance market.⁷⁵ In some states, lawyers established bar-related mutual companies, owned by lawyers, to provide affordable insurance.⁷⁶ In other states, including California and Washington, lawyers explored the possibility of lowering insurance costs by requiring all lawyers to purchase insurance.⁷⁷ 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.”⁷⁸ 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.”⁷⁹ 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).⁸⁰

areas.” *Id.* (citing ISSUES IN FORMING A BAR-RELATED PROFESSIONAL LIABILITY INSURANCE COMPANY 4 (ABA Standing Comm. on Lawyers’ Professional Liability ed., 1989)).

73. 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.

74. See *id.* at 1285 (citing Smith, *Cautious Optimism—An Overview of Lawyer Malpractice*, 12 B. LEADER 13, 14 (1989)).

75. See Cohen, *supra* note 69, at 309–31 (chronicling bar initiatives to make insurance more accessible and affordable).

76. 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.*

77. “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.

78. Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2610 (1996).

79. Goldfein, *supra* note 69, at 1296; Ramos, *supra* note 78, at 2610.

80. 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

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.”⁸¹ “The Oregon State Bar Association determined that [the PLF] would cost individual [lawyers] less than comparable . . . insurance.”⁸² In commenting on the Oregon Bar Association’s role in supporting a mandatory insurance program, one malpractice expert noted that “[a]ltruism, or concern for the consumer, was not entirely behind Oregon’s decision to establish the PLF.”⁸³ Lawyers and bar leaders recognized that the mandatory insurance program made economic sense for lawyers.⁸⁴

In arguing for mandatory legal malpractice insurance, commentators often point to the success of the Oregon PLF program.⁸⁵ 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.⁸⁶ As

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.*

81. Goldfein, *supra* note 69, at 1296.

82. 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).

83. Ramos, *supra* note 78, at 2610.

84. 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).

85. 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.*

86. In explaining why the Oregon model of mandatory insurance has “stayed only in Oregon,” Manuel Ramos summarizes the opposition as follows:

noted by Professor Leslie Levin, “[w]hile 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.”⁸⁷ Some outspoken opponents of mandatory insurance would require lawyers to disclose that they do not carry malpractice insurance.⁸⁸ 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.⁸⁹ 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

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.*

87. 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)).

88. 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).

89. *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).

liability insurance.⁹⁰ 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.⁹¹

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.⁹² 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.⁹³ 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.⁹⁴ 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.⁹⁵

90. 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).

91. 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).

92. 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 “sunsetting” and not reenacted. *Id.*

93. 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).

94. 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.*

95. 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

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).⁹⁶ 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.⁹⁷ 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.⁹⁸ Although the ABA Model Court Rule was “lawyer friendly,” it only passed the House of Delegates by a narrow eleven-vote margin.⁹⁹

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.¹⁰⁰

professional liability insurance. *See generally* Cincinnati Bar Ass’n v. Trainor, 950 N.E.2d 524 (Ohio 2011).

96. 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/.

97. *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*].

98. 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.

99. 5 RONALD E. MALLIN & 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).

100. *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_mcrd_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.

Another seven states require disclosure directly to clients.¹⁰¹ 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.¹⁰²

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.¹⁰³ 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.¹⁰⁴

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

101. 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.

102. *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.*

103. The following states have rejected a disclosure rule: Arkansas, Connecticut, Florida, Kentucky, and Texas. *State Implementation Chart*, *supra* note 100.

104. *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).

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.¹⁰⁵ Lay consumers may assume that lawyers are required to carry insurance.¹⁰⁶

To address the asymmetry and lack of information, proponents maintain that states should require disclosure when lawyers do not carry professional liability insurance.¹⁰⁷ 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:

[W]hen 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.¹⁰⁸

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.¹⁰⁹

Unless consumers possess sufficient information on a lawyer's insurance status, they cannot make an "efficient risk assessment" as

105. 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.*

106. 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).

107. 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).

108. 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).

109. 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.

to whether they wish to hire the lawyer.¹¹⁰ 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.¹¹¹

Failure to require disclosure shifts risk of loss to consumers who rely on the superior position of their lawyers.¹¹² 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.¹¹³

Often malpractice plaintiffs' lawyers do not pursue actions against lawyers who do not carry professional liability insurance.¹¹⁴ Recognizing this, practitioners may see "going naked" as an "effective strategy for avoiding lawsuits but it comes at the cost of

110. Mills & Petrova, *supra* note 106, at 1034.

111. 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.

112. 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.").

113. 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.

114. "Legal malpractice cases are rarely pursued against an uninsured attorney unless that attorney has significant assets." Ramos, *supra* note 86, at 1727.

protecting the interests of clients.”¹¹⁵ 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.¹¹⁶

The likelihood of being injured by an uninsured lawyer is significant because a substantial percentage of lawyers do not carry professional liability insurance.¹¹⁷ 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.¹¹⁸

The adoption of mandatory insurance disclosure rules reduces the number of uninsured lawyers by creating incentives for lawyers to buy insurance.¹¹⁹ 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

115. Acello, *supra* note 96 (quoting Robert Fellmeth).

116. *Id.*

117. 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).

118. 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 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_Attorney_Survey_0208.pdf.

119. 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.

to avoid premium increases.¹²⁰ 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.¹²¹

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.¹²² The increased number of malpractice claims makes this more of a threat for responsible lawyers who carry insurance.¹²³

Finally, proponents argue that disclosure rules balance lawyer autonomy and client protection.¹²⁴ 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.¹²⁵ 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.

120. Mignone, *supra* note 113, at 1083 (suggesting that disclosure rules would lead attorneys to deliver legal services with greater care).

121. 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).

122. 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).

123. 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.

124. 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).

125. 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).

Lawyers who oppose mandatory disclosure rules do not see those rules as a compromise that preserves lawyer independence.¹²⁶ Rather they assert that disclosure rules intrude on the choices lawyers should be able to make in representing clients.¹²⁷ Specifically, they argue that mandatory disclosure rules interfere with a practitioner's autonomy to decide whether to self-insure or purchase insurance.¹²⁸ 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.¹²⁹ Another concern related to lawyer independence is that mandatory insurance disclosure rules give too much power to insurance companies.¹³⁰

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.¹³¹ Opponents also argue that a mandatory disclosure rule is unnecessary because consumers may always inquire as to whether a lawyer carries insurance.¹³² Opponents maintain that consumers

126. 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”).

127. 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).

128. 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).

129. 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/.

130. 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).

131. 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”).

132. 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).

consider a variety of factors when retaining counsel, including the lawyer's experience and disciplinary record.¹³³

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."¹³⁴ 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.¹³⁵

Some of the most vocal critics argue that adoption of mandatory disclosure rules will disproportionately affect solo and small firm lawyers.¹³⁶ They assert that many solo and small firm practitioners cannot afford insurance and therefore disclosure rules will unfairly stigmatize them.¹³⁷

To lawyers familiar with professional liability coverage, the most persuasive criticism is that mandatory disclosure actually misleads lay people.¹³⁸ 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.¹³⁹ Unlike occurrence policies, claims-made policies cover claims that are made and reported during the policy term. Therefore, lawyers who disclose

133. 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").

134. 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.

135. Cunitz, *supra* note 82, at 656–57.

136. 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").

137. 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).

138. 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.

139. See *id.*

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.¹⁴⁰ Other concerns relate to the fact that limits of liability, deductibles, insuring agreements, exclusions, and even conditions vary widely.¹⁴¹ 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.¹⁴²

In 2010, the Supreme Court of Texas weighed the arguments related to adoption of a mandatory disclosure rule.¹⁴³ 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.¹⁴⁴ This decision came after a lengthy debate and conflicting recommendations.¹⁴⁵ First, in 2008, the State Bar of Texas Task Force on Insurance Disclosure voted against adoption of an insurance disclosure rule.¹⁴⁶ Within a year, the Grievance Oversight Committee

140. 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).

141. 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.

142. 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.

143. 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).

144. 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.

145. 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).

146. 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>

(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.¹⁴⁷ The Supreme Court of Texas then asked the State Bar Board of Directors to take a position.¹⁴⁸ 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.¹⁴⁹

/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.*

147. 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.

148. 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.

149. 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).

To obtain the perspectives of consumers of legal services, State Bar leadership included the public in hearings and conducted a public opinion survey.¹⁵⁰ The survey conducted in November 2009 started with open-ended questions related to the factors respondents believed were important when hiring lawyers.¹⁵¹ In response to these questions, respondents did not identify professional liability coverage as a factor.¹⁵² 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.¹⁵³ Eighty-eight percent reported that they would be less likely to hire a lawyer who does not carry professional liability insurance.¹⁵⁴ Sixty-four percent also believed that lawyers should be required to disclose to their clients whether or not they carry professional liability insurance.¹⁵⁵ 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.¹⁵⁶ Although most prospective clients might not ask whether a lawyer carries insurance, these results suggest that many consumers view insurance status as material information.¹⁵⁷

150. For the survey report, see ST. B. TEX., *supra* note 105.

151. 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.*

152. *Id.* at Question 1. Eleven percent indicated that they had asked if their attorneys carried professional liability insurance. *Id.* at Question 4.

153. 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.*

154. *Id.* at Question 9.

155. *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.

156. *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.

157. 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:*

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.¹⁵⁸ Practitioner opinions voiced in both written submissions and hearing testimony overwhelmingly opposed requiring disclosure.¹⁵⁹ 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.¹⁶⁰ On the Texas Bar Blog, 92% of comments were opposed to disclosure and 8% were in favor of disclosure.¹⁶¹ Of the eight responses received from State Bar Sections and Committees, six were against requiring disclosure and two were neutral.¹⁶² 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.¹⁶³

To learn more about the basis for the opposition to mandatory disclosure, I analyzed the hearing testimony as summarized on the

Public Opinion Focus Group Study, HUMAN INTERFACES INC. (Jan. 15, 2010), http://www.texasbar.com/pliflashdrive/material/SBOT%20FG%20Report_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.

158. *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&ContentFileID=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.

159. For a numerical analysis of the submissions, see ST. B. TEX., *supra* note 149, at 2–3.

160. *Id.* at 2.

161. *Id.* (reporting that ten of the sixteen comments in favor of a disclosure rule appeared to be from physicians and non-lawyers).

162. *Id.*

163. *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.

State Bar of Texas website.¹⁶⁴ The largest number of lawyers opposed the disclosure because there was no evidence of a problem.¹⁶⁵ Other common complaints were that disclosure would be misleading¹⁶⁶ and would increase malpractice suits.¹⁶⁷ 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.¹⁶⁸ Those few who supported adoption of a disclosure rule tended to make public protection arguments.¹⁶⁹

164. 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.

165. 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_SanAntonio_Hearing_upload.mp3 (last visited Oct. 12, 2012).

166. 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).

167. 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).

168. 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 policies 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

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.¹⁷⁰ 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”¹⁷¹

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.¹⁷² 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

informal survey of the members of the Task Force on Insurance Disclosure indicated that each was paying approximately \$4,000 per year. *Id.*

169. 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_Dallas_Hearing_upload.mp3 (last visited Oct. 12, 2012).

170. 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.”).

171. 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/pliflashdrive/material/sections_committeesResponses.pdf.

172. *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.

should come down on the side of the public. Practicing law is a privilege and our basic goal must be to serve the public.¹⁷³

Another Texas lawyer prefaced his comments by noting that he considers law to be a “profession and not merely a business.”¹⁷⁴ 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.”¹⁷⁵

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

173. 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].

174. See Letter from Roger W. Anderson, Attorney, Gillen & Anderson, to State Bar of Texas (Oct. 16, 2009) (on file with author).

175. *Id.*

events reveals that lawyers have tended to elevate their own self-interest over consumer interests.¹⁷⁶

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.¹⁷⁷ 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.¹⁷⁸ Therefore, the persons left without protection were inexperienced users of legal services who may have assumed that lawyers carry insurance.¹⁷⁹ Such consumers likely do not know the effect and consequences of their lawyers practicing in LLPs.¹⁸⁰

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

176. 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_SurveyOfAttorneys.pdf.

177. *See* BROMBERG & RIBSTEIN, *supra* note 9, § 2.03(a)(3) (describing the types of business that may organize as LLPs under state laws).

178. 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).

179. 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.

180. 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.

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.¹⁸¹

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.¹⁸² Second, in states with judicial elections, judges rely heavily on financial and other support from the practicing bar.¹⁸³ 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.¹⁸⁴

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.¹⁸⁵ By doing so, the

181. As noted by Professor Wolfram, most courts have not been involved in the LLP adoption process in any way and "[i]n 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.

182. 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").

183. 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.

184. 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).

185. 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.

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.¹⁸⁶ 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 "[t]o 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.¹⁸⁷ 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.¹⁸⁸

Greco's recommendation was rejected and the ABA adopted the proposed mission statement that puts lawyers first.¹⁸⁹

186. See *supra* note 55 and accompanying text.

187. 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_delegates_passionately_debates_abas_goals/.

188. *Id.*

189. 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)).

Within the ABA there are pockets of consumer-minded individuals, such as the ABA Standing Committee on Client Protection.¹⁹⁰ These groups have supported initiatives such as the ABA Model Rule that requires lawyers to disclose their lack of insurance.¹⁹¹ 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.¹⁹² 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.¹⁹³

While courts will continue to assume primary responsibility for lawyer regulation, lawyers may face legislative action.¹⁹⁴ For example, proponents of mandatory disclosure have threatened to resurrect a bill proposed by a Texas legislator.¹⁹⁵ 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.¹⁹⁶

190. 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).

191. 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).

192. 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.

193. In professional liability litigation, the burden may fall on the shoulders of insured lawyers when plaintiffs do not pursue claims against uninsured lawyers.

194. 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).

195. 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).

196. 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.

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.”¹⁹⁷ 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.¹⁹⁸

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.¹⁹⁹ In regulating lawyers, courts should hold them to strict accountability for the performance and observance of their professional duties.²⁰⁰ Finally, those who espouse the status of law as a profession should recognize financial responsibility as a professional virtue and promote it as such.²⁰¹

197. See Mendrzycki, *supra* note 133, at 37. Mr. Mendrzycki chaired the ABA Standing Committee on Lawyer’s Professional Liability.

198. 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).

199. 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).

200. See, e.g., Gallagher, *supra* note 91, at 5 (quoting court opinions that underscored responsibilities that lawyer-fiduciaries owe clients).

201. 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).

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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.²⁰² 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.²⁰³ 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.

202. See *House of Delegates Passionately Debates ABA's Goals*, *supra* note 187.

203. 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).

Western States Bar Conference

March 30, 2017, Hyatt Regency Maui



















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Question

	 AK	 AZ	 CA	 CO	 HI	 ID	 MT	 NV	 NM	 ND	 OR	 SD	 TX	 UT	 WA	 WY
1. Does your State have a mandatory malpractice requirement, either for lawyers generally in private practice or for any other subclass of professionals which serve the public?	NO	NO Considered in past, but rejected.	NO	NO	NO	YES (New)	NO	NO	NO	NO	YES (Since 1978)	NO	NO	NO	No to lawyers; Yes to LLLT / LPO	NO
2. Does your State have any disclosure requirement to clients for lawyers in private practice which opt not to maintain malpractice insurance? If so, what types of disclosure is required? (Letterhead disclosure, statement in fee agreement, etc.)	Yes; AK RPC 1.4 (in writing if less than \$100 /\$300 limits)	NO	Yes; Rule 3-410 (in engagement letter if > 4 hrs)	NO	NO	NO	NO	NO	No response to survey.	NO	N/A	Yes; SD RPC 1.4 (c); Rule 7.5 (e) (on letterhead)	NO	NO	NO	NO
3. Does your State inquire about malpractice insurance in the annual lawyer licensing process? If so, what specifically is asked? If possible, please forward an example.	NO	Yes, in private practice, are you insured, name of carrier.	No response to survey.	YES	Yes; do you maintain LPL insurance?	NO	NO	Yes; whether insured + name / address carrier.	No response to survey.	YES	YES	Yes; whether insured and with whom.	NO	NO	Yes; whether insured; APR 26(a)	NO
4. Is any information gathered during lawyer licensing made available to the public in any way? If so, how? If so, is all information made available to the public or only partial information?	NO	Yes. Included in online directory profile.	No response to survey.	Yes. Included in online directory profile.	HSBA website general statistical information; NO individual coverage info available.	NO	NO	No; coming soon to member record on website.	No response to survey.	Generally no, unless specifically sought.	N/A	Generally no; yet available upon request.	NO	NO	Yes; in WSBA online Lawyer Directory (APR 26(b))	N/A
5. Do you in any way cross tabulate those who maintain malpractice insurance with law firm size? If so, what have you learned?	NO	NO	No response to survey.	Yes; 37% of solos going bare.	NO	NO	NO	NO	No response to survey.	NO	N/A	Yes; can explore solo practitioner exposure.	NO	NO	Not directly, but monitored.	N/A
6. Has there been any recent discussion in your state regarding mandatory malpractice or the need for greater attorney or client protection in regards to LPL insurance?	NO	Perennial discussion that goes nowhere.	No response to survey.	Focused on Proactive Management Based Regulation.	NO	Yes; passed by ISB membership; approved by Supreme Court.	NO	Yes; task force formed to examine issue.	No response to survey.	NO	N/A	NO	NO	NO	Yes; work group formed to examine issue.	NO

Notice Provisions



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CURRENT RULES

Rules of Professional Conduct

Rule 3-410 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 in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.

(B) If a member does not provide the notice required under paragraph (A) 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 of the date that the member knows or should know that he or she no longer has professional liability insurance.

(C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.

(D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.

(E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.

Discussion:

[1] The disclosure obligation imposed by Paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.

[2] A member may use the following language in making the disclosure required by Rule 3-410(A), and may include that language in a written fee agreement with the client or in a separate writing:

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."

[3] A member may use the following language in making the disclosure required by Rule 3-410(B):

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance."

[4] Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. (Added by order of the Supreme Court, operative January 1, 2010.)

Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client's behalf and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform an existing client in writing if the lawyer does not have malpractice insurance of at least \$100,000 per claim and \$300,000 annual aggregate and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for six years from the termination of the client's representation.

Alaska Rules of Professional Conduct

COMMENTS

Comment - Rule 1.4 (AK CODE.HTM#Rule 1.4)

Subsection (c) does not apply to lawyers in government practice or lawyers employed as in-house counsel.

Lawyers may use the following language in making the disclosures required by this rule:

(1) no insurance: "Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least \$100,000 per claim and \$300,000 annual aggregate and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm) does not have malpractice insurance coverage of at least \$100,000 per claim and \$300,000 annual aggregate."

(2) insurance below amounts: "Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least \$100,000 per claim and \$300,000 annual aggregate and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s malpractice insurance has dropped below at least \$100,000 per claim and \$300,000 annual aggregate."

(3) insurance terminated: "Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least \$100,000 per claim and \$300,000 annual aggregate and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s malpractice insurance has been terminated."

Rule 1.4. Communication

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) If a lawyer does not have professional liability insurance with limits of at least \$100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's 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."

(d) The required disclosure in 1.4(c) shall be included in every written communication with a client.

(e) This disclosure requirement does not apply to lawyers who are members of the following classes: § 16-18-20.2(1), (3), (4) and full-time, in-house counsel or government lawyers, who do not represent clients outside their official capacity or in-house employment.

Licensing Statements with Malpractice Insurance Inquiries



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2016 ANNUAL FEE STATEMENT
Delinquent after February 1, 2016

Bar No. 0- - - -
 >c\ b'K "Ga jh
 Ga jh and >cbYg PLLC
 2' () * N A Ujb St Ste 1- -
 Phoenix, AZ 8500\$-\$\$\$

VOLUNTARY CONTRIBUTION

CONTRIBUTION	AMOUNT
Legal Services Contribution The Board of Governors requests Bar members join them in raising funds to assist in delivering legal services to Arizona's least advantaged. Your total contribution to the Arizona Foundation for Legal Services & Education will go toward this effort (no administrative fee will be deducted) and is fully tax deductible. The suggested donation is \$50.00, although larger amounts are encouraged. <input type="checkbox"/> I prefer NOT to make a financial contribution at this time.	
TOTAL	\$ 50.00

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- 45 Hours of substantially reduced-fee service to indigent clients
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- 58 Hours of volunteer legal or professional work for charitable groups
- 140 Hours of volunteer work improving the law/legal system/profession

☒ I have provided financial support for legal services for the poor.

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MEMBERSHIP CATEGORY	FEE (\$)	CURRENT
CURRENT CATEGORY		
Active - 3+ Yrs	490.00	490.00
CHANGING MEMBERSHIP CATEGORY		
No change		
MEMBERSHIP CATEGORY TOTAL	\$	490.00
<i>Membership fees include \$10.00 for the Client Protection Fund Active Member first admitted in any jurisdiction</i>		

SPECIALISTS CATEGORY	CURRENT
<i>I am not a member of any specialists categories.</i>	
SPECIALISTS CATEGORY TOTAL	\$ 0.00

SECTIONS CATEGORY	FEE (\$)	CURRENT
627 Administrative Law and Regulatory Practice	25.00	
625 Alternative Dispute Resolution	45.00	
629 Animal Law	35.00	
601 Antitrust Law	45.00	
626 Appellate Practice	30.00	
602 Bankruptcy Law	35.00	
604 Business Law	30.00	
603 Construction Law	35.00	
605 Criminal Justice	30.00	
624 Elder Law, Mental Health and Special Needs Planning	35.00	
610 Employment and Labor Law	40.00	
606 Environmental and Natural Resource Law	30.00	
607 Family Law	35.00	35.00
608 Immigration Law	30.00	
622 Indian Law	35.00	
612 Intellectual Property Law	35.00	
609 International Law	35.00	
628 Internet, E-Commerce and Technology Law	40.00	
623 Juvenile Law	35.00	
613 Probate and Trust Law	40.00	
614 Public Lawyers	25.00	
615 Real Property Law	35.00	
616 Securities Regulation	30.00	
621 Sole Practitioner/Small Firm	35.00	
617 Tax Law	35.00	
618 Trial Practice	25.00	
619 Workers' Compensation	20.00	
620 World Peace Through Law	35.00	
SECTIONS CATEGORY TOTAL	\$	35.00

PAYMENT SUMMARY

	AMOUNT (\$)
MEMBERSHIP CATEGORY TOTAL	\$ 490.00
SPECIALISTS CATEGORY TOTAL	+ \$ 0.00
SECTIONS CATEGORY TOTAL	+ \$ 35.00
LEGAL SERVICES CONTRIBUTION	+ \$ 50.00
LATE FEE (+\$100 after 2/1/16, +\$200 after 3/1/16)	+ \$ 0.00
SPECIALISTS LATE FEE (+\$25 each after 2/1/16)	+ \$ 0.00
PAYMENT AMOUNT / TOTAL DUE	= \$ 575.00

TAX DEDUCTION NOTICE

No contribution or gift to the State Bar of Arizona is deductible as a charitable contribution for income tax purposes. Annual Fee payments may be deductible as a business expense; however, due to lobbying activities, 0.50% of annual fees are not deductible.

INSURANCE COMPLIANCE

I am an "active" member of the State Bar of Arizona and in private practice ☐ yes ☒ no
 (Private practice excludes government lawyers, in-house counsel, judges and legal services lawyers.)

If yes, then answer: I am currently covered by professional liability insurance ☐ yes ☐ no

(Rule 32 (c) 12 requires that you notify the State Bar of Arizona in writing within 30 days if your professional liability insurance lapses, is no longer in effect, or terminates for any reason.)

TRUST ACCOUNT AND IOLTA COMPLIANCE

IF YOU CHECK ONE OF THE FOLLOWING FOUR BOXES, YOU DO NOT HAVE TO
 COMPLETE THE REMAINING QUESTIONS. PLEASE PROCEED TO THE SIGNATURE AREA AT THE BOTTOM OF THE FORM.

- ☒ I practice in Arizona, or I am eligible to practice in Arizona, but I am not required by Rule 42, ER 1.15, and Rule 43, Ariz. R. Sup. Ct., to maintain an Arizona client trust account.
- ☐ I am admitted in Arizona and practice in another jurisdiction. I am not required by Rule 42, ER 1.15, and Rule 43, Ariz. R. Sup. Ct., to maintain an Arizona client trust account.
- ☐ I am on inactive, retired, or judicial status with the State Bar of Arizona and I am not required by Rule 42, ER 1.15, and Rule 43, Ariz. R. Sup. Ct., to maintain an Arizona client trust account.
- ☐ I am required by Rule 42, ER 1.15, and Rule 43, Ariz. R. Sup. Ct., to maintain an Arizona client trust account, but the **Arizona lawyer** listed below is responsible for the ongoing maintenance and supervision of the Arizona client trust account into which my client funds are deposited.

(Cannot elect self)

NAME OF ARIZONA LAWYER (Please Print)

BAR NUMBER

IF YOU CHECK ONE OF THE BOXES BELOW, PLEASE COMPLETE THE BANK INFORMATION SECTION, SIGN AND RETURN.

- ☐ I am required by Rule 42, ER 1.15, and Rule 43, Ariz. R. Sup. Ct., to maintain a Arizona client trust account. (The full text of these rules are available through the Arizona Supreme Court's website at www.azcourts.gov/rules.)
- ☐ I am admitted in Arizona but practice in another jurisdiction. However, I am required by Rule 42, ER 1.15, and Rule 43, Ariz. R. Sup. Ct., to maintain an Arizona client trust account.

I am responsible for the ongoing maintenance and supervision of the following client trust accounts into which client funds are deposited:

TYPE	NAME ON ACCOUNT	ACCOUNT NUMBER	NAME OF FINANCIAL INSTITUTION
IOLTA	George Jefferson	157711566	First Fidelity

SIGNATURE

I have read and understand Rule 42, ER 1.15, and Rule 43, Ariz. R. Sup. Ct., and certify that:

- a. I am in compliance with these rules; **or**
- b. I am exempt from maintaining a Arizona client trust account; **or**
- c. I am adopting the certification of another Arizona lawyer regarding the maintenance and supervision of the Arizona client trust account in which my client funds are deposited and do so with the good-faith belief that the Arizona client trust account complies with these rules.

In addition, I have read and understand Rule 32(c), Ariz. R. Sup. Ct., and certify my answers above. I acknowledge the February 1st deadline for filing my yearly statement and fees is by Court rule. Annual reminders may be sent by the Bar as a courtesy, but the statement and fees are due by February 1st even if no bill is received.

R @ A E U i a @

0JJJJJ

NAME OF LAWYER (Please Print)

BAR NUMBER

DIGITALLY SIGNED AS // R @ A E U i a @

1/24/2015

SIGNATURE OF LAWYER

DATE

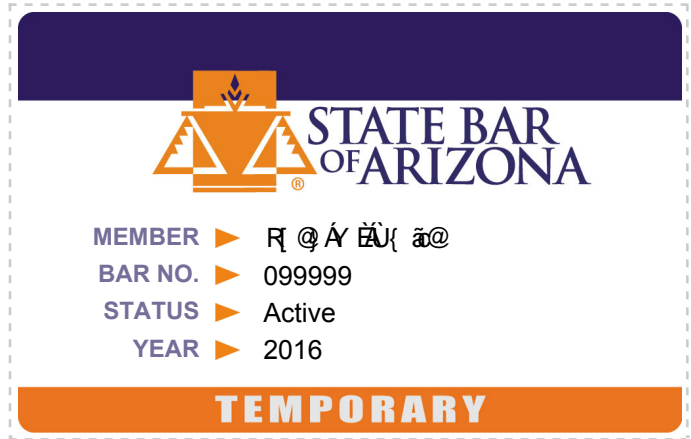
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Provided on this page is your 2016 State Bar of Arizona temporary membership card. Your permanent card will be mailed to you at a later date.

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State Bar of Nevada
2017 Annual Disclosures

XXXX XXXX
Bar No. XXXX
January 19, 2017



XXX

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####

Bar Number

XXX XXXX

Name

REPORT OF EXISTENCE OR ABSENCE OF CHILD SUPPORT
NRS 7.034 and NRS 425.520

All members, active or inactive, **MUST** complete this section. Please select **ONE** option.

- ☐ I am NOT subject to a court order for the support of a child.
- ☐ I am subject to a court order for the support of one or more children and am in compliance with the order or am in compliance with a plan approved by the district attorney or other public agency enforcing the order for the repayment of the amount owed pursuant to the order.
- ☐ I am subject to a court order for the support of one or more children and am NOT in compliance with the order or a plan approved by the district attorney or other public agency enforcing the order for the repayment of the amount owed pursuant to the order.

SCR 79 PROFESSIONAL LIABILITY INSURANCE DISCLOSURE

All members, active or inactive, **MUST** complete this section. Please select **ONE** option.

- ☐ I am not currently representing clients; or I am engaged as a full-time government lawyer or judge; or I am employed by an organizational client and do not represent clients outside that capacity.
If you check this box, you are done, please sign and date at the bottom of this page.
- ☐ I am engaged in the private practice of law and do not maintain professional liability insurance.
If you check this box, you are done, please sign and date at the bottom of this page.
- ☐ I am engaged in the private practice of law and, I or my firm, maintain professional liability insurance with the carrier listed below. This includes insurance from ANY state. If you check this box, you **MUST** disclose the following:

Firm Name (if you are reporting insurance):

Names of Insurance Carrier (not broker):

Insurance Carrier Address:

City: State: Zip:

I certify all of the above disclosures required by NRS 7.034, NRS 425.520 and SCR 79 are true and complete.

Signature

Date

Please return to: State Bar of Nevada
3100 W. Charleston Blvd., Suite 100
Las Vegas, NV 89102

OR: Submit online at www.nvbar.org



MANDOCSA



DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE

(to be completed by all active and house counsel members)

(Please make any necessary corrections.)

I, _____, ISB Number _____,
hereby certify the following pursuant to Idaho Bar Commission 302(a)(5):

1. I am an active member of the Idaho State Bar; and

(Choose One)

2. ☐ I AM NOT currently covered by professional liability insurance.

or

☐ I AM currently covered by professional liability insurance and the name of my primary insurance
carrier is: _____

_____; and

3. I will notify the Idaho State Bar in writing within 30 days if any insurance policy providing coverage
lapses, is no longer in effect, or terminates for any reason, unless the policy is renewed or replaced
without substantial interruption.

Dated this _____ day of _____, _____.

Attorney's Signature

05510

NORTH DAKOTA STATE BOARD OF LAW EXAMINERS

JUDICIAL WING 1ST FL
600 E. BOULEVARD AVE
BISMARCK, ND 58505-0530

STATEMENT OF LICENSE FEES DUE

(Return complete statement with check. No credit cards accepted.)

Section 27-11-22, NDCC, provides every person engaged in the practice of law or who serves as a judge of a court of record shall secure an annual license **ON OR BEFORE JANUARY 1 OF EACH CALENDAR YEAR.**

MR ANTHONY JOSEPH WEILER
ATTORNEY AT LAW
STATE BAR ASSOCIATION OF NORTH DAKOTA
1661 CAPITOL WAY, STE. 104LL
P.O. BOX 2136
BISMARCK ND 58502-2136

ADMITTED: 09/30/1998
PHONE NO.: 701-255-1404
FAX NO.: 701-224-1621

EMAIL: tony@sband.org
E-SERVICE EMAIL:

ANNUAL LICENSE FEE FOR 2016 \$380.00 - five or more years from the date of admission.

PLEASE NOTIFY THIS OFFICE OF ANY CHANGES IN THE ABOVE INFORMATION

REQUIRED ANNUAL CERTIFICATE OF COMPLIANCE
TO CLERK OF THE SUPREME COURT

I certify that I have read rule 1.15, N.D. Rules of Professional
Conduct and that:

A. TRUST ACCOUNT

_____ I am in compliance with Rule 1.15. My trust account is:

Account Number _____

Financial Institution _____

OR

X I am exempt from Rule 1.15 because:

X I do not actively practice law.

_____ I am admitted in, or associated with a law firm located in
another jurisdiction where a trust account is maintained.

_____ I do not hold client funds because:

_____ I am a full-time judge, corporate counsel,
or government attorney.

_____ I **never** hold property of clients or third persons.

_____ Other: Please explain

B. MALPRACTICE INSURANCE

_____ I represent private clients.

_____ I am currently covered by professional liability
insurance and intend to maintain such insurance
during the next 12 months.

_____ I am **NOT** covered by professional liability insurance.

_____ Other: Please explain

X I do not represent private clients.

SIGNATURE: _____

LAW FIRM: _____

STATE BAR ASSOCIATION OF NORTH DAKOTA
ANNUAL SBAND SECTION
ENROLLMENT FORM

- | | |
|--|---|
| <input type="checkbox"/> Administrative & Government
Lawyers - \$10 | <input type="checkbox"/> Real Property, Probate
& Trust Law - \$25 |
| <input type="checkbox"/> Business & Corporations - \$10 | <input type="checkbox"/> Taxation - \$10 |
| <input type="checkbox"/> Criminal Defense - \$10 | <input type="checkbox"/> Women Lawyers - \$10 |
| <input type="checkbox"/> Family Law - \$25 | <input type="checkbox"/> Elder Law - \$10 |
| <input type="checkbox"/> Legal Economics - \$10 | |

Subtotal \$ _____

ND BAR FOUNDATION

- | | |
|---|------------|
| <input type="checkbox"/> Sustaining Member (Annual) | \$ 25.00 |
| <input type="checkbox"/> Donor (\$500 total or \$50 Annual) | \$ 50.00 |
| <input type="checkbox"/> Patron (\$1,000 total or \$100 Annual) | \$ 100.00 |
| <input type="checkbox"/> Silver Patron (\$2,500 total or \$250 Annual) | \$ 250.00 |
| <input type="checkbox"/> Gold Patron (\$5,000 total or \$500 Annual) | \$ 500.00 |
| <input type="checkbox"/> Platinum Patron (\$10,000 total or \$1,000 Annual) | \$1,000.00 |

Pro Bono Fund

☐ _____ Hours (\$85/hour) \$ _____

Subtotal \$ _____

OPTIONAL: Keller deduction relating to (\$ _____)
nonchargeable activities. Members wanting to take
this deduction may deduct \$10.07 if paying \$380;
\$8.99 if paying \$350; and \$7.90 if paying \$325.
(See Insert.)

TOTAL SECTION AND FOUNDATION
FEES REMITTED

TOTAL \$ _____

MAKE ALL CHECKS PAYABLE TO: STATE BOARD OF LAW EXAMINERS

600 E. BOULEVARD AVE, BISMARCK, ND 58505-0530



NAME:

REGISTRATION #

ATTORNEY REGISTRATION STATEMENT - Compliance Statements

1. CHILD SUPPORT

Please refer to C.R.C.P. 227(A)(2)(a) certification pertaining to child support and compliance with any child support order.

- ☐ I hereby certify that I am NOT UNDER ANY COURT ORDER to pay child support.
- ☐ I hereby certify that I am IN COMPLIANCE with respect to any child support orders.
- ☐ I hereby certify that I am NOT IN COMPLIANCE with respect to child support orders.

2. COMPLIANCE STATEMENT FOR RULE 1.15 A-E - COLTAF

The following statement only applies to Colorado accounts and Colorado client funds.

- ☐ I or my law firm have established one or more interest-bearing accounts for client funds in a financial institution approved by the Supreme Court Regulation Counsel with interest payable to the Colorado Lawyer Trust Account Foundation (COLTAF). Client funds are held in:

Account Name	Account Number	Financial Institution	City
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

- ☐ I am exempt from the requirement to establish a COLTAF account because:
- ☐ All client funds are deposited in trust accounts with interest payable to the clients.
- ☐ I do not receive, maintain or disburse client funds in Colorado.
- ☐ A COLTAF account is not feasible for reasons beyond my control: SPECIFY:

3. MALPRACTICE INSURANCE

Are you in private practice?

☐ YES ☐ NO

Are you currently covered by Professional Liability Insurance and do you intend to maintain coverage?

☐ YES ☐ NO

Indicate carrier if covered: ☐ ALAS (Attorneys' Liability Assurance Company) ☐ ALPS (Attorneys' Liability Protection Society)

☐ AmTrust (Wesco Insurance Company) ☐ Travelers (St. Paul Mercury Insurance Company) ☐ CNA (Continental Casualty)

☐ Other

4. CERTIFY STATEMENTS: Please certify that the above marked statements are true and correct by signing below:

- ☐ I certify that I completed my registration statement and that the answers provided are accurate.
- ☐ I understand that my annual registration is not complete until the Court has received my annual registration fee payment.
- ☐ I understand that pursuant to C.R.C.P. 227(b) I must provide the Office of Attorney Registration with a supplemental statement of change in the information previously submitted, within 30 days of any changes. Such changes include changes to my registered mailing address, phone number, email, trust account information, child support payment status, or professional liability insurance coverage status.

Signature

Date

South Dakota Presentation



ALPS

The nation's largest direct writer of lawyers' malpractice insurance.

SOUTH DAKOTA

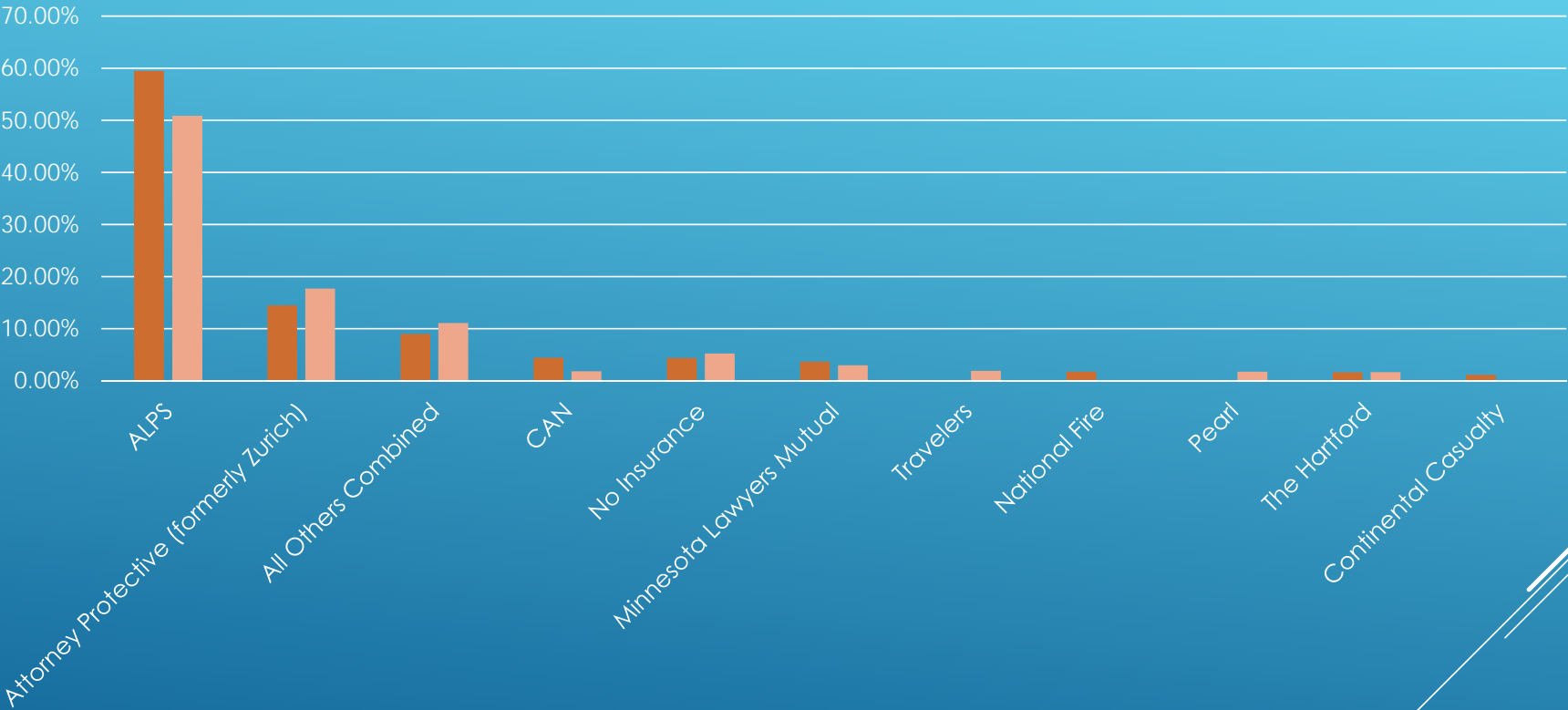
Malpractice Insurance Statistics

► Private Sector Attorneys
carrying Malpractice
Insurance

95%

A series of white diagonal lines of varying lengths and thicknesses, located in the bottom right corner of the slide.

Malpractice Insurance Providers – 2015 & 2016



ALL ATTORNEYS WITHOUT INSURANCE ARE SOLO PRACTITIONERS

- ▶ Of those without insurance:
 - ▶ 1 Admitted in the 1950's
 - ▶ 2 Admitted in the 1960's
 - ▶ 9 Admitted in the 1970's
 - ▶ 12 Admitted in the 1990's
 - ▶ 4 Admitted in the 2000's
 - ▶ 4 Admitted in the 2010's

South Dakota Rules of Professional Conduct

▶ Rule 1.4. Communication

▶ (a) A lawyer shall:

- ▶ (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- ▶ (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- ▶ (3) keep the client reasonably informed about the status of the matter;
- ▶ (4) promptly comply with reasonable requests for information; and
- ▶ (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

▶ (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

▶ (c) If a lawyer does not have professional liability insurance with limits of at least \$100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's 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."

▶ (d) The required disclosure in 1.4(c) shall be included in every written communication with a client.

▶ (e) This disclosure requirement does not apply to lawyers who are members of the following classes: § 16-18-20.2(1),(3),(4) and full-time, in-house counsel or government lawyers, who do not represent clients outside their official capacity or in-house employment.

COMMENT:

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision

must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequa-

cy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission

of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

[8] The 1998 amendments establish that the absence of professional liability insurance is a material fact which must be disclosed to clients. The disclosure shall be made at the inception of the attorney-client relationship, or promptly thereafter. Further, if a lawyer has liability insurance and allows it to lapse or if the policy is terminated, there is an affirmative duty to make the disclosure to all clients with active files. The rule provides for uniform disclosure language and mandates that the written disclosure shall be a component of the lawyer's letterhead. Since the rule mandates disclosure only to the client, it necessarily means that lawyers without malpractice insurance will have to maintain two sets of letterhead—one for communications with the client and another for all other letters. Component of the letterhead means pre-printed. In other words, when a lawyer prepares his or her letterhead for printing, the disclosure must appear on the face of the letterhead using the precise language provide in Rule 1.4(c),(d) and (e). It should be noted that Rule 7.5 relating to a lawyer's letterhead requires that this disclosure be printed in black ink and in a type size no smaller than used for printing of the lawyer's name on the letterhead.

South Dakota Rules of Professional Conduct

▶ Rule 7.5. Firm Names and Letterheads

- ▶ (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
- ▶ (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- ▶ (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- ▶ (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.
- ▶ (e) The disclosure required in Rule 1.4(c)(1) or (2) shall be in black ink with type no smaller than the type used for showing the individual lawyer's names.

COMMENT:

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for

that title suggests that they are practicing law together in a firm.

[3] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[4] Rule 7.5(e) establishes the requirements for the letterhead component for all lawyers required to make the disclosure of the absence of professional liability insurance. While a lawyer may choose any color of ink for his or her letterhead, the disclosure component must be in black ink. The intent of this requirement is to avoid, for example, a lawyer selecting yellow bond paper for letterhead and printing the mandated disclosure in yellow ink. Further, recognizing the great variance of letterhead styles, rather than mandating a minimum type size, the rule requires that the disclosure be printed with type size no smaller than the type size used to print the lawyer's name. If a lawyer utilizes letterhead that omits the lawyer's name, then the disclosure shall be printed in type size reasonably necessary to comply with the disclosure requirement. Although not required, it is anticipated that most lawyers will prepare letterhead with the disclosure appearing centered and at the bottom of the letterhead.

Professional Liability Insurance (PLI) Taskforce

Meeting Highlights

June 19, 2017

Members in attendance: Gene Leverty, Chair; Connie Akridge; Doug Clark; Eric Dobberstein; Elana Graham; Carol Bernick, Oregon PLF; Chris Newbold, ALPS; and Kim Farmer and Lisa Dreitzer, State Bar of Nevada.

The Taskforce invited Carol Bernick, CEO of the Oregon Professional Liability Fund (PLF), to provide information about Oregon's mandatory insurance fund and how such a fund might operate in Nevada.

Professional Liability Fund:

Establishment/Oversight:

- Created by a legislative act in Oregon; exempt from insurance regulations.
- Initial establishment assisted with investment from the Oregon State Bar.
- Nine-member volunteer board (7 attorneys, 2 lay members) who serve one lifetime term.
- State Bar of Oregon approves appointment of PLF board members and bylaw amendments; provides oversight with reviews of PLF reports.
- Fund operates with a net position goal of \$13.1 million.; currently operating at a \$13.5 million net position.

Operations:

- \$28 million annual budget.
- 80% of budget is received through annual assessments; remaining 20% supplemented by investment income.
- 50 employees, including: four practice management staff who provide education/advisory services; loss prevention staff to field 1,400 calls annually; and four lawyer assistance program staff.
- All information regarding ethical violations, substance abuse, etc., is confidential and is not shared with the Oregon Bar.

Coverage:

- Shared risk pool regardless of practice area, full/part-time practice, etc.
- \$3,500 annual assessment with no deductible; actuary sets annual assessment.
- \$300,000 in coverage, plus \$50,000 in defense costs; defense expenses exceeding \$50,000 deplete available coverage.
- PLF will hire counsel to represent an attorney in defense of claims; no representation for disciplinary proceedings, but may assist in preparation of response to an investigation.
- PLF offers excess coverage up to \$10 million may be purchased (\$2,200 for excess coverage up to the first million).
- Excess coverage may be purchased through PLF or on the secondary market.

- There is no underwriting and no adverse consequences for having a claim.
- Tail coverage is provided at no cost.

Exemptions to Mandatory Involvement:

- PLF is mandatory for all licensed attorneys, with exceptions for those in government or in-house practice, and for those whose primary practice is located outside the state.
- Lawyers must affirmatively seek exemptions; requests for exemptions are filed on an honor basis as officers of the court.
- Exemptions may be sought temporarily in months when an attorney is not in practice; affirmative duty to report when returning to active practice.

Claims Management:

- There is an 11% claims frequency rate (percentage of lawyers with claims).
- In 25% of claims, nothing is paid; in 43% of claims, expenses only are paid.
- Higher user demographics include attorneys practicing in securities and elder law (unique to practice in Oregon because of state regulations). Oregon is also seeing an increase in claims related to attorneys with cognitive deficiencies related to aging.
- Only exceptions to claim coverage relate to cyber hacking, extortion and data breaches.

Additional Considerations:

- The Oregon PLF operated at a loss (\$4 million per year) during the recession.
- Budgeting can be difficult as it is hard to predict the number of claims and claim amounts each year; variation in investment income.
- The PLF had a provision to create a special underwriting assessment for individuals who exceeded claim amounts; this was eliminated six years ago when data showed no change in behavior as a result. The special assessment was also considered to be adversarial in nature.

Mandatory Model in Nevada:

If implemented:

- Financial considerations for attorneys who would need to purchase tail coverage from previous insurers. ALPS charges up to 300% of expiring premiums for tail coverage. Nevada may want to consider offering prior acts coverage for purchase.
- Need to consider how much money we would need to have in reserve/consideration of when first claims would be received in relation to start of fund.
- Consider working with an established provider, like ALPS, to provide fund management (est. \$13-17 million for \$300,000 in coverage).

Next Steps:

- Explore open market and mandatory education models in Iowa and Illinois.
- Explore mandatory disclosure requirements.
- Discussion with the Nevada Insurance Division re: establishing fund exempt from insurance requirements.

Professional Liability Insurance (PLI) Taskforce

Meeting Highlights

August 18, 2017

Members in attendance: Gene Leverty, Chair; Connie Akridge; Eric Dobberstein; Elana Graham; and Kim Farmer and Lisa Dreitzer, State Bar of Nevada.

The Taskforce invited Oliver Seebald to the meeting to provide his perspectives on why malpractice insurance should not be required. Mr. Seebald's perspective is that professional liability insurance is a boutique market with nuanced provisions that make it difficult for claims to be paid. He is a solo practitioner with less than five years' practice and is a patent law specialist. Coverage for his area of law is in excess of \$28,000 per year. Requiring someone like him to carry insurance would increase his cost of doing business, forcing him to pass along the cost to his clients. Mr. Seebald asked that the Taskforce consider exemptions for those with specialty admissions, such as patent or admiralty law. He also favored disclosure to clients over mandatory insurance. The Taskforce presented Mr. Seebald with the Oregon and Illinois models. He stated he would accept the Illinois model, but would see the Oregon model as a tax.

PLI Model Discussion

The Taskforce discussed the following models for PLI in Nevada:

ALPS: ALPS was asked to formulate a proposal which would provide a \$100,000 minimum policy on behalf of all Nevada attorneys. This is a new approach that Washington is also considering. Under this plan, the state bar would presumably collect premiums and retain an administrative fee. ALPS has previously voiced its hesitation with a statewide program, given the high claims in the Las Vegas market. The Taskforce also discussed the need to issue an RFP if using this approach to avoid anti-trust issues.

Illinois Model: In Illinois, attorneys who do not have malpractice insurance will be required to take a four-hour online course in risk management annually. The Taskforce voiced concern about whether CLE in risk management served to protect the public. The Taskforce was interested in seeing the modules covered in the online course.

Idaho Model: Idaho recently changed its rules to require all attorneys licensed in that state to obtain \$300,000 in coverage through carriers in the open market. This model will be expensive for those attorneys who carry a higher risk. Due to this being a new program, there are undetermined outcomes regarding compliance with the rule and possible disciplinary action resulting from noncompliance. Additionally, the timing of the rule implementation in Idaho may leave lawyers in a lurch, as their practices will be suspended until they can obtain coverage in the open market.

Oregon Model: This model was previously considered by the Taskforce and there was agreement that it was a good concept. However, the Taskforce expressed concern about the difficulty regarding implementation.

Professional Liability Insurance (PLI) Taskforce

Meeting Highlights

September 12, 2017

Members in attendance: Gene Leverty, Chair; Connie Akridge; Doug Clark; Eric Dobberstein; and Kim Farmer and Lisa Dreitzer, State Bar of Nevada.

The Taskforce invited Chris Newbold and David Bell from ALPS to provide information about an “All-In” Mandatory LPL Pool Concept.

ALPS provided a flow chart with options to consider, should the state bar elect to create a mandatory pool, with one central provider for malpractice insurance.

Desired Outcome: The pool should provide for desired coverage without an increase in premiums. However, with a mandatory pool, the best lawyers will subsidize for the small percentage of bad lawyers who repeatedly make claims. This could have downstream impact on the perception of the program.

Policy Coverage: The state bar could elect to provide full “Cadillac” coverage or take a more austere approach, which would provide limited insurance options.

Economic Penalty: When the Oregon PLI was initially created, an economic penalty was put in place for those who repeatedly made claims. However, this option was removed following push back from members of the bar. With no economic penalty, there is greater pressure on the Office of Bar Counsel to pursue discipline and remove bad lawyers from practice.

Geographic Consideration: In Nevada, there is higher risk in Clark County than in other parts of the state. If a blended model (one in which all attorneys have the same premiums) is in place, those practicing in northern Nevada will subsidize those in Clark County.

Deductible: The Oregon PLI model attaches no deductible. However, one school of thought is that with a deductible, the attorney has an economic interest – or skin in the game. This may keep claim levels lower.

Tail Coverage: ALPS could underwrite a policy for prior acts. Alternatively, if the policy does not include prior acts, ALPS would provide tail coverage to existing policy holders and make it available to those who are new to the market or who had coverage through another carrier (with a signed warranty statement).

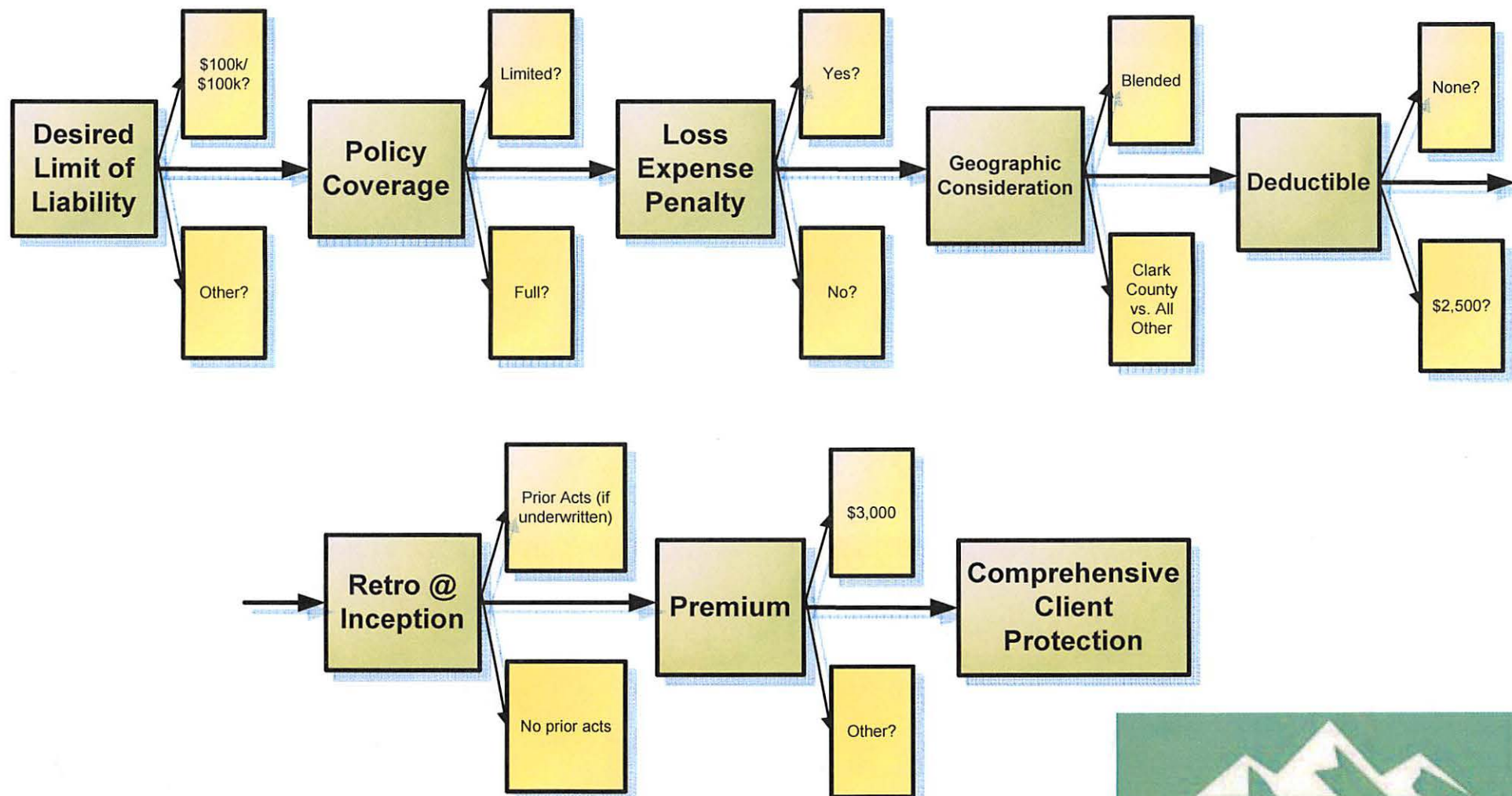
Premium: ALPS proposed a premium of \$3,000 based on the risk in Nevada, using a blended model. If there is no blended model, premiums for those in northern Nevada would be closer to \$2,500.

Excess Coverage: ALPS would offer excess coverage with a 20% discount.

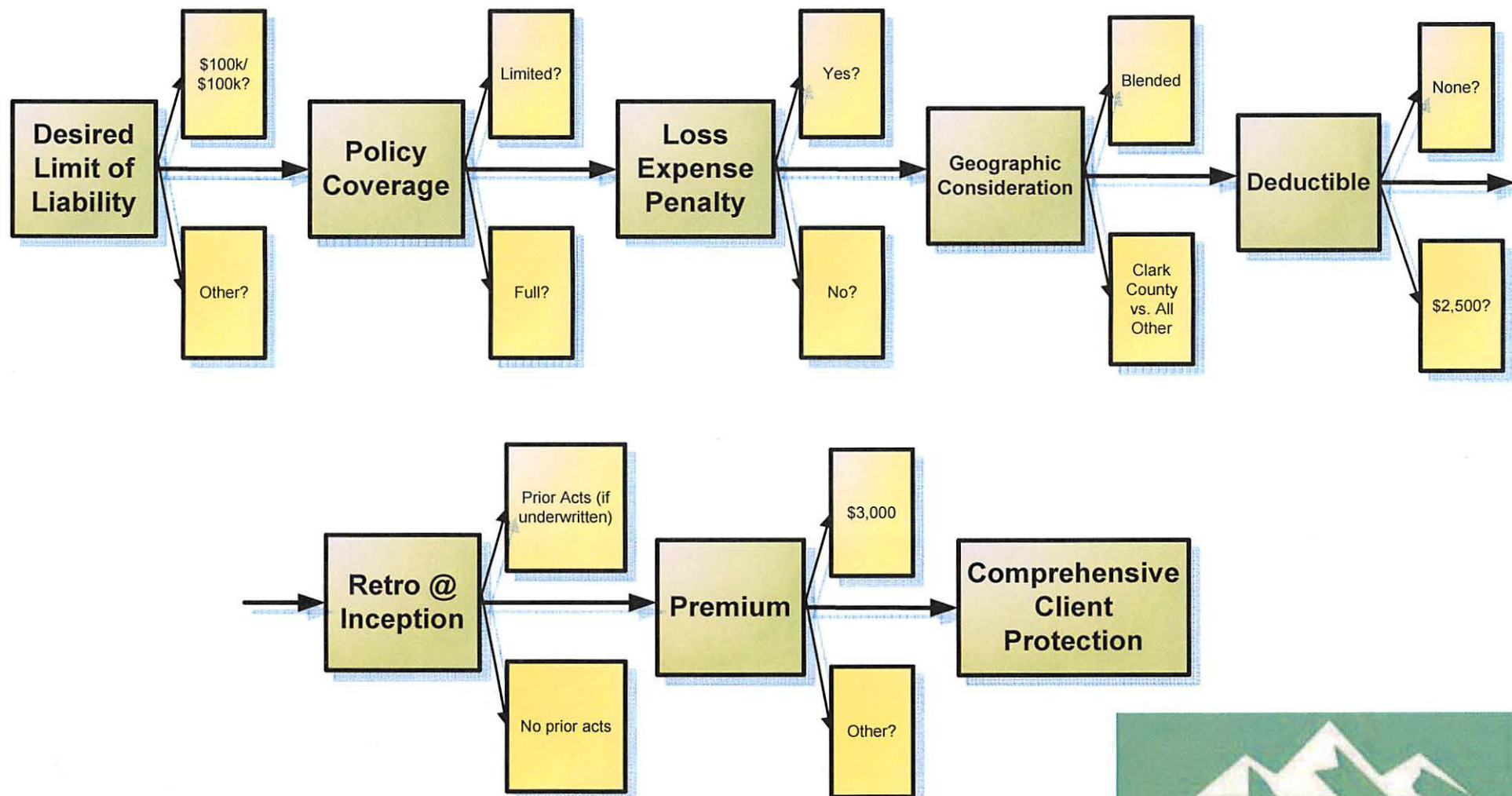
Other Considerations:

- How to handle transparency of loss/revenue. The state bar would be the beneficiary if premiums are overpriced and PLI becomes profitable. At that point, we may consider premium relief.
- Should the state bar collect premiums on the dues notice (with an associated admin fee) or require attorneys to pay ALPS directly. The second option is more labor intensive as it will require the state bar to provide regular updates regarding change of address, license status, etc.
- If we were to charge a premium penalty, would the rate be flexible depending on the rate of claims? Additionally, would the penalty charge appear on the dues statement or would ALPS bill directly for this secondary charge?
- Certificate of Coverage: Is this something the state bar would provide or ALPS? As with the collection of premiums, it is more administratively efficient for the bar to handle.
- If the bar were to require a \$100,000 minimum coverage policy, would that incentivize some attorneys to carry less coverage than they might have? Additionally, the state bar could consider requiring mandatory CLE in risk management if an attorney elects to only carry the minimum.
- If we were to require all attorneys, regardless of prior claims history, premiums may be raised for good lawyers (similar to the Affordable Care Act).
- ALPS estimated a \$3,000 premium for a \$100,000 policy based on a blended model where all attorneys in the state are covered. ALPS currently charges \$2,400 for a \$100,000/\$300,000 policy. Premiums can be lowered depending on factors such as limiting basic coverage, not providing tail coverage, and raising deductibles. However, there may be a point where we would end up with a product that we don't want – and that would upset attorneys who would be required to have it.
- If we adopted a model similar to Idaho and require the 10% of Nevada attorneys who do not have coverage to get it, could we ask ALPS to create a high risk pool just for those individuals?

The following flowchart highlights key decision points necessary for the Task Force to address in developing a recommendation for the Board of Governors.



The following flowchart highlights key decision points necessary for the Task Force to address in developing a recommendation for the Board of Governors.





White Paper Available to ALPS-Endorsed State Bars Contemplating Mandatory Lawyers' Professional Liability Insurance Options

State Bars contemplating mandatory professional liability insurance programs are usually motivated by ensuring the public as consumers of legal services are financially protected from attorney error, improving the practice of law in the state and enhancing the reputation of the profession generally.

This white paper was developed at the request of State Bars inquiring of how a mandatory program might work, leveraging ALPS' 30 years in the lawyers' professional liability market. It presents two models of governing mandatory coverage: an open-market model and a mandatory fund. The two models approach the problem from very different perspectives and both models contain positive and not so positive attributes depending on how you perceive each. The open Market Program has less State Bar involvement and is best described as a monitoring program. The Mandatory Fund Model is much more robust and really addresses, in a participatory way, the whole concept of comprehensive client protection with central administration of a number of aspects of financial and personal responsibility to clients.

Open Market Model

In an Open Market Model, every lawyer licensed to practice law in the state must maintain professional liability insurance consistent with the standards set by the Supreme Court and the State Bar. In addition, it would require professional liability insurers to report all cancellations and non-renewals. In its simplest form, this program establishes minimum standards of required coverage and reporting requirements, but allows attorneys the flexibility to select their own insurance carrier and operates entirely in the open market with no government fund or guarantees. For purposes of this proposal, we will assume a minimum limit of \$500,000 per occurrence/ \$1Million annual aggregate with deductibles not to exceed \$1,000 per attorney insured under the policy.

This model is likely the one that most lawyers would favor, but puts a more significant supervisory burden on the State Bar and or the Court in the administration of program exceptions (discussed in detail later). For purposes of further reference, we assume the State Bar has the responsibility for all administrative functions as designee of the Supreme Court

Program Framework

The open-market model significantly increases the administrative responsibilities of lawyers' professional liability (LPLI) insurers by requiring carriers to report cancellations

and non-renewals to the State Bar. Because of the requirement for insurer reporting, it may require legislative action to authorize the Court to guarantee insurer compliance and create enabling financial responsibility legislation. At a minimum, insurers will be required to provide the State Bar, or its appointed party, with duplicate copies of all non-renewal and cancellation notices, at the same time such notices are sent to the attorney and to update the administrator of any rescissions of cancellation or non-renewal.

Insurer compliance can be done through legislative mandate or on a voluntary basis. The simplest is “voluntary” participation by the insurance community. The standards would state that in order for a certificate of insurance to be acceptable to the State Bar as proof of coverage, it must state that the carrier agrees to comply with Court’s rules in regard to reporting. Prior to the commencement of the program, the State Bar would notify all licensed or authorized insurers in the state. They would have the opportunity to indicate they agree to comply and the list of compliant companies would form.

In order to facilitate the attorney’s effort to secure appropriate coverage, the State Bar would maintain the list of compliant insurers on their web site and initially provide the list with the license renewal or application materials sent to individual lawyers or firms. All that said it would be the responsibility of the individual lawyer to be sure he or she obtained coverage from an acceptable company. Certification would be re-filed annually as part of the Bar renewal process.

If an attorney’s coverage lapses, the State Bar would send a notice informing the attorney that they need to obtain an exemption (discussed below) from the State Bar to practice without Professional Liability coverage and how to make such an application. It would further advise the attorney that license revocation will occur at a time certain (or had occurred if the State Bar wanted to be hard nosed) if coverage is not restored or an exemption obtained.

Certain types of attorneys may not, for professional reasons, need malpractice insurance or wish to obtain it. That list could include governmental lawyers, law professors, in-house corporate counsel or private practitioners working solely on a *pro bono* basis. Under the program, these attorneys would be allowed to petition the court for an exemption from mandatory malpractice rules. Additionally, some attorneys may not be able to acquire coverage in the commercial market due to area of practice, prior loss experience or lack of insurance history. These attorneys will require the State Bar to make difficult decisions about who to exempt and who not to exempt. The conditions of exemption need to be well defined in the regulations or rules and should be strictly applied to avoid litigation. It may be that the State Bar would also consider an exemption for attorneys wishing to post a bond equal to the minimum insurance limit. All these issues will require deliberate definition as part of the organizational process.

The proposed program would be administered by the Bar or by ALPS as a program administrator selected and appointed by the Bar. Administrator responsibilities would include the following:

- Collection of filings from insurers,
- Notification to the Court in the event an attorney fails to comply with the insurance requirements,
- Compilation of requests for exemption, and such other things as the court or Bar may determine as appropriate for administration of the program.

Though both simple and comprehensive, the free-market model has potential drawbacks:

- Insurer Cooperation – The requirements placed on insurers will create increased administrative burden. The increased administrative burden may encourage existing or prospective Lawyers Professional Liability Insurance carriers to exit the market, reducing the availability of coverage and potentially increasing the cost of coverage.
- Exemption Administration – There would be a burden for administering exemption requests and approvals/declinations. Further, in at least some cases, it is likely that the Court would have to revoke licenses of attorneys unable to comply with the requirements.
- Lack of integrated loss prevention - Though less a flaw in the open-market system than an opportunity cost of not pursuing the mandatory fund program, the open market model in its simplicity does not provide the comprehensive client protection included within the Mandatory Professional Liability Fund model. These resources (impaired lawyers program, comprehensive risk management and lawyer malfeasance coverage) could still be provided by the Bar, independently, and funded by an additional bar dues assessments.

Mandatory Professional Liability Fund

The implementation of a Mandatory Professional Liability Fund (“the Fund”) goes beyond simply requiring attorneys to carry lawyers’ professional liability insurance (“LPLI”) to truly protecting the legal consumer through a State Bar operated facility which could do any or all of the following: 1) provide lawyers’ professional liability malpractice coverage, 2) provide indemnification for clients against attorney malfeasance, 3) provide risk management and loss prevention resources to improve the practice of law in the state, and 4) identify and assist in the rehabilitation of impaired lawyers. Participation in the Fund would be mandatory for all attorneys licensed to practice in the state (subject to fee reductions for those attorneys not requiring professional liability insurance as discussed below).

Comprehensive Client Protection through The Fund

Participation in the Fund would be mandatory for all attorneys in private practice. Attorneys employed as in-house counsel, government or private industry, law professors and retired attorneys would be exempt from participation in the professional liability portion of the Fund. All others would be charged an assessment annually, on a per-

attorney basis for remaining portions of coverage. Only attorneys in private practice or other electing to participate fully would be afforded coverage for professional liability risks.

LPLI Coverage

The fund would provide all participants with LPLI coverage with no deductible. The limits provided by the Fund will need to be considered by the State Bar, and may be, on a per attorney basis, \$500,000 per occurrence/ \$500,000 annual aggregate, \$1Million per occurrence/\$1Million annual aggregate or any other amount selected by the State Bar. Those lawyers wishing to have greater protection would be able to obtain excess coverage above the fund in the open market through commercial carriers.

Unlike commercially available malpractice insurance, the Fund would incorporate coverage for attorney malfeasance with a sub-limit of \$100,000 annually on an occurrence and aggregate basis. This enhanced coverage replaces current client protection fund mechanisms and provides greater protection for consumers of legal services and streamlines indemnification for clients. Clients often do not distinguish between malpractice and malfeasance, and a single source of recovery can help improve the reputation of the Bar. All lawyers who have a license would pay an assessment for coverage just as they do presently

Loss Prevention and Risk Management

The stated purpose of the Fund would be to provide the public with protection against, and in the event of, a lawyer's mistake. It stands to reason that reducing the incidences of malpractice serves that purpose as well as does providing for client indemnification. To that end, a fundamental part of the Fund would be to design, administer and require participation in risk management and loss prevention programs designed to improve the practice of law. Activities could include, but are not limited to, sample forms, manuals, articles, risk visits, practice audits and continuing legal education.

Impaired Lawyer Program

The Fund's impaired lawyer program is a humanitarian program intended to identify lawyers suffering from impairment due to alcohol or drug use, excessive stress, mental disease or disorder, and provide them with recovery tools and resources. As with loss prevention, the impaired lawyer component of the Fund ultimately serves the goal of protecting clients and ensuring we are addressing challenged attorneys for a self-regulating profession. It is certainly not too much for a client to expect their attorney to perform legal services with competency and without impairment from alcohol, drugs or excessive stress.

The State Bar or Program Administrator would staff counselors and attorneys to perform the following functions:

- Coordinate recovery programs
- Provide professional and peer counseling
- Administer recovery groups
- Design and administer career evaluations and counseling; and
- Provide support to family members.

Practice intervention could, on a case-by-case basis, assist attorneys seeking treatment by ensuring their clients are handled to avoid potential claims. This would be coordinated by the Fund's professional staff but would involve volunteer lawyers to provide direct practice support as needed. All attorneys licensed to practice would pay this portion of the assessment.

Underwriting and Assessment Considerations

The malfeasance and lawyer impairment portions of the fund assessment would be the same for all licensed lawyers and would likely be less than \$250 per year depending on the ultimate design of coverage for the programs.

The LPLI portion of the assessment could be developed using one of two models. Both would collect the same total assessment for the Fund, but illustrates two different ways of distributing an assessment among participants.

The first model requires no underwriting, and would charge an equal base assessment to each and every participant. Preliminary review indicates that the assessment for the program would fall within the following ranges:

Limit	Assessment Range
\$500,000	\$2,000 - \$2,600
\$1,000,000	\$2,650 - \$3,300

The second model effectively underwrites attorneys by area of practice according to simplified classes of practice. Attorneys in higher-risk categories of practice (including but not limited to Mergers / Acquisitions and Securities Law) would be charged an assessment closer to the top of the range, attorneys in medium-risk practice (such as Civil Litigation plaintiffs' law and Real Estate) would be charged an assessment in the middle of the range, and attorneys in lower-risk practice (such as Domestic Relations or Criminal Law) would be charged a lower assessment. The preliminary indications of the range for this model are broader to reflect the risk classifications and higher expense involved in additional underwriting:

Limit	Assessment Range
\$500,000	\$1,300 - \$6,500
\$1,000,000	\$1,625 - \$8,125

Within either model, attorneys with prior malpractice claims would be charged an additional assessment to reflect their increased loss activity. The issue of part-time vs full-time attorneys would need to be addressed with respect to assessment charges and underwriting criteria. If elected, a separate lower assessment could be developed for part-time practitioners.

New attorneys entering the Bar would be charged a reduced rate (probably 50-60% of the normal assessment in year one) for the professional liability portion of the assessment on a step rated basis reaching full maturity in six years as their exposure on a claims-made and reported basis expands with experience.

If an attorney fails to pay their annual assessment, the Court would take disciplinary action against the attorney to include suspension or revocation of their law license to practice in the state.

Administration

The Fund could be overseen by a board or committee of comprised of members of the State Bar as appointed or elected by a process to be determined by the Supreme Court. The Fund could be administered by the Bar and by ALPS as a Program Administrator. In administering the program, the Program Administrator will at a minimum perform the following functions:

Certificate Management and Customer Service

- Determine individual attorney assessments and dissemination of license renewal materials.
- Administer a website for attorneys to renew licenses and pay assessments online. If applicable, it would also maintain the attorney profiles and underwriting information (if administering the underwriting model)
- Offer annual assessment payment options, including full payment at time of binding coverage, credit card billing for full premium payment at time of binding coverage and privately-funded financing plan terms of up to nine months.
- Issue Certificate of Coverages exhibiting the coverage terms and conditions. Once issued, the Certificate of Insurance remains in force until cancelled.
- Provide a full staff of customer service representatives available for telephone contact and discussion of the Fund and services.

Claims Management

The Program Administrator would need experienced claims professionals to administrator all aspects of claims handling. This staff would include state-based claims attorneys and appropriate support staff. The Program Administrator would be responsible for the initial intake through final resolution of all malpractice claims including:

- Determination of whether the allegations fall within coverage extended by the Fund
- Investigation and evaluation of each claim to determine the risk posed to the Fund. If litigation becomes necessary, the administrator will hire defense counsel to respond on behalf of the covered attorney and will monitor the claim throughout the litigation process. From the initial investigation through the claim conclusion, the administrator will make reasonable efforts to resolve the claim expeditiously and cost effectively under the facts and the law at issue.
- Timely establish and post the appropriate reserves reflecting the Fund's risk for its amount of coverage.
- Manage the reserve portfolio of the Fund
- Coordinate with the excess carrier responsible for excess layers of coverage, if any is purchased by the individual attorney or firm.
- Report relevant claims statistics in order for the Fund to determine the risk posed to the Fund each year and reset assessment amounts
- With regard to claims arising from lawyer malfeasance, the claims department will interface with the state's relevant client protection governing board, provide that board with claim information and follow the board's determination with regard to claim coverage

Accounting and Actuarial

The Program Administrator will:

- Receive assessments
- Manage assessment financing
- Administer accounting of the Fund on a GAAP basis
- Manage accounts payable and receivable
- Prepare monthly financial statements
- Book reserves as directed by claims personnel
- Issue expense and claim checks
- With the assistance of an independent actuary, review reserve adequacy, prepare annual budget recommendations and set annual assessment amount.

Investment Management

The Program Administrator will also manage the assets of the Fund in a manner designed to ensure adequate liquidity to meet Fund obligations, and provide an advantageous investment return on held assets.

Other Services

It is contemplated the Program Administrator, at the Bar's request, would assist the State Bar in developing and implementing an industry-leading risk management program, thus

providing additional Bar relevance to members. It would also, if requested, administer the lawyer impairment portion of the program.

While the potential is greater for ultimate client protection, it comes on the basis of a mandatory program for lawyers licensed in the state. Because of this, Supreme Court leadership is critical for leadership, approval and implementation.