

Susan Saab Fortney
500 Throckmorton Street, Unit 2101
Fort Worth, Texas 76102

April 24, 2020

Susan L. Carlson
Clerk of the Supreme Court
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504

Re. Matter of the Proposed Amendment to APR 26—Insurance
Publication Order 25700-A-1281

Dear Madam Clerk:

I write to share observations related to the proposed amendment to APR 26. Please share this letter and the attached article with the members of the Supreme Court of Washington.

For the reasons outlined below and many more, I urge the Supreme Court of Washington to adopt the proposed amendments to Admission and Practice Rule (APR) 26 requiring professional liability insurance for Washington lawyers in private practice.

I am a law professor at Texas A&M University School of Law. I specialize in the area of legal ethics and malpractice. I have conducted a number of empirical studies related to lawyers' professional responsibility and liability. I have also authored a number of articles examining lawyers' professional liability insurance and co-wrote the nation's first textbook on legal malpractice law.

Last year I published a law review symposium article to help inform states' consideration of mandatory insurance. The attached article sets forth the reasons supporting a mandatory insurance requirement and addresses common arguments made in opposition to such a requirement. The opposing arguments, including the ones set forth in the January 26, 2020, letter from Fajeev Majumdar, President of the Washington State Bar Association, commonly are asserted with no supporting data, but with comments from the minority of practicing lawyers who do not carry insurance. At a time when the mandatory bar is under consideration, bar leaders should consider actual data, rather than deferring to comments of the minority of lawyers who refuse to obtain insurance.

In my article, I point out that this minority of uninsured lawyers tend to dominate the discourse in states, providing decisionmakers with a perspective that may not reflect the views or experiences of the vast majority of lawyers who responsibly carry insurance. Lawyers who refuse to purchase legal malpractice insurance suffer from what behavioral ethicists call an ethical blind spot, not recognizing the ethical imperative to be financially accountable to those they harm. See pages 235-36 of the attached article. Ethical blindness and complacency also contribute to insured lawyers not getting involved in the debate over insurance. I urge decision makers and insured lawyers to address these blind spots by supporting mandating insurance. If we fail to do so, it hurts the integrity of the legal profession and our standing as an accountable profession that can be trusted.

In my work on lawyer regulation, I have also observed that often no group speaks for consumers and regulators and decisionmakers may not hear the consumer voice. The following comments are intended to provide a snapshot of the consumer perspective on insurance, focusing on public protection as the first Regulatory Objective adopted by the Supreme Court of Washington.

The most compelling reason to require insurance is to provide malpractice victims access to meaningful remedies. As professionals who are given licenses to practice law, lawyers should be financially accountable when their conduct harms others. Although it is difficult to quantify in specific dollar terms the public harm associated with uninured lawyers, empirical researchers provide data on the harm to injured persons. In an article based on her study of uninsured lawyers, Professor Leslie Levin of the University of Connecticut provides data on the number of unsatisfied judgments against uninsured lawyers. For a discussion of the unsatisfied judgments and harm to the public, see pages 214-15 of the attached article. These judgments represent only a sliver of the number of victims injured by lawyers because malpractice claims against uninsured lawyers are rarely pursued. Qualitative data collected by experienced empirical researcher reveal that it is very difficult for a victim to retain counsel to handle a legal malpractice case on a contingency fee basis when the lawyer is uninsured. See discussion at pages 202 of the attached article. Mandatory insurance improves the likelihood that victims will be able to retain counsel.

Calculations based on claims paid against solo/small firm lawyers suggest that damages attributable to uninsured lawyers would amount to tens of millions of dollars per year. See discussion of Professor Levin's analysis on page 215 of the attached article. Most troublesome is the fact that the malpractice victims who are hit the hardest are modest-means clients who often hire solo and small firms, the lawyers most likely to be uninsured.

Decisions related to public protection should not be determined by an opinion poll in which lawyers emphasize how insurance impacts their individual practices. To avoid elevating lawyer interests over consumer interest, decision makers should consider available data reflecting consumer interests.

In the 2018 public opinion study conducted by a research center at University of Chicago for the California Working Group on Insurance, 78% of the respondents indicated that lawyers should be required to carry insurance. See Attachment M, Question 11, [Malpractice Insurance Working Group's Report to the Board of Trustees](#). Of that number, 86% believed that lawyers should be required to carry insurance *even if it means that the lawyer may charge higher fees*. (emphasis added). *Id.* at Question 12. Given these results pointing to consumer interest in insurance and willingness to pay higher fees, those who oppose insurance should have the burden to demonstrate that mandating insurance will impact the availability of legal services.

Based on the current cost of premiums for malpractice insurance, my article also estimates the amount that legal fees could increase if lawyers wanted to pass the cost of insurance on to clients. Assuming that a solo lawyer bills only 2.4 hours a day, as one study has suggested, the amount of increased legal fees would be \$6.07 per hour to cover a \$3,500 insurance premium if the lawyer works forty-eight weeks per year. See page 221 of the attached article.

In my article, I address other arguments related to costs and the availability of insurance for lawyers in high-risk practice areas. Lawyers who practice in high-risk areas should not be given a pass on being responsible for their torts. To do so effectively gives them a competitive edge when other lawyers in the same practice area responsibly carry insurance. Moreover, if lawyers are practicing in a high risk and complex areas, such as securities or patent law, the public may be better served if those lawyers practice with others, rather than practicing alone.

For those lawyers who claim that they are in solo practice and uninsurable, I point to the Idaho experience where no lawyer reported the inability to obtain insurance. See page 223-24 of the attached article.

At pages 222-23 of the attached article, I point to the approaches to providing insurance for lawyers who deliver pro bono legal services. One approach used in Idaho is for lawyers to obtain insurance by performing their pro bono work through the Idaho Law Foundation.

Finally, I understand that the Washington State Bar Association is exploring changes to the mandatory insurance disclosure rule. Although such changes may provide more information to clients, the changes do not address asset insufficiency and the inability to retain counsel to pursue a legal malpractice claim, nor do disclosure rules provide protection to nonclients. Reports reveal that some of the most serious legal malpractice claims involve injured persons who are nonclients.

Based on the data that I refer to in my article and the experiences in other states with a mandatory insurance regime, I urge the Court to adopt the amendments to APR 26.

Thank you for your leadership and for seriously considering the role of mandatory insurance in advancing public protection and the integrity of the legal profession.

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Sincerely,

Susan Fortney



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Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots

Susan S. Fortney

Texas A&M University School of Law, susanfortney2014@gmail.com

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ARTICLE

Susan Saab Fortney

Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots

Abstract. The legal landscape for lawyers' professional liability in the United States is changing. In 2018, Idaho implemented a new rule requiring that lawyers carry legal malpractice insurance. The adoption of the Idaho rule was the first move in forty years by a state to require legal malpractice insurance since Oregon mandated lawyer participation in a malpractice insurance regime. Over the last two years, a few states have considered whether their jurisdictions should join Oregon and Idaho in requiring malpractice insurance for lawyers in private practice. To help inform the discussion, the article examines different positions taken in the debate on mandatory insurance and recent empirical research related to uninsured lawyers and legal malpractice litigation. The article focuses on arguments in favor of mandating insurance and considers approaches that may address particular concerns expressed by those who oppose requiring lawyers to carry professional liability insurance. The article also considers select alternatives to mandatory insurance. After concluding that mandatory insurance better promotes public and lawyer protection than the alternatives, the article examines reasons why decisionmakers fail to require that lawyers carry a minimum level of insurance. Drawing on ethics scholarship and behavioral psychology research, the article notes that individual uninsured lawyers may fail to see the consequences of their conduct because they have a blind spot. The conclusion also suggests that the bar and judiciary may suffer from a collective blind spot that contributes to lawyers and judges not seeing financial accountability as an ethics issue. The conclusion urges lawyers who are insured to address the blind spots and promote their states joining Oregon,

Idaho and countries around the world that recognize that financial accountability is a hallmark of an ethical profession.

Author. Susan Saab Fortney is a Professor and Director of the Program for the Study of Legal Ethics at Texas A&M University School of Law. She thanks the following individuals for their assistance and helpful feedback, Erin Dohnalek, Jett Hanna, Ethan Hughes, Milan Markovic and Leslie Levin. She also thanks *St. Mary's Law Journal* and *St. Mary's Journal on Legal Malpractice & Ethics* and Interim Dean Vincent R. Johnson for their assistance and the opportunity to participate in the 2019 ethics and malpractice symposium.

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INTRODUCTION

The legal landscape for lawyers’ professional liability in the United States (U.S.) is changing.¹ In 2016, the members of the Idaho Bar Association voted on a rule change mandating legal malpractice coverage for Idaho attorneys in private practice.² Following the membership’s narrow approval of the resolution by a vote of 51%, the Idaho Supreme Court adopted the proposed rule with an effective date of January 1, 2018.³ The new Idaho rule requires lawyers engaged in private practice to submit proof that they carry professional liability insurance coverage with minimum limits of liability of \$100,000 per occurrence and \$300,000 for an annual aggregate of claims.⁴

1. See Petition at 1, *In re* Amendments to Supreme Court Rule 79, No. ADKT-534 (Nev. June 29, 2018) [hereinafter *Nevada Petition*] (referring to the shift in the tide).

2. Annette Strauser, *2018 Malpractice Coverage Requirement—General Information*, IDAHO ST. B. (Aug. 29, 2017), <https://isb.idaho.gov/blog/category/licensing/> [http://perma.cc/MZ2H-K8CG].

3. See *Mandatory Malpractice Insurance Task Force, Minutes, Presentation by Diane Minnich, Executive Director of the Idaho State Bar*, WASH. ST. B. ASS’N 2–3 (Feb. 28, 2018), https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/february-21-2018-minutes.pdf?sfvrsn=9b0407f1_2 [http://perma.cc/B2VM-6KPL] [hereinafter *Idaho Presentation*] (offering a presentation before the Washington Bar on the newly adopted Idaho rule and the background information on why it was adopted).

4. For licensing purposes, the Idaho rule requires that attorneys certify whether they represent private clients. Those attorneys who represent private clients must “submit proof of current

The adoption of the Idaho rule was the first move in forty years by a state to require legal malpractice insurance since Oregon mandated lawyer participation in a malpractice insurance regime.⁵ In 1977, Oregon established the Oregon State Bar Professional Liability Fund for the purpose of providing insurance to bar members. The Oregon requirement that lawyers in private practice maintain a minimum level of insurance coverage was unprecedented in the U.S.

Over the last two years, a few states have considered whether to join Oregon, and now Idaho, in requiring malpractice insurance for practicing attorneys. Bar groups in California, Washington, Nevada, New Jersey, and Georgia have studied the issue of mandatory insurance coverage for attorneys.

In recognition of the “importance of protecting the public from attorney errors through errors and omissions insurance,” the California legislature enacted a 2017 statute directing the state bar to review and study errors and omissions insurance for attorneys licensed in California.⁶ The statute identifies a number of areas for study and expressly notes that the study must cover the advisability of mandating errors and omissions insurance for attorneys and the adequacy of California’s rule requiring lawyers to disclose whether they carry insurance. Following the directive from the legislature, the State Bar of California established a Malpractice Insurance Working Group (California Working Group).⁷ On January 14, 2019, the California

professional liability insurance coverage at the minimum limit of \$100,000 per occurrence [and] \$300,000 annual aggregate.” IDAHO B. COMM. R. 302(a)(5) (Westlaw 2019).

5. Carol J. Bernick, *PLF Celebrates 40 Years*, 134 PLF IN BRIEF 1, 1 (May 2018), https://www.osbplf.org/assets/in_briefs_issues/PLF%20Celebrates%2040%20Years.pdf [<http://perma.cc/A9AY-XX7A>].

6. S.B. 36, 2017 Leg., Reg. Sess. § 26 (Cal. 2017); CAL. BUS. & PROF. CODE § 6069.5(a) (Westlaw 2019). In addition to directing the state bar to study mandatory insurance for lawyers, the statute directs the state bar to review, study and make determinations on all of the following issues: the adequacy, availability and affordability of errors and omissions insurance for licensed attorneys in California, proposed measures for encouraging attorneys to obtain and maintain such insurance, the ranges of insurance limits recommended to protect the public, the adequacy and efficacy of the current rule relating to disclosure of the attorneys insurance status, and other proposed measures relating to insurance that will further the goal of public protection. *Id.*

7. The Board of Trustees of the State Bar of California authorized the formation of the California Working Group. *The State Bar of California Malpractice Insurance Working Group Charter*, ST. B. CAL. 1, <http://www.calbar.ca.gov/Portals/0/documents/cc/Malpractice-Insurance-Working-Group-Charter.pdf> [<http://perma.cc/E8J9-3M4V>]. The charter of the California Working Group notes that the study and review process will include consideration of past studies and convening meetings with attorneys and other interested parties with knowledge of relevant issues. *Id.* The charter also outlines

Working Group rejected a recommendation to require malpractice insurance as a condition for licensing for attorneys who represent private clients, but recommended: “More data [as indicated in the Working Group Report] is required prior to making a recommendation on whether mandatory malpractice insurance is necessary.”⁸

In 2017, the Board of Governors for the Washington State Bar Association established the Mandatory Malpractice Insurance Force (Washington Task Force).⁹ The Washington Task Force’s charter specifically charges the task force with determining whether to recommend mandatory malpractice insurance for Washington attorneys, developing a model that might work best in Washington, and then drafting rules to implement that model.¹⁰ In its final report, the Washington Task Force described its information-gathering process, key findings and its recommendation that “[a]ctive Washington-licensed attorneys engaged in the private practice of law, with specified exemptions, should be required to be covered by continuous, uninterrupted malpractice insurance.”¹¹ The Washington Task Force Report recommends that the insurance coverage requirement be managed through the existing annual licensing process.¹²

A State Bar of Nevada Task Force reached a similar conclusion in 2018, recommending the adoption of a rule to require all attorneys in private

the appointment source for the 14–17 members of the working group. As noted, one member was to be a “Consumer Advocate (not licensed attorney).” *Id.*

8. STATE BAR OF CAL. WORKING GROUP, REPORT AND RECOMMENDATION RE LEGISLATIVELY MANDATED MALPRACTICE INSURANCE 1, 12 (Mar. 15, 2019) [hereinafter CALIFORNIA WORKING GROUP REPORT].

9. *Washington Mandatory Malpractice Insurance Task Force Charter*, WASH. ST. B. ASS’N (Sept. 28, 2017), https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/task-force-charter.pdf?sfvrsn=381a3bf1_6 [http://perma.cc/T2C9-SCVN].

10. *Id.* The Washington Task Force’s charter also directs the study to focus on the nature and consequences of uninsured attorneys, to examine current mandatory malpractice insurance systems, and to gather information and comments from bar association members and other interested parties. *Id.*

11. MANDATORY MALPRACTICE INSURANCE TASK FORCE, REPORT TO WSBA BOARD OF GOVERNORS 45 (Feb. 2019) [hereinafter WASHINGTON TASK FORCE REPORT]. The Washington Task Force voted unanimously to approve the report and its recommendation for submission to the Washington State Bar Association Board of Directors. *Id.* at 2. The Washington Task Force recommended that the minimum coverage should be \$250,000 per occurrence and \$500,000 total per year. *Id.* at 45.

12. *Id.* at 52.

practice to carry minimum levels of malpractice insurance.¹³ Based on the recommendation of the task force, the Board of Governors of the Nevada State Bar petitioned the Supreme Court of Nevada, asking that the Court amend licensure rules to require professional liability insurance for attorneys engaged in private practice.¹⁴ The sixteen-page petition describes the justification for requiring insurance and addresses specific concerns articulated in opposition to such a requirement. The petition's conclusion states that "[r]equiring a minimum level of professional liability insurance for all attorneys directly responds to the state bar's mission to protect the public."¹⁵ In a two-page order, the Supreme Court denied the petition, stating that the Board of Governors "provided inadequate detail and support demonstrating that the proposed amendment to SCR 79 is appropriate."¹⁶

The New Jersey State Bar Association took a similar position in concurring with a recommendation of a Supreme Court Ad Hoc Committee on Attorney Malpractice to reject mandatory insurance.¹⁷ In 2018, "The Committee determined that a rule requiring mandatory professional liability insurance would be unworkable in the New Jersey marketplace and would not satisfy a current and plain unmet need."¹⁸

Also in 2018, the President of the State Bar of Georgia appointed a committee to investigate issues related to mandatory insurance and disclosure.¹⁹ After the study, the committee recommended that the State Bar of Georgia require lawyers to be covered by a professional liability policy

13. Vernon "Gene" Leverty, *Message from the President: Tipping the Scales in Honor of our Profession*, NEV. LAW. 4 (Apr. 2018), https://www.nvbar.org/wp-content/uploads/NevadaLawyer_April2018_PresidentsMessage_taskforces.pdf. [<http://perma.cc/6N2H-BVMJ>].

14. *Nevada Petition*, *supra* note 1, at 1–16.

15. *Id.* at 12.

16. Order at 1, *In re Amendments to Supreme Court Rule 79*, No. ADKT-534 (Nev. Oct. 11, 2018) [hereinafter *Nevada Supreme Court Order*].

17. Letter from Robert B. Hille, President N.J. State Bar Ass'n, to Hon. Glenn A. Grant, Acting Admin. Dir. N.J. Court, (Jan. 15, 2018), <https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Reports%20&%20Comments/malpractice%20insurance%20-%202018.pdf> [<http://perma.cc/YDQ9-HWY8>] [hereinafter *NJSB Comments*].

18. *Report of the Supreme Court Ad Hoc Committee on Attorney Malpractice Insurance*, N.J. CTS. 7 (June 2017), <https://www.njcourts.gov/courts/assets/supreme/reports/2017/attmalpracticeinsurance.pdf> [<http://perma.cc/2Nj8-W7DX>] [hereinafter *NEW JERSEY REPORT*].

19. Greg Land, *State Bar Mulls Rule on Purchase, Disclosure of Legal Malpractice Insurance*, DAILY REP. (Jan. 4, 2019, 3:01 PM), <https://www.law.com/dailyreportonline/2019/01/04/will-state-require-purchase-disclosure-of-legal-malpractice-insurance/> [<http://perma.cc/S8LV-XL7Y>] (citing the State Bar of Georgia President who explained that reports from malpractice lawyers described problems of malpractice as "pervasive" and spurred his call to create the committee to study the issue).

in the amount of \$100,000 per occurrence and \$300,000 for the aggregate, the limits of which would not be reduced by payments of attorney's fees or claims of expenses incurred for defending claims under the policy.²⁰

As states consider the advisability of mandatory insurance, it is worth examining different positions in the debate on mandatory insurance and recent empirical research related to uninsured lawyers and legal malpractice litigation. To introduce the topic, Part I provides a historical note with information on the current status of requiring malpractice insurance for lawyers in practice. Part II examines arguments in favor of mandating insurance. Part III tackles common arguments opposing such a requirement. The discussion of the insurance debate focuses on arguments in favor of insurance and approaches that may be used to address concerns expressed by those who oppose requiring lawyers to carry professional liability insurance. Following the discussion of the pros and cons of mandating insurance, Part IV considers select alternatives to mandatory insurance that are in current use. After concluding that mandatory insurance better promotes public and lawyer protection than the alternatives, the conclusion examines reasons why decisionmakers fail to require that lawyers carry a minimum level of insurance. Drawing on ethics scholarship and behavioral psychology research, I argue that individual, uninsured lawyers may fail to see the consequences of their conduct because they have a blind spot. Furthermore, I argue that the bar and judiciary may suffer from a collective blind spot that contributes to responsible lawyers and judges not seeing financial accountability as an ethics issue. This ethical blindness and complacency allow the minority to dominate the discourse on lawyer's professional responsibility and accountability for their acts and omissions. The conclusion urges lawyers who are insured to address the blind spots and promote their states joining Oregon, Idaho and countries around the world that recognize that financial accountability is a hallmark of an ethical profession.

I. HISTORICAL AND PRACTICE CONTEXT OF THE DEBATE ON MANDATORY LEGAL MALPRACTICE INSURANCE

Around the world both common law and civil law regulators require that lawyers maintain a minimum level of professional liability insurance

20. Memorandum from Paula J. Frederick, Gen. Counsel, State Bar of Ga. Executive Comm. (Feb. 28, 2019) (on file with author). The committee preferred that the enforcement of the insurance requirement rule would be through an administrative suspension and not a disciplinary penalty. *Id.*

coverage.²¹ Depending on the regulatory scheme, carrying insurance could be a statutory mandate in civil law countries or a requirement imposed by professional associations in common law countries.²² The majority of common law countries outside the U.S. require some form of malpractice insurance.²³ The minimum coverage required in these countries is at least one million dollars in those countries' currencies.²⁴

The Law Society for England and Wales described the justification for mandating 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.²⁵

In the U.S., concerns about affordability and accessibility of malpractice insurance prompted bar associations to seriously examine mandatory insurance. In the late 1970s, the restrictive insurance market caused lawyers to explore alternatives to private insurance.²⁶ In an effort to provide affordable insurance, some bar associations established bar-related mutual companies.²⁷ Lawyers in other states, including California, Washington and

21. Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 FORDHAM URB. L.J. 177, 189 (2012) [hereinafter *Law as a Profession*].

22. Dimitra Kourmatzis, *Professional Liability Insurance Coverage in Common and Civil Law Jurisdictions—Event Made and Claims Made Approaches*, 2009 INS. L. REV. 41, 41.

23. See Leslie C. Levin, *Uninsured Lawyers and Professional Liability Insurance Requirements: What Does the Research Tell Us?*, NW LAW., Aug. 2018, at 36, 36 [hereinafter *Uninsured Lawyers*] (noting the vast majority of common law counties outside the U.S.—as well as civil law countries—require some form of malpractice insurance for lawyers in private practice).

24. The Washington Task Force Report identified the following minimum limits of liability required in the other common law jurisdictions as follows: AU \$1.5 million or AU \$2 million (US \$1.11 million or US \$1.48 million) in most Australian states; CDN \$1 million (US \$760,000) in British Columbia; S \$1 million (US \$730,000) in Singapore; and £2 million (US \$2,628,000) in England and Wales. WASHINGTON TASK FORCE REPORT, *supra* note 11, at 27.

25. *Law as a Profession*, *supra* note 21, at 189 (quoting *Professional Liability Insurance*, L. SOC'Y § 3.2 (July 4, 2012)).

26. 5 RONALD E. MALLIN, LEGAL MALPRACTICE § 38:3 (2019 ed.) [hereinafter LEGAL MALPRACTICE TREATISE].

27. *Law as a Profession*, *supra* note 21, at 191. There are currently thirteen U.S.-based companies that are members of the National Organization of Bar-Related Insurance Companies (NABRICO). *Member Companies*, NABRICO, <https://nabrigo.com/members/> [http://perma.cc/HYK3-JLRM].

Oregon “explored the possibility of lowering insurance costs by requiring all lawyers” in the state to purchase legal malpractice insurance.²⁸

Following study and proposed legislation mandating legal malpractice in California, the governor refused to sign the bill.²⁹ Oregon then “borrowed the proposed California legislation and passed it as its own.”³⁰ On July 1, 1978, Oregon became the first state in the U.S. to require that all lawyers purchase minimum levels of insurance coverage provided through the state’s professional liability fund. Although some lawyers challenged the constitutionality of compelling lawyers to purchase insurance from a state-related entity, the U.S. Court of Appeals for the Ninth Circuit upheld the requirement that lawyers purchase primary insurance from the Oregon program.³¹

When the Oregon fund was first established, the primary coverage required was \$100,000 with a separate \$50,000 available for defense costs.³² In 2019, the basic primary coverage is \$300,000 per claim and \$300,000 in aggregate for claims made against each attorney each year, and \$50,000 for claims expenses with an annual payment reduced to \$3,300 per attorney in private practice.³³ Idaho, the second U.S. jurisdiction to require mandatory insurance, requires minimum limits of liability of \$100,000 per occurrence and \$300,000 for an annual aggregate of claims.³⁴ The Idaho requirement does not specify any one insurance carrier, but allows lawyers to purchase

28. *Law as a Profession*, *supra* note 21, at 191.

29. *Id.*

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

31. *Hass v. Or. State Bar*, 883 F.2d 1453, 1463 (9th Cir. 1989). The defendant-appellee challenged the insurance requirements on constitutional and antitrust grounds. The Ninth Circuit rejected the antitrust attack because the activity was undertaken pursuant to a clearly articulated and affirmatively expressed state policy. *Id.* The court also rejected the constitutional challenge because the mandatory participation provision of the bar’s resolution “regulates a local matter in which the state has a strong interest, and the provision does not impose an excessive burden, if any, on interstate commerce.” *Id.*

32. Bernick, *supra* note 5, at 1.

33. See *About the PLF*, OR. ST. B. (2019), <https://www.osbplf.org/about-plf/overview.html> [<http://perma.cc/P4B4-F59A>] [hereinafter *Oregon’s Professional Liability Fund*] (providing an in-depth report on Oregon’s Professional Liability Fund).

34. For licensing purposes, the Idaho rule requires that attorneys to certify whether they represent private clients. Those attorneys who represent private clients must submit proof of current professional liability insurance coverage at a minimum limit of \$100,000 per occurrence and \$300,000 annual aggregate. IDAHO B. COMM. R. 302(a)(5) (Westlaw 2019).

insurance in the open market.³⁵

In addition to the Idaho and Oregon requirements that apply to all lawyers in private practice, malpractice insurance may also be mandated for particular types of practice or work. For example, it is common for lawyer referral agencies to require insurance.³⁶ Similarly, around the U.S., a number of states require certain levels of insurance as a condition for lawyers who practice in limited liability law firms.³⁷ In private transactions, sophisticated clients, such as corporations, routinely require that counsel they retain provide proof of insurance.³⁸

As noted above, there is a new wave of state bar associations appointing groups to study mandatory insurance and related issues. When the issue was raised in the past, lawyers and bar leaders discussed in bar journals and internet pieces the pros and cons of mandating insurance for lawyers.³⁹ Even a few law students published law review pieces examining the issue.⁴⁰

35. Robert Horne & Jennifer Smith, *Join the Discussion: Whether Malpractice Insurance Should be Mandatory for Nevada Attorneys*, NEV. LAW., Dec. 2017, at 28, 28.

36. The ABA Model Rules Governing Lawyer Referral & Information include a provision requiring that lawyer-participants maintain errors and omissions insurance or provide proof of financial responsibility. MODEL SUPREME COURT RULES GOVERNING LAWYER REFERRAL & INFORMATION SERVICE R. IV (AM. BAR. ASS'N 2019), https://www.americanbar.org/groups/lawyer_referral/policy/ [http://perma.cc/JQP6-ZXCG].

37. For a discussion of insurance requirements for limited liability partnerships, see CHRISTINE HURT ET AL., BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT § 2.06 (2d ed. 2018). Some jurisdictions base the amount of insurance on the number of lawyers in the firm. Such an approach provides more protection to malpractice plaintiffs with claims against large law firms. *See, e.g.*, 100A ILL. COMP. STAT. ANN. 722(b)(1) (West 2019) (requiring limited liability firms maintain a minimum “amount of insurance of \$100,000 per claim and \$250,000 annual aggregate, times 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”). For a discussion of the insurance issues related to practice in limited liability firms, see Jett Hanna, *Legal Malpractice Insurance and Limited Liability Entities: An Analysis of Malpractice Risk and Underwriting Responses*, 39 S. TEX. L. REV. 641 (1998).

38. Manual R. Ramos, *Legal Malpractice: The Profession’s Dirty Little Secret*, 47 VAND. L. REV. 1657, 1730 (1994) [hereinafter *The Profession’s Dirty Little Secret*].

39. *See* John Schlegelmilch, *Insufficient Evidence to Support Mandatory Malpractice Insurance Requirements*, NEV. LAW., June 2000, at 9, 9 (submitting the argument “that there is insufficient evidence to support any State Bar” requirements for malpractice insurance); Jeffrey A. Tidus, *Mandatory Malpractice Insurance: Any Feasible Plan Must Enable Lawyers to Obtain Affordable Coverage*, L.A. LAW., Mar. 1987, at 16, 16 (examining whether lawyers who do not carry malpractice insurance can pose a threat to the general public); Jeffrey M. Wilson, *Mandatory Malpractice Insurance—The Debate Continues*, ADVOCATE, Nov. 1994, at 6, 16 (claiming small town lawyers will not be impacted through a requirement that they maintain malpractice insurance).

40. *See* Nicole A. Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO J. LEGAL ETHICS 637, 640–53 (1995) (examining and

A number of these articles were written before there were studies dealing with uninsured lawyers and malpractice claims. Some findings come from surveys conducted by bar groups. Other assessments come from studies and analyses conducted by scholars. Notably, Professor Leslie C. Levin published the results of her study on uninsured lawyers.⁴¹ Professors Herbert M. Kritzer and Neil Vidmar have recently published a book that includes qualitative and quantitative data related to legal malpractice claims and the impact of lawyers' insurance status on victims of lawyer malpractice.⁴² To help inform the debate on imposing an insurance requirement, the following discussion of the pros and cons of mandatory insurance draws on findings and commentary from these scholarly works, as well as bar studies.

II. ARGUMENTS IN SUPPORT OF MANDATORY MALPRACTICE INSURANCE

In his seminal article on the role that legal malpractice plays in our regulatory system, Professor John Leubsdorf, an associate reporter on the American Law Institute's Restatement (Third) of Law Governing Lawyers, noted that legal malpractice relates to three regulatory functions of the law of lawyering by "delineating the duties of lawyers, creating appropriate incentives and disincentives for lawyers in their dealings with clients and others, and providing access to remedies for those injured by improper lawyer behavior."⁴³ Arguments supporting mandatory insurance directly or

presenting arguments "in favor of requiring malpractice insurance for attorneys"); Nicholas A. Marsh, Note, "Bonded & Insured?": *The Future of Mandatory Insurance Coverage and Disclosure Rules for Kentucky Attorneys*, 9 KY. L.J. 793, 793–94 (2003) (exploring mandatory insurance coverage for attorneys); Devin S. Mills & Galina Petrova, Note, *Modeling Optimal Mandates: A Case Study on the Controversy over Mandatory Professional Liability Coverage and Its Disclosure*, 22 GEO. J. LEGAL ETHICS 1029, 1029–30 (2009) (considering mandatory professional liability and accompanying disclosures).

41. Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 FLA. L. REV. 1281, 1287–88 (2016) [hereinafter *Lawyers Going Bare*] (using information from a 2011 survey of uninsured New Mexico lawyers and recent surveys of insured and uninsured lawyers in Arizona and Connecticut).

42. HERBERT M. KRITZER & NEIL VIDMAR, *WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS* (2018). Professors Kritzer and Vidmar note that calls for mandatory insurance are not new. *Id.* at 170. According to a review conducted by research assistants, forty-seven articles have been written on mandatory insurance with the many articles advocating in favor of mandatory insurance for lawyers. *Id.* at 217 n.4. One of the earliest articles advocating for mandatory insurance was written by Manuel R. Ramos, a law professor who previously defended legal malpractice cases. See *The Profession's Dirty Little Secret*, *supra* note 38, at 1725–30 (addressing arguments on both sides of the mandatory insurance debate for both requiring a duty to report and a duty to carry coverage).

43. John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 105 (1995).

indirectly relate to each of these functions, starting with the concern that victims of legal malpractice are denied access to meaningful remedies when lawyers fail to carry professional liability insurance. This is commonly characterized as the public protection justification for requiring that licensed lawyers carry malpractice insurance.

A. *Public Protection & Access to Remedies*

Legal malpractice as a type of third-party insurance covers claims seeking damages arising out of the insured's acts, errors, or omissions in rendering legal services to others.⁴⁴ Policy coverage is triggered when a person alleges that a lawyer has engaged in conduct that damaged the claimant. This points to the most compelling reason for requiring insurance: to provide access to remedies for malpractice victims, whether the injured person is a client or a nonclient.

States restrict the practice of law to licensed attorneys. This special privilege comes with the responsibility to be accountable when lawyers' misdeeds harm others.⁴⁵ This financial accountability distinguishes lawyers as professionals.

As a matter of professionalism, lawyers should be required to bear the costs of practicing law and not shift losses to others. Applying tort law and risk distribution principles, lawyers—not clients or injured third parties—are the persons in the best position to guard against and obtain insurance for losses caused by the lawyers' professional misconduct.⁴⁶ Lawyers can then factor in insurance costs when setting fees.

Despite these basic principles of tort law and the professional imperative to be financially accountable, a significant portion of lawyers practice

44. RONALD E. MALLEN, LEGAL MALPRACTICE: THE LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE INSURANCE § 2:21 (2019 ed.) [hereinafter INSURANCE PURCHASING GUIDE]. For an explanation on the different types of policies and insurers' preference for claims-made policy forms, see Susan Saab Fortney, *Legal Malpractice Insurance: Surviving the Perfect Storm*, 28 J. LEGAL PROF. 41, 43 (2003-2004) [hereinafter *Legal Malpractice Insurance*] (identifying different types of claims-made policy forms).

45. "A license to practice law is a privilege, and no lawyer should be immune from his or her responsibility to clients injured because of those mistakes." WASHINGTON TASK FORCE REPORT, *supra* note 11, at 38.

46. See Guido Calabresi, *Some Thoughts on Risk Distributions and the Law of Torts*, 70 YALE L.J. 499, 500 (1961) (introducing a critique of "enterprise liability" with the following notions: "Activities should bear the costs they engender [and] it is only fair that an industry should pay for the injuries it causes" (quoting 2 HARPER & JAMES, ON TORTS 731 (1957))).

without insurance.⁴⁷ This poses a serious risk to clients who rely on lawyers, as well as third parties who are injured by lawyers' misdeeds.⁴⁸ Uninsured lawyers impede the ability of victims to obtain redress, largely because of the economics and challenges associated with successfully pursuing a legal malpractice case.⁴⁹

Most fundamentally, the lack of insurance will make it highly unlikely (some would say virtually impossible) for most legal malpractice victims to retain counsel to pursue a claim, unless the victim is able to pay legal fees associated with prosecuting the case. Interviews with experienced plaintiffs' lawyers confirmed a commonly held belief that experienced lawyers will decline to represent malpractice victims, unless the prospective defendant-lawyer carries insurance.⁵⁰ Experienced lawyers also avoid cases involving uninsured defendants because uninsured defendants may proceed pro se and any judgment obtained would be uncollectable.⁵¹ These conclusions are logical, especially when the target is a lawyer with limited means to pay defense costs, let alone a judgment. Even if the prospective defendant could afford defense costs, plaintiffs' lawyers may be concerned that uninsured lawyers may hide or shield assets, creating serious questions on the ability to recover amounts awarded in malpractice judgments.⁵²

Consumers who infrequently retain legal counsel are the persons who are more likely to retain solo or small firm lawyers.⁵³ Because of the higher concentration of uninsured lawyers among the ranks of solo and small firm lawyers, these clients may unwittingly hire uninsured lawyers.⁵⁴ As a result,

47. For a table based on available data on uninsured lawyers in private practice, see KRITZER & VIDMAR, *supra* note 42, at 41.

48. See WASHINGTON TASK FORCE REPORT, *supra* note 11, at 45 (noting uninsured lawyers pose serious risks to clients and themselves).

49. See Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2033, 2038–41 (2017) [hereinafter *Tort in Search of a Remedy*] (discussing how the complex and expensive nature of legal malpractice cases makes it very difficult for many malpractice victims to retain counsel to handle cases on a contingency fee basis). Depending on the facts of a case, it is common for experienced plaintiffs' attorney to require a minimum amount of damages, such as \$300,000, before the attorney agrees to a contingency fee. *Id.* at 2039.

50. KRITZER & VIDMAR, *supra* note 42, at 148.

51. *Id.*

52. See *Lawyers Going Bare*, *supra* note 41, at 1330 (suggesting one reason that the percentage of uninsured lawyers may be higher in some states is because of state laws that make it easy to shield assets from malpractice judgments).

53. See KRITZER & VIDMAR, *supra* note 42, at 42 (concluding clients using small-firm lawyers or solo practitioners have a "substantial chance of dealing with a lawyer who lacks insurance").

54. See *Uninsured Lawyers*, *supra* note 23, at 36 ("Ordinary people are overwhelmingly the ones who are harmed by uninsured lawyers. This is because most individuals hire solo and small firm lawyers

the clients may feel doubly victimized when malpractice occurs and the lawyer is uninsured.⁵⁵

Although experienced users of legal services may hire firms who carry and maintain insurance, infrequent consumers may not even ask lawyers about insurance in those states where lawyers are not required to directly disclose the lawyers' insurance status to prospective clients. According to a public opinion poll conducted for the State Bar of Texas, 87.1% of the respondents indicated that they did not ask if their attorneys carried professional liability insurance.⁵⁶ Many lay people may mistakenly believe that lawyers are required to carry insurance. Subject to limitations in the policy, mandatory insurance protects all users of legal services, especially the most vulnerable due to the disparate positions between lawyers and clients. In short, mandatory insurance is necessary to protect the public by providing a source of compensation for persons injured by attorneys' malpractice.

B. *The Mission of the Organized Bar & Integrity of the Legal Profession*

Bar groups that have recommended mandating insurance focus on the risk that uninsured lawyers pose to the public. The Petition filed by the State Bar of Nevada went so far as to say that requiring insurance responds to the bar's mission as it "puts in place safeguards for both the attorney and client if a negligent act occurs."⁵⁷

Similarly, the February 2019 Report of the Washington Task Force on Mandatory Malpractice Insurance focuses on the risk to the public, noting that the mission of the bar association includes serving the public, ensuring the integrity of the legal profession, and championing justice.⁵⁸ In

for their legal matters."); see also KRITZER & VIDMAR, *supra* note 42, at 5 (using a two-hemisphere dichotomy of corporate clients who hire larger firms as compared to personal service sector clients who more frequently hire solo and small firm lawyers).

55. See *Uninsured Lawyers*, *supra* note 23, at 36 (reviewing the prolonged battle that a former client in litigating with an uninsured defendant on a claim that an insurer would likely have settled many years earlier).

56. *Law as a Profession*, *supra* note 21, at 197 n.105 (citing *PLI Disclosure Survey of the Public*, ST. B. TEX. (Nov. 2009), <http://www.texasbar.com/pliflashdrive/material/PublicSurvey.pdf> [<http://perma.cc/Q69R-6Y3N>]).

57. *Nevada Petition*, *supra* note 1, at 1. "The State Bar's mission is to govern the legal profession, to serve our members, and to protect the public interest. This mission is fulfilled through rigorous admission standards, disciplinary proceedings and client protection programs." *Id.* at 1.

58. WASHINGTON TASK FORCE REPORT, *supra* note 11, at 5 (referring to the mission "to serve the members of the Bar"). "Protection of the public is the overriding *public* duty of lawyers, the WSBA, and the Washington Supreme Court." *Id.*

commenting on the autonomy of lawyers to not purchase insurance and the role of the Washington State Bar Association (WSBA), the Washington Task Force Report to the Board of Governors made the following observations:

While it may be appropriate for lawyers to evaluate and assume personal risks created by lack of [professional liability] insurance, the Task Force concluded that it is simply not fair for the clients. Clients of uninsured lawyers often have a difficult time obtaining compensation from those lawyers after a malpractice event. Clients of uninsured lawyers have an especially difficult time finding legal representation for [quite] legitimate claims against uninsured lawyers because malpractice plaintiffs' lawyers routinely decline to handle those claims. . . .

In the Task Force's view, there is a distinct problem that directly affects the public interest, and a solution is needed. The Washington Supreme Court as the supervisory authority over the practice of law in this state, regulates the profession to protect the public and maintain the integrity of the legal profession, and it does so by adopting rules for the regulation of the practice of law.⁵⁹

As noted by Professor Levin, "uninsured lawyers . . . threaten to undermine the public's trust in lawyers" when clients discover that they have no meaningful recourse against their uninsured lawyers and when media report stories about clients who cannot recover for the harm caused by uninsured lawyers.⁶⁰

Meaningful public protection through mandatory insurance helps fosters confidence in the legal profession.⁶¹ More malpractice judgments may improve the public perception of lawyers if members of the public see that lawyers cannot escape liability for their mistakes that cause harm to others.⁶² By providing access to remedies to malpractice victims, mandatory insurance advances the status of law as an honorable, self-regulatory profession that holds lawyers accountable for their misdeeds. "If we fail to

59. *Id.* at 38.

60. *Lawyers Going Bare*, *supra* note 41, at 1319.

61. *See Professional Indemnity Insurance—10 Key Questions Answered*, THE L. SOC'Y (July 24, 2017), <https://www.lawsociety.org.uk/support-services/advice/articles/professional-indemnity-insurance-10-key-questions-answered> [<http://perma.cc/46HW-FCVN>] (explaining professional liability insurance is important for public confidence in the legal profession).

62. *See Cunitz*, *supra* note 40, at 652 (suggesting more cases reaching the court system will generate publicity and may alter the public perception of the legal profession).

protect those who rely on us, we fail to fulfill our obligations as a protected profession.”⁶³

C. Preserves Attorney Self-Regulation

Proponents of insurance also warn that failure to act will invite legislative control of the legal profession.⁶⁴ Arguably, the legal profession does not deserve to be self-regulated if we fail to discharge our responsibilities to protect the public and provide remedies to those we injure.⁶⁵ Although this argument may appear to be an empty threat, developments over the last twenty years point to a shift towards more administrative and legislative regulation of lawyers.⁶⁶ In discussing how lawyers are increasingly subject to legislation that governs their conduct, Professor James M. Fischer suggests that there will be increased “flashpoints between legislators and the bar over lawyers’ professional and public duties.”⁶⁷ The mandatory insurance issue may ignite such a flashpoint, requiring the bar to take decisive action to protect the public and discharge professional duties.

This may first occur in California given the 2017 statute requiring the state bar to review and study the legal malpractice insurance issue and to report back to the legislature no later than March 31, 2019.⁶⁸ Following the state bar’s report to the legislature, decisionmakers may fashion a legislative solution if they determine that the bar is unwilling to take steps that protect

63. *Law as a Profession*, *supra* note 21, at 215.

64. *See, e.g., Lawyers Going Bare*, *supra* note 41, at 1319 (pointing to concerns that if the bar does not self-regulate and require lawyers to carry insurance, legislatures may impose the requirement).

65. “Once confidence is lost in the bar’s ability to regulate itself in ways that are consistent with the public interest, state legislatures may increasingly become involved in lawyer regulation.” *Id.*

66. *See* Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OK. CITY U. L. REV. 559, 608 (2005) (reviewing recent developments and implications for lawyer self-regulation). Increasingly, there are challenges to lawyer self-regulation. *E.g.*, Renee Newman Knake, *The Legal Monopoly*, 93 WASH. L. REV. 1293, 1307–08 (2018) (referring to lawyer self-regulation as “problematic on multiple levels”).

67. James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 108 (2006).

68. CAL. BUS. & PROF. CODE § 6069.5 (Westlaw 2019). The statutory directive opens with the following phrase: “In recognition of the importance of protecting the public from attorney errors through errors and omissions insurance” *Id.* § 6069.5(a). One California expert on lawyer regulation suggests that this phrase provides a glimpse of the legislature’s attitude on the insurance issue and that the legislature has already made up its mind and that the public needs protection through insurance. James Ham, *Will California Have Mandatory Malpractice Insurance for Attorney and What Will It Look Like?* (2018) (unpublished paper on file with author).

the public and advance access to justice.⁶⁹

D. *Improves Risk Management & the Delivery of Legal Services*

Lawyers who carry insurance benefit from the role that insurers play in risk management and practice assistance. Although it may be a challenge to quantify the impact of risk management, studies have revealed that the implementation of risk management techniques saved firms millions in claims⁷⁰ and were associated with a substantial reduction in the number of complaints against lawyers who implemented appropriate management systems.⁷¹

Insurers' risk management assistance to lawyers takes various forms.⁷² Most obviously, insurers assist lawyers by educating them through continuing legal education programs, seminars, practice materials, and newsletters.⁷³ In addition, insurers provide individual guidance to firms. This individual guidance includes consultations on specific issues and practice reviews or audits of firm risk management systems that relate to

69. See Fisher, *supra* note 67, at 98 ("In California, aggrieved individuals and groups have developed a practice of seeking legislative solutions to issues that were once seen as entirely within the purview of the bar.")

70. See News Brief, *Risk Management Techniques Can Save Firms Millions in Claims*, 1997 ANDREWS INS. INDUS. LITIG. REP. 22529, 22529 (reporting on the results of survey of 395 of the approximately 1,100 law firms in the U.S. employing thirty-five or more attorneys). The survey conducted by Louis Harris & Associates identified two key practices that correlate to large saving in liability dollars. *Id.* "Firms which have a designated risk management partner or committee, on average, paid out over \$1 million less for the largest claim they resolved over the past five years. [And] firms which have a separate partner or committee to oversee the acceptance of new clients and engagements, on average, paid out approximately \$800,000 less for the largest claim." *Id.*

71. See Susan Saab Fortney, *Preventing Legal Malpractice and Disciplinary Complaints: Ethics Audits as a Risk-Management Tool*, BUS. L. TODAY, Mar. 2015, at 1, 2 (reporting on the results of an Australian study that revealed that the complaints rate against law firms that completed a self-assessment process went down by two-thirds and the complaints rates for those firms was one-third of the number of complaints registered against firms that had not completed the process). For additional discussion of the self-assessment process as part of a proactive, management-based regulation program, see *infra* Part IV-C.

72. For an overview of insurer's risk management efforts and positive impact on the quality of legal services, see Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209, 220-22 (1996) [hereinafter *Insurers as Regulators*].

73. *Id.* at 220 (noting the programs deal with fundamental firm management issues, as well as particular issues, such as conflicts, dockets, and file controls). For a discussion on risk management services that insurers offer solo and small firm lawyers, see Leslie C. Levin, *Regulators at the Margins: The Impact of Malpractice Insurers on Solo and Small Firm Lawyers*, 49 CONN. L. REV. 553, 582-84 (2016) [hereinafter *Regulators at the Margin*].

preventing malpractice.⁷⁴ In the event that the review reveals areas in need of improvement, the insurer's representative may recommend remedial steps for resolution or the insurer may require implementation of appropriate measures as a condition to obtaining insurance.⁷⁵

The Attorneys' Liability Assurance Society (ALAS), a legal malpractice mutual formed by large law firms, pioneered loss prevention audits for member firms and the designation of loss prevention partners at member firms.⁷⁶ This initiative was part of the movement of law firms to designate ethics counsel and general counsel who contribute to the improvement of the quality of legal services.⁷⁷ Other carriers offer audits provided by employees of the insurer or outside counsel.⁷⁸ These audits are designed to review firm policies and procedures, as well as informal controls that focus on ethics and malpractice concerns.⁷⁹

Some insurers provide self-audit materials that enable lawyers to systematically review firm policies and procedures relating to the firm's ethical infrastructure and delivery of legal services, such as the firm's procedures related to commencing and documenting the attorney-client relationship. In recent years, insurers have provided lawyers a great deal of guidance in adapting to the new world of electronic communications and data security. This assistance benefits lawyers as well as clients they serve.

74. *Insurers as Regulators*, *supra* note 72, at 220–22 (“Also within this education category are the variety of newsletters and even more substantial publications issued to insured by Insurers to guide and assist insureds in avoiding claims by adopting improved practice management.”).

75. *Id.*

76. See Tom Baker & Rick Swedloff, *Mutually Assured Protection Among Large U.S. Law Firms*, 24 CONN. INS L.J. 1, 13 (2017) [hereinafter *Mutually Assured Protection*] (describing the origin of ALAS). After analyzing qualitative data based on interviews and participants' observations related to the role of ALAS and other mutual organizations, Professors Baker and Swedloff conclude that mutual insurance arrangements in the lawyers' professional liability sector serves the members firms as well as the legal profession. *Id.* at 62.

77. See Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 590 (2002) (examining the contributions that compliance specialists play in law firms). “Several [study] participants credit ALAS for shaping the development of in-house compliance efforts in their firms; and we heard similar comments about the role of other insurers . . .” *Id.* at 590.

78. For a discussion of practice audits by a person who conducts them for insurers and firms, see Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 111–12 (2008) [hereinafter *Risk Management*].

79. See *Insurers as Regulators*, *supra* note 72, at 221 (noting “some law firms are beginning to recognize the value of streamlined practice management in the increasingly competitive marketplace in which they operate, and are, therefore, voluntarily commissioning and undergoing risk management audits”).

In addition to the valuable assistance that insurers provide lawyers in avoiding and dealing with malpractice concerns, insurers' positive impact on lawyers' practices actually starts with the terms of insurance policies. Policy provisions can be written in such a way to dissuade lawyers from engaging in risky and unwise practices. As explained by insurance law experts, Professors Tom Baker and Rick Swedloff: "Insurers also use contract provisions that eliminate or reduce coverage for claims thought to pose a high degree of moral hazard. . . . These contract designs regulate indirectly. By leaving a greater share of certain liability risks on the insured, they encourage greater vigilance over those risks."⁸⁰

In analyzing such contract provisions in legal malpractice insurance policies, Anthony E. Davis, a risk management expert, explains that the policy provisions may supplement or clarify the definition of prohibited conduct beyond the terms and standards of ethical constraints or may limit or exclude coverage for conduct not forbidden by the ethics rules.⁸¹ For example, malpractice policies include some form of business pursuits exclusion that eliminates coverage for claims related to business transactions with clients.⁸² These exclusions recognize the serious risks associated with such claims and the difficulty in lawyers engaging in such activities in accordance with applicable ethics rules and fiduciary principles.⁸³ Over the years lawyers have heeded the warnings and prohibited such transactions in their law firms.⁸⁴ Firm managers and ethics counsel can justify the prohibitions by pointing to the policy exclusions.

80. Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1420 (2013) [hereinafter *Regulation of Liability Insurance*].

81. See *Insurers as Regulators*, *supra* note 72, at 211–20 (providing examples of policy provisions which augment existing ethical rules and those that create new classes of restricted conduct).

82. Some policy exclusions are narrow, eliminating claims related to the business enterprise while others are broader in extending to claims related to the rendition of legal services to the enterprise. See *id.* at 212–14 (reviewing policy approaches).

83. See *id.* at 214 (noting cases involving business pursuits "invariably cast the lawyers in a negative, self-interest light. . . [and are] difficult to defend and lead to awards or settlements that reduce [i]nsurers' profits"). "By excluding coverage, [i]nsurers attempt to make the profession confront the fact that lawyers who engage in representations involving conflicts, even if such representations are technically permissible, will assume the entire risk of the consequences." *Id.*

84. "While it is generally imprudent to do business with a client, it is very dangerous and irresponsible to do so if the policy's business pursuit exclusion eliminates coverage for all claims relating to the business enterprise." SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION* 547 (2d ed. 2015) [hereinafter *LEGAL MALPRACTICE LAW*].

Insurers' positive impact on the implementation of risk management measures also dates back to the time when lawyers apply for insurance. Insurance applications require lawyers to describe how the firm handles matters such as conflicts checking and tracking deadlines. To respond to the application questions, lawyers must consider their policies and procedures. Lawyers who do not have policies and procedures in place should develop them in order to complete the application. Renewal applications should also contribute to lawyers evaluating the adequacy of policies and procedures related to practice and risk management.⁸⁵

Once insured, lawyers can obtain their insurers' guidance when dealing with ethics and malpractice concerns. This is illustrated in Oregon where all lawyers in private practice receive practice management assistance as participants in a mandatory insurance plan provided by the Oregon Professional Liability Fund (PLF). The PLF has developed an outstanding reputation for its loss prevention and mitigation efforts that have evolved into a comprehensive Personal and Practice Management Assistance Program⁸⁶ which assists thousands of lawyers a year.⁸⁷

Requiring insurance in other jurisdictions will extend the reach of such practice management assistance and possibly incentivize insurers to improve the practice assistance they provide in order to compete in the marketplace. This type of risk and practice management guidance helps lawyers avoid and address professional liability problems at the same time that it assists lawyers

85. In interviews with Connecticut lawyers, a "small number . . . reported that the process of applying for . . . insurance positively affects their thinking or conduct." *Regulators at the Margins*, *supra* note 73, at 594. For example, one lawyer stated that the renewal process "makes us go and review the [office] policies . . . and question whether or not there's a more efficient way to do it, a safer way to do it." *Id.*

86. "The PLF stands at the vanguard as an innovative program for providing covered parties with services and support in the most cost-effective, efficient, responsive, and responsible way possible." Bernick, *supra* note 5, at 2. Such assistance includes counseling on claims prevention as well as assistance in claims repair to address the problem and get the matter back on track. *Id.*

87. "The PLF's practice management advisors make over 250 office visits and answer over 750 informational calls annually, teach dozens of CLEs throughout the state, and publish nearly 400 practice aids." *Id.* at 1. The PLF services include legal education, on-site practice management assistance through the PLF Practice Management Advisor Program, and personal assistance through the Oregon Attorney Assistance Program. See OR. STATE BAR PROF'L LIAB. FUND, 2017 ANNUAL REPORT 3-4 (2017), https://www.osbplf.org/assets/documents/annual_reports/2017%20PLF%20Annual%20Report.pdf [http://perma.cc/8GDR-UM9K] [hereinafter OREGON 2017 ANNUAL REPORT] (noting 100% of the people who returned surveys were "very satisfied" or "satisfied" with eight aspects of the Professional Management Assistance program).

in discharging their duties to clients.⁸⁸

Mandating insurance also incentivizes lawyers to take precautions to minimize their malpractice exposure. Lawyers should invest in risk management when they recognize that such efforts can help avoid claims that would require them to pay deductibles and would negatively impact future premiums.⁸⁹

E. *Improves Accessibility & Affordability*

As noted above, the need for a source of affordable insurance first prompted Oregon to implement a mandatory insurance program in the 1970s.⁹⁰ Interestingly, market forces and lawyer self-interest sparked the change.⁹¹

Since creation of the PLF in Oregon, all Oregon attorneys in private practice have been charged an annual assessment. In 2019 the assessment was \$3,300.⁹² From 2012–2018, the assessment was \$3,500 per Oregon lawyer in private practice.⁹³

Regardless of practice area, claims experience, or years of practice, lawyers in private practice in Oregon pay the same assessment and obtain basic coverage that includes \$50,000 for defense costs and \$300,000 for indemnity and, if necessary, additional defense costs.⁹⁴ By insuring all lawyers, the Oregon fund has been able to spread the risk while keeping costs down for all insured lawyers.⁹⁵ All Oregon lawyers in private practice obtain the primary coverage provided by the Oregon fund even if a lawyer

88. For example, one thorny ethical conundrum relates to lawyers' duty to disclose professional malpractice to their clients, see ABA COMM'N ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 481 (2018). Although this ABA Ethics Opinion provides some general guidance, lawyers would benefit from expert guidance and a disinterested opinion in determining whether they have a duty to disclose malpractice to clients given the particular facts and circumstances of representation.

89. Insurers can also incentivize risk management by providing premium discounts for certain activities. See *Regulators at the Margins*, *supra* note 73, at 582 (noting a few underwriters offer a premium discount to lawyers who participate in risk management or ethics programming).

90. *Law as a Profession*, *supra* note 21, at 190–92 (providing historical background on the establishment of the Oregon program).

91. *Id.* at 190.

92. See *Oregon's Professional Liability Fund*, *supra* note 33 (stating the basic assessment for Oregon lawyers).

93. OREGON 2017 ANNUAL REPORT, *supra* note 87, at INTRODUCTION.

94. Bernick, *supra* note 5, at 4.

95. A mandatory state program saves expenses by eliminating broker commissions, marketing costs, taxes, regulator fees, and required contributions to state guaranty funds. Cunitz, *supra* note 40, at 646–48 (discussing a 1993 Report from the ABA National Legal Malpractice Conference).

has a record of professional discipline or liability claims that make the lawyer a high-risk insured.

Although the Oregon experience of relying on a state bar program to provide quality coverage to all lawyers at an affordable premium may not translate to other jurisdictions where the practicing private bar is considerably larger, requiring insurance of all lawyers may positively impact the affordability and accessibility of insurance through the private marketplace.⁹⁶ With more prospective insureds in the marketplace there should be more competition among insurers, contributing to greater stability in the insurance market, less restrictive coverage, and greater availability of coverage.⁹⁷

Mandating that lawyers carry insurance may also contribute to the creation of special programs and risk retention groups. More state bar associations may establish bar-affiliated companies to provide affordable and accessible insurance. Specialty bar groups, such as the National Association of Criminal Defense Lawyers, have developed programs where association members can obtain a full-range of professional liability insurance products.⁹⁸ Such programs can be designed to meet the special needs of members while improving the affordability and accessibility of insurance.⁹⁹

F. *Avoids Shifting of Losses to Insured Lawyers*

Uninsured lawyers also increase the malpractice exposure of insured lawyers. Quite simply, if there are insured lawyers and uninsured lawyers involved in representation, the insured lawyers will likely be the targets of possible malpractice claims related to the representation, even if the insured lawyers did not engage in misconduct.¹⁰⁰ For example, an uninsured lawyer

96. See Bennett J. Wasserman & Krishna J. Shah, *Mandatory Legal Malpractice Insurance: The Time Has Come*, 199 N.J. L.J., Jan. 14, 2010, at 1 (suggesting carriers would lower premiums because there would be more revenue for carriers and competition for premium dollars).

97. *Id.*

98. See *National Association of Criminal Defense Lawyers*, COMPLETE EQUITY MKTS., <http://cemins.com/attorneys/nacdl.php> [<http://perma.cc/H52E-VFFU>] (describing various insurance products tailored to types of practice, including part-time and assigned counsel practices).

99. For example, the exoneration or “actual innocence” rule applicable in the majority of U.S. jurisdictions significantly lowers malpractice exposure of criminal defense lawyers. The premiums for an insurance product designed for criminal defense attorneys can reflect the lower risk of civil liability claims against criminal defense lawyers.

100. See Robert I. Johnston & Kathryn Lease Simpson, *O Brothers, O Sisters, Art Thou Insured?: The Case for Mandatory Disclosure of Malpractice Insurance Coverage*, PA. LAW., May–June 2002, at 28, 32

may refer a matter to an insured lawyer. If the fee arrangement between the uninsured and insured lawyers is not in proportion to the services provided by each lawyer, state versions of ABA Model Rule 1.5(e) require that the lawyers assume joint responsibility for the representation.¹⁰¹ The comments to the rule clarify that “[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.”¹⁰² In the event of malpractice by the uninsured lawyer, such as failure to convey a settlement offer to a jointly-represented client, the insured lawyer can face a malpractice claim even though the insured did not commit malpractice.¹⁰³ Requiring insurance for all private practitioners should help prevent situations where uninsured lawyers commit malpractice and shift responsibility to those lawyers who purchase insurance.

G. *Helps Lawyers and Malpractice Victims Avoid Insurance Gaps*

In the professional liability market, insurers initially offered the “occurrence” policy form.¹⁰⁴ Under an “occurrence” policy, an occurrence during the policy period triggers coverage. Because of uncertainty associated with predicting claims and losses that would be paid under occurrence policies, insurers abandoned the occurrence policy form and moved to the “claims-made” policy form.¹⁰⁵ A claims-made policy typically covers claims that are first made against an insured during the policy period, regardless of when the incident giving rise to the claim actually occurred.¹⁰⁶

The shift from occurrence policies to claims-made policy forms can create gaps when lawyers do not understand that they must have a policy in effect at a time a claim is made and reported. In particular, a coverage gap

(noting members of the Pennsylvania Bar Association Professional Liability Committee have seen “responsible attorneys who are drawn into malpractice suits because another attorney involved in the matter proved to be uninsured”).

101. MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (AM. BAR. ASS'N 2019).

102. *Id.* cmt. 7. For a discussion of joint responsibility under ABA Model Rule 1.5, the Restatement of Law Governing Lawyers and related caselaw, see Susan Saab Fortney & Vincent R. Johnson, *Legal Malpractice*, in LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY AND THE LEGAL PROFESSION § 5–7.3(a)(1) (2018) [hereinafter LEGAL ETHICS].

103. Although the insured lawyer may pursue a contribution claim, such a claim may not result in any recovery if the other lawyer is uninsured and does not own sufficient non-exempt assets.

104. INSURANCE PURCHASING GUIDE, *supra* note 44, § 2:28.

105. *See id.* (explaining the claims-made form provides insurers more underwriting certainty and the ability to better control their losses).

106. *Id.* §§ 2:31, 2:32.

may occur when a lawyer switches law firms. Insurers may rely on a number of policy provisions to clarify that the policy will only cover claims related to work performed while working at the named insured firm.¹⁰⁷ This can create a coverage gap for the lateral lawyer who joins a firm if the lawyer's former firm does not have a policy in effect at the time the claim is made.¹⁰⁸ When I was in private practice handling legal malpractice coverage matters, I was surprised to learn how many lawyers did not focus on the limitations under their insurance policies. If insurance is required, lawyers would have to certify that they have a policy in effect. This would effectively force lawyers to understand the terms of their policy and to obtain coverage to protect themselves and persons they injure.

In short, mandating insurance serves the regulatory functions of the law of lawyering by providing access to remedies and providing incentives for lawyers to obtain insurance to protect themselves and persons they injure, while improving their practices. Although the most compelling justification relates to public protection, the discussion above also reveals that a mandatory scheme can positively impact the individual lawyers, the legal profession, and the quality of legal services.

III. ARGUMENTS IN OPPOSITION TO MANDATORY INSURANCE

A pattern of arguments emerges in reviewing commentary and reports that oppose requiring that private practitioners maintain professional liability insurance. Although many of these arguments focus on the impact on lawyers who are required to purchase insurance, some arguments are framed in terms of the public good. The discussion below reviews some of the most common arguments asserted by those who oppose mandating insurance.¹⁰⁹

107. Susan Saab Fortney, *Insurance Issues Related to Lateral Hire Musical Chairs*, 2000 PROF. LAW. 65, 70–71 (discussing the different approaches that insurers use to limit coverage to claims related to legal services performed at the law firm that is named as the insured under the policy).

108. *Id.* at 70. Typically, a former lawyer will be covered under the former firm's policy for claims related to legal services performed at the former firm. The complication and possible gap occurs when the former firm does not carry insurance at the time the claim is made. A gap can also occur when a law firm dissolves without adequate tail coverage. For a discussion of post-dissolution risks, see ROBERT W. HILLMAN & ALLISON MARTIN RHODES, *HILLMAN ON LAWYER MOBILITY* § 4.11.3 (3d ed. Supp. 2018). The authors note that it is unlikely that lawyers are taking steps to insure against the post-dissolution malpractice risks because most lawyers are “unaware of the possibility of post-dissolution liabilities” *Id.* § 4.11.2.

109. Those who oppose insurance also identify various logistics issues that will not be addressed by this article.

A. *No Proof of Harm*

As a starting point, opponents maintain that there is no demonstrated need for requiring that lawyers carry professional liability insurance. Simply stated, they assert that the proponents have failed to establish that the public is harmed by the status quo in the vast majority of jurisdictions where insurance is not required for lawyers in private law practice. Rather than conceding that there is a public protection problem, some bar groups and leaders have concluded that there is insufficient evidence to support mandating insurance.¹¹⁰ This is the position recently taken by the New Jersey State Bar Association in recommending that the New Jersey Supreme Court reject a mandatory insurance requirement because there is “no evidence that . . . [such a] requirement is necessary or will resolve any demonstrated problem in connection with the ability of consumers to obtain quality legal services and to have recourse available in the event of negligent representation.”¹¹¹

The argument that there is no proof of harm refers to the lack of “statistics” demonstrating that the existence of uninsured attorneys results in uncompensated claims.¹¹² This argument does not recognize data available on unsatisfied judgments against lawyers and the significant percentage of lawyers practicing law without insurance. In an article reporting on her empirical study on uninsured lawyers, Professor Levin devotes nine pages to addressing the “no harm” argument.¹¹³ She concludes, “[T]here is evidence that clients of uninsured lawyers are being harmed by their lawyer’s malpractice, clients are not always compensated for the harm, and sometimes clients suffer substantial harm.”¹¹⁴

Although it is difficult to discern the extent to which there are unsatisfied judgments against uninsured lawyers, there are numerous media stories reporting on unsatisfied judgments. In her article based on an empirical study of uninsured lawyers, Professor Levin cited numerous news stories referring to cases around the U.S. where plaintiffs obtained uncollectible

110. See, e.g., John Schlegelmilch, *Insufficient Evidence to Support Mandatory Malpractice Insurance Requirements*, NEV. LAW., June 2000, at 9, 9 (referring to “the complete lack of empirical data supporting the need for mandatory malpractice insurance”).

111. *NJSB Comments*, *supra* note 17, at 1.

112. “Given the lack of statistics, it is not possible to determine the extent of public harm occurring, if any, due to the absence of mandatory insurance, and no way to measure the benefit of requiring insurance.” NEW JERSEY REPORT, *supra* note 18, at 50.

113. *Lawyers Going Bare*, *supra* note 41, at 1309–17.

114. *Id.* at 1316.

judgments against uninsured attorneys.¹¹⁵ These judgments ranged from amounts as small \$25,000 in one case to \$10 million in another case.¹¹⁶ In Virginia, where lawyers must report unsatisfied judgments against them, ten lawyers indicated that they had unsatisfied judgments in 2015 and six of those were uninsured.¹¹⁷

These cases only represent a sliver of the number of victims injured by uninsured lawyers because malpractice claims against uninsured lawyers are very rarely pursued. Data collected by empirical scholars in two different studies reveal that it is very difficult for a victim to retain counsel to handle a legal malpractice matter on a contingency fee.¹¹⁸

When cases are not brought because the target is uninsured, we cannot establish with certainty the extent of the harm caused by uninsured lawyers. We do have one empirical scholar's estimate of harm caused by uninsured lawyers. Based on available claims data in Missouri, Professor Levin extrapolated from the Missouri data to estimate that the total indemnity payment for solo and small firm lawyers was—very roughly—\$260 million annually.¹¹⁹ Assuming that 25% of all solo and small firm lawyers are uninsured nationwide, she concludes that tens of millions more dollars would be paid annually to compensate the clients of uninsured lawyers for malpractice if their lawyers were insured.¹²⁰

When evaluating the risk of harm, the number of uninsured lawyers and their practice settings should be considered. Although there are not national

115. *Id.* at 1314–15, 1317 n.196.

116. *Id.*

117. “Some uninsured lawyers have more than one unsatisfied malpractice judgment against them.” *See id.* at 1314.

118. *See* KRITZER & VIDMAR, *supra* note 42, at 148 (reporting their study results that revealed that members of the plaintiff's bar were reluctant to pursue claims against uninsured lawyers). The following describes what Professor Levin learned in her interviews with six attorneys who devote substantial time to plaintiffs' malpractice work:

Some plaintiffs' lawyers will “absolutely never” take such cases, at least on a contingent fee basis. If plaintiffs' malpractice lawyers discover that a lawyer is uninsured during the representation, some drop the case if there are no substantial assets. One such lawyer, who encounters two to three cases a year in which he learns after the lawsuit commences that the lawyer is uninsured, noted, “It has gotten to the place where I tell clients up front that if it turns out their lawyer is uninsured, I will have to send the case elsewhere or drop the claim. It does not make sense to chase lawyers for their condos and BMWs. They will file for bankruptcy.”

Lawyers Going Bare, *supra* note 41, at 1313 (quoting a Telephone Interview with Plaintiff's Attorney No. 5 (May 6, 2015)).

119. *Id.* at 1311.

120. *Id.* at 1312.

numbers available, data from individual states does reveal the percentage of uninsured lawyers in those particular states. Available survey data indicate that there is a significant percentage of lawyers practicing without insurance, ranging from 6% in South Dakota to 36% in Texas.¹²¹ Uninsured lawyers are predominately in solo practice or firms of five or fewer lawyers.¹²² These uninsured lawyers may represent individuals and small businesses.¹²³ This suggests that the clients of the uninsured will likely be infrequent users of legal services and may be the most vulnerable when lawyers commit malpractice. At that point the malpractice victim will likely need to hire a plaintiff's attorney who will handle the matter on a contingent fee basis. As noted above, qualitative data support the conclusion that the malpractice victims will not be able to retain such counsel when the wrongdoer is uninsured. This harm to individual consumers may not be quantifiable but deserves special note because personal service clients are the least prepared to protect themselves and most directly impacted by uncompensated losses.¹²⁴

Finally, there is the personal face of harm experienced by clients injured by uninsured lawyers. In an open letter to the Nevada Supreme Court and Board of Governors, a Nevada litigator shared his experiences in counseling two personal injury clients, one of whom had lost a leg and another who suffered from life-long disabilities and pain.¹²⁵ Both had their cases dismissed because the attorney failed to timely serve the complaints in the personal injury actions. Because of the malpractice, the clients lost their underlying personal injury cases, leaving millions in uncompensated damages. Because the lawyer was uninsured and had no collectible assets, the clients were left without recovery. In cases such as these, the lawyer's negligence not only "deprives . . . [the] client of property or rights to which he would otherwise be entitled under applicable law, [but also] damage is

121. For a table outlining available data, see KRITZER & VIDMAR, *supra* note 42, at 41.

122. *See id.* at 41–42 (discussing the practice setting of uninsured lawyers). According to the Washington Task Force Report, 14% of all Washington lawyers in private practice consistently report being uninsured, but 28% of those in solo or small firms reported being uninsured. WASHINGTON TASK FORCE REPORT, *supra* note 11, at 11.

123. "[S]ome unknown but probably substantial proportion of lawyers working in personal services sector forgoes insurance." KRITZER & VIDMAR, *supra* note 42, at 92.

124. *See id.* at 168–69 (summarizing findings related to the differences between the corporate and personal services hemispheres and the ability of personal service clients to obtain redress).

125. Robert T. Eglet, *An Open Letter to the Nevada Supreme Court & the Board of Governors on the State Bar of Nevada*, VEGAS LEGAL MAG., <https://www.vegaslegalmagazine.com/nevada-supreme-court-board-of-governors/> [http://perma.cc/BP8A-EPTX].

done . . . to the societal objectives embodied in the substantive rule and to the capacity of the legal system as a dispute-solving mechanism.”¹²⁶

B. *Invites Litigation*

Those who support and oppose mandatory insurance may agree on one point: the insurance status of a lawyer will affect the odds that a malpractice lawyer will pursue a claim. It is undeniable that existence of insurance improves the likelihood that the lawyer will be sued. This is where the proponents and opponents part ways.

Proponents focus on the impact on the injured person, arguing that without insurance, most victims are denied access. Stated differently, public protection is advanced if mandatory insurance increases the possibility that injured persons will be able to retain counsel to pursue actions with the prospect of recovery.¹²⁷

Those who oppose mandatory insurance focus on the impact on lawyers, maintaining that insurance effectively puts a target on the lawyers back. They may believe that “going bare” and “making their pockets shallow” is an effective and ethical loss prevention strategy.¹²⁸ Without malpractice insurance to cover losses, some may also shelter non-exempt assets that would be subject to execution in the unlikely event of a malpractice action.¹²⁹ Lawyers who use such tactics do not appear to differentiate between meritorious and frivolous claims, apparently believing that it appropriate to take action to avoid responsibility for malpractice losses.

A related argument against mandatory insurance is that it will lead to more frivolous claims.¹³⁰ Persons who take this position may not recognize or acknowledge that the economics and common law rules related to legal malpractice claims present significant challenges for persons injured by lawyers’ conduct.¹³¹

126. *Improving Information on Legal Malpractice*, 82 YALE L.J. 590, 592 (1973).

127. See *infra* Part II, Section A (discussing public protection and access to remedies).

128. But see *Lawyers Going Bare*, *supra* note 41, at 1324 (suggesting it would be a “perverse outcome, however, to allow these lawyers to reduce their chances of being sued by declining to purchase insurance that would compensate clients if the lawyers commit malpractice”).

129. “The failure to purchase insurance is especially concerning when some uninsured lawyers use their legal knowledge to shelter their assets.” *Id.*

130. E.g., Harry H. Schneider Jr., *Mandatory Malpractice Insurance: No: An Invitation to Frivolous Suits*, ABA J., Nov. 1993, at 44, 45.

131. For an article that focuses on the various challenges that victims must overcome in commencing a legal malpractice case, trying the case, and recovering judgement, see *Tort in Search of a Remedy*, *supra* note 49.

To commence a legal malpractice action an injured person typically will seek representation. Because of the costs and complexity associated with legal malpractice actions, experienced plaintiffs' counsel screen engagements carefully, declining claims that are unmeritorious, unprovable, or where the amount of damages do not justify moving forward.¹³²

Because of defendant-friendly rules related to malpractice cases, it is very difficult for plaintiffs to carry the burden of proof on each element of a negligence claim.¹³³ Most notably, proving causation with the trial-within-a-trial presents a serious obstacle that many injured persons will not be able to overcome.¹³⁴ Other rules related to the case-in-chief and affirmative defenses also protect lawyers.¹³⁵

Lawyers who understand what is necessary to prove malpractice claims should be less concerned about insurance inviting frivolous litigation. To help lawyers better understand their malpractice exposure, bar associations could educate lawyers on challenges that plaintiffs face in pursuing and recovering on legal malpractice claims. More information on the showing necessary to prevail on a legal malpractice claim should help lawyers take measures to limit their exposure while, at the same time, deal with concerns related to insurance inviting frivolous claims.

To further address the concern that mandatory insurance would invite frivolous litigation, a jurisdiction could raise the threshold for filing a legal malpractice claim. One approach to doing so is to require that plaintiff file an expert's affidavit of merit within a certain period of time after the commencement of litigation.¹³⁶ In connection with tort reform related to medical malpractice litigation, a number of states adopted statutory requirements requiring that complaints against professionals be supported by expert affidavits.¹³⁷ Some states expressly require such affidavits for

132. See *id.* at 2039–41 (reviewing factors that plaintiffs' counsel consider in evaluating malpractice cases); see also KRITZER & VIDMAR, *supra* note 42, at 143–50 (discussing interview responses related to the screening factors that plaintiffs' lawyers used in evaluating legal malpractice claims).

133. *Tort in Search of a Remedy*, *supra* note 49, at 2042; see generally Vincent R. Johnson, *Causation and "Legal Certainty" in Legal Malpractice Law*, 8 ST. MARY'S J. ON LEGAL MAL. & ETHICS 374, 374 (2018) (arguing "judicial references to legal certainty are ambiguous and threaten to undermine the fairness of legal malpractice litigation").

134. See *Tort in Search of a Remedy*, *supra* note 49, at 2043–48 (discussing the trial-within-a-trial hurdle and causation in civil litigation, transactional matters and criminal cases).

135. See *id.* at 2048–51 (identifying common rules on recovering types of damages and attorneys' fees, as well as affirmative defenses that enable lawyers to escape or limit their liability).

136. LEGAL MALPRACTICE LAW, *supra* note 84, at 78.

137. LEGAL MALPRACTICE TREATISE, *supra* note 26, § 37:62.

legal malpractice cases.¹³⁸ Although the procedural and substantive requirements for these requirements vary,¹³⁹ such affidavits can be used to both deter and dismiss frivolous professional liability claims. Imposing such an affidavit requirement may be a reasonable approach to deal with lawyer concerns related to mandatory insurance and frivolous litigation, while providing protection to injured persons who can prove their legitimate claims.

C. Cost and Impact on Legal Fees

The largest percentage of uninsured respondents refer to “cost” when identifying reasons why they do not carry lawyers’ professional liability insurance (LPL). The following summarizes the findings from surveys of uninsured lawyers in New Mexico, Arizona and Connecticut:

In all three of these jurisdictions, annual LPL premiums for solo and small firm practitioners cost around \$3,000 per lawyer for minimum levels of coverage (\$100,000/\$300,000). LPL insurance is a deductible business expense. Nevertheless, uninsured New Mexico lawyers most frequently cited cost as the reason for not carrying malpractice insurance. In the other two states, uninsured lawyers most frequently cited unaffordability as the reason: Among the uninsured Arizona and Connecticut lawyers, 65% and 58% responded, respectively, that one of the reasons they did not carry LPL insurance was because they could not afford it.¹⁴⁰

As suggested in this excerpt, lawyers often refer to “cost” or “affordability” as a reason for not buying insurance but may not actually know the relatively reasonable cost of purchasing insurance in their jurisdictions. For example, New Mexico lawyers most frequently cited cost as the reason for not carrying malpractice insurance, but 40.8% of the uninsured lawyers in private practice reported that they had never applied for insurance.¹⁴¹ Another telling result was that 53% of the New Mexico uninsured lawyers “strongly agreed” or “agreed” that they would purchase insurance if the

138. LEGAL ETHICS, *supra* note 102, § 5–2.2(f)(3).

139. See LEGAL MALPRACTICE TREATISE, *supra* note 26, § 37:63 (reviewing jurisdictional variations and attempts by plaintiffs to avoid application of the requirement).

140. *Lawyers Going Bare*, *supra* note 41, at 1290 (footnotes omitted). “Among the fifteen Arizona lawyers who had never been insured, seven had never communicated with an insurance agent, broker, or underwriter about the possibility of obtaining LPL insurance.” *Id.*

141. *Id.*

New Mexico Supreme Court required them to do so.¹⁴² This suggests that some respondents may conflate “cost” and “affordability.” Evidently, lawyers who can afford to purchase insurance do not see it as a cost of practicing law, unless insurance is required by the regulator.

The recent experience in implementing an insurance requirement in Idaho suggests that objections based on cost are overstated. The Executive Director of the Idaho State Bar reported that no premium quote had exceeded \$3,500, although some lawyers expressed concern about the cost.¹⁴³ In her study of uninsured lawyers, Professor Levin learned that some lawyers with marginal or not very profitable practices genuinely could not pay for insurance.¹⁴⁴ If required to purchase insurance these lawyers would need assistance on law practice management to determine if they could improve the profitability of their practices or could be forced to find other positions.

Some attorneys concerned about cost may be practicing on a part-time basis. These attorneys may be able to purchase part-time policies with very reasonable premiums.¹⁴⁵ Undeniably, if insurance is required, some lawyers who currently practice on a part-time basis may retire if the cost of insurance is more than the revenue from occasional legal work.¹⁴⁶

Another critique is that mandatory insurance could contribute to increases in legal fees lawyers charge.¹⁴⁷ This argument assumes that the lawyer will pass the cost of insurance on to clients. This is not the only option available to lawyers. Without increasing fees, a lawyer could elect to work more hours (assuming that the lawyer has enough business to generate additional income) or a lawyer may absorb the cost of insurance (effectively adjusting annual income).

Because uninsured lawyers are predominately in solo and small firm practice, data on lawyers' income shed light on the ability of lawyers to purchase insurance and not raise legal fees. Although the findings of these

142. *Id.* at 1291.

143. *Idaho Presentation*, *supra* note 3, at 3.

144. *Lawyers Going Bare*, *supra* note 41, at 1292.

145. “In some states, part-time lawyers (working fewer than 25 hours per week) can obtain LPL insurance for \$600 per year or less.” *Id.* at 1320.

146. See *Uninsured Lawyers*, *supra* note 23, at 36–37 (noting some uninsured lawyers that were semi-retired cited “cost” as a reason for not maintaining insurance but reported that they could afford to purchase insurance if required to do so).

147. See *NJSB Comments*, *supra* note 17, at 2 (asserting “any increase due to the mandatory nature of the coverage might be passed onto clients. . . . [And] could make legal services even more out of reach for those who need them the most”).

surveys and analyses of data on the income of solo lawyers have been debated, data reveal that lawyers at the higher percentiles of income should be able to more comfortably pay insurance premiums than those in the lower quartiles.¹⁴⁸ For those in the lower quartiles, the cost of insurance may be more of a hardship without an increase in legal fees.

For those lawyers who determine that they cannot afford to purchase insurance without increasing fees, the amount of the actual increase will depend on a number of factors, including the type of fee and the number of hours that lawyers work. Even if we assume that the average lawyer bills only 2.4 hours a day, as one study has suggested, the amount of increased legal fees would be \$6.07 per hour to cover a \$3,500 insurance premium if the lawyer works forty-eight weeks per year.¹⁴⁹

Depending on their circumstances and means, consumers may be willing to pay higher fees for a lawyer who is insured. In a 2018 survey conducted by the National Opinion Research Center at the University of Chicago, 78% of California residents indicated that legal malpractice insurance should be required for lawyers to practice in California.¹⁵⁰ Of those respondents, 86% believed that lawyers should be required to carry insurance even if

148. Data and analyses of income reported by solo and small firm lawyers vary a great deal. For example, according to an online survey by the Martindale Legal Marketing Network, solo and small firm lawyers made an average of \$198,000 in 2017, while the median earning amount was \$140,000. Debra Cassens Weiss, *Average Earnings for Solo and Small-Firm Lawyers Was Nearly \$200K Last Year*, *Report Says*, ABA J. (May 22, 2018, 3:17 PM), http://www.abajournal.com/news/article/average_earnings_for_solo_and_small_firm_lawyers_was_nearly_200k_last_year [http://perma.cc/7D8U-S7RX]. By contrast, Professor Benjamin H. Barton identified Internal Revenue data indicating that the average income for solos was slightly more than \$49,000 in 2012. See Debra Cassens Weiss, *How Much Do Solo Lawyers Make? More Than IRS Data Suggests, Law Profs Assert*, ABA J. (Aug. 1, 2016, 7:30 AM), http://www.abajournal.com/news/article/how_much_do_solo_lawyers_make_more_than_irs_data_suggests_law_profs_assert/ [http://perma.cc/43LR-H4AT] (discussing the debate related to calculating average earnings for solo lawyers). Amounts earned may also vary depending on the state of residence. For example, the following sets forth the results for income reported by the 1,530 full-time solo lawyers who responded to the Texas survey conducted in 2016: the twenty-fifth percentile was \$65,000, the fiftieth percentile was \$105,000, and the seventy-fifth percentile was \$175,000. Milan Markovic & Gabriele Plickert, *Results of the 2016 Texas Lawyer Study*, TEX. A&M SCH. OF L. http://tamulawyerstudy.org/results/#gf_1 [http://perma.cc/2KY5-DQX3].

149. The 2.4 per day figure is based on a 2018 CLIO study that found an average lawyer dedicates 2.4 hours to billable work per day. CLIO, *LEGAL TRENDS REPORT 2018 10*, <https://www.clio.com/resources/legal-trends/> [http://perma.cc/ZE2V-PI7E].

150. NORC AT UNIV. OF CHI., *LEGAL MALPRACTICE 2018 CALIFORNIA STATE BAR AMERISPEAK FIELD REPORT* (Dec. 13, 2018). The NORC results reflected opinions of 1,038 adults who were selected using sampling strata. *Id.*

lawyers would charge higher fees to cover insurance premiums.¹⁵¹

If a lawyer is practicing in a high risk and high premium area such as securities law, that lawyer's fees may reflect the cost of services. If the fees do not and the uninsured securities lawyer is charging less than insured lawyers, any increase in fees to cover insurance costs could eliminate the competitive advantage of uninsured lawyers who appear to be charging less for comparable services.

D. *Impact on Pro Bono, Low Bono Representation*

Some lawyers maintain that requiring insurance will adversely impact pro bono representation. Lawyers interested in providing such services may be able to identify legal services or bar programs that provide insurance coverage to volunteers who handle pro bono cases under the umbrella of the programs.¹⁵² If a state mandates insurance coverage for private practitioners, the insurance provided by the legal services or bar organization should satisfy the state requirement for lawyers who only represent pro bono clients under the organization's sponsorship. If the lawyer's other representation of clients is limited, the lawyer may seek a part-time policy available from some insurers.

The Washington Task Force Report discusses various insurance options for lawyers providing primarily pro bono services.¹⁵³ The report notes that 56% of Washington lawyers "are connected to their pro bono clients through referrals from legal aid providers, non-profit organizations, or bar association or other independent pro bono programs," many of which are "required to either provide malpractice insurance for their volunteers or have a policy in place to require that all volunteers carry their own malpractice insurance."¹⁵⁴ Recognizing that there are some gaps in the availability of insurance for lawyers providing pro bono representation in Washington, the Washington Task Force Report recommends that the

151. When asked if they would vote in favor of a proposed law requiring lawyers to have legal malpractice insurance, 72% indicated that they would be in favor of mandatory insurance if it would result in lawyers raising their hourly fees by \$10 and 60% would be in favor of mandatory insurance if it would result in lawyers raising their hourly fees by \$30. "Overall, 57% of respondents would support such a law, despite an increase in costs." CALIFORNIA WORKING GROUP REPORT, *supra* note 8, at 10.

152. According to the ABA Standards for Programs Providing Civil Pro Bono Legal Service to Persons of Limited Means, "A pro bono program should obtain professional liability insurance for itself, its staff and its volunteers." ABA, STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS STANDARD 4.6, at 7 (AM. B. ASS'N 2013).

153. WASHINGTON TASK FORCE REPORT, *supra* note 11, at 17-19.

154. *Id.* at 17-18.

Washington State Bar Association “develop and put into effect an improved statewide program to increase access to malpractice insurance for lawyers whose private practices are limited solely to pro bono representations.”¹⁵⁵ Other bodies recommending mandatory insurance should follow Washington’s lead in evaluating and addressing issues related to the availability of insurance for lawyers providing pro bono representation.

Lawyers handling matters on a reduced fee basis should study their business model to determine how they can cover insurance costs. Guidance is available from experts, such as directors of legal incubators, who can assist lawyers in determining how to develop personal and professional budgets to cover their costs, including insurance, while continuing to provide representation to persons of modest means.¹⁵⁶

E. *Philosophical Objections*

Some commentators question the manner in which a mandatory insurance regime would encroach on bars’ autonomy and cede too much power to insurance companies.¹⁵⁷ The argument is that insurers through their underwriting and pricing can effectively determine who practices law.¹⁵⁸

Given the degree to which insurers compete for business in a soft market, this concern appears to be unfounded. Even in harder insurance markets, lawyers who encounter difficulty in securing insurance should be provided the opportunity to obtain coverage from an assigned risk pool. Interestingly, after Idaho adopted the rule requiring insurance, no lawyer

155. *Id.* at 53.

156. For a very helpful article on the importance and sustainability of low bono law practices, see Luz E. Herrera, *Encouraging the Development of “Low Bono” Law Practices*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 3 (2014). Dean Herrera’s article includes budget illustrations that factor in the cost of malpractice insurance. *Id.* at 14. Some incubator programs designed for law school graduates starting their own practices require that incubator attorneys obtain malpractice insurance. For examples, the Los Angeles Incubator Consortium requires incubator participants to carry insurance, but the organization does not provide it to them. See *Lawyer Incubator Profiles*, ABA, https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/program_profiles/#laconsortium [http://perma.cc/22M3-BFRV].

157. For a review brief discussion of lawyers’ objections based on autonomy, see Jacob. J. (Jake) Key, *Analyzing the Oregon Model: The Pros and Cons of Requiring Attorneys in Private Practice to Maintain Malpractice Insurance*, 19 W. MICH. U. COOLEY. J. PRAC. & CLINICAL L. 163, 177–78 (2017).

158. See, e.g., Schneider, *supra* note 130, at 45 (warning mandatory malpractice insurance “effectively defers to the insurer . . . the ultimate decision as to who will, and who will not, be permitted to practice law”).

reported an inability to purchase insurance, although some indicated that the requirement will affect their decision to retire from practice.¹⁵⁹

Some fiercely independent lawyers resent being required to purchase malpractice insurance. They may believe that they practice safely and that they should be able to self-insure. One approach to addressing this concern is to give lawyers an option of maintaining the minimum amount of insurance required or proof of financial responsibility. This possibility is discussed in the next section dealing with alternatives to mandatory malpractice insurance.¹⁶⁰

IV. ALTERNATIVE APPROACHES DEALING WITH RISKS POSED BY UNINSURED LAWYERS

Rather than requiring that all practitioners maintain malpractice insurance, three different approaches have been used in the U.S. to address specific risks posed by uninsured lawyers: mandatory disclosure of insurance status, compulsory risk management training, and proof of financial responsibility. Each of the alternatives has its advantages and limitations.

A. *Insurance Disclosure Rules*

The most common alternative to mandatory insurance has been for states to adopt disclosure rules that require uninsured lawyers to disclose their insurance status. These disclosure rules are intended to address the asymmetry between lawyers and consumers related to information on the lawyer carrying insurance.¹⁶¹ The lack of insurance is clearly material information because surveys reveal that nonlawyers mistakenly believe that all lawyers are insured.¹⁶² Many of the same public protection arguments that are made in favor of mandatory malpractice insurance apply to

159. In a presentation to the WSBA Task Force on February 21, 2018, Diane Minnich, Executive Director of the Idaho State Bar stated that “so far no lawyer has been categorically unable to obtain insurance.” *Idaho Presentation*, *supra* note 3, at 3.

160. In other situations, in which insurance is required, lawyers may maintain proof of financial responsibility rather than purchasing insurance. For example, an Illinois rule allows lawyers to practice in limited liability firms provided that they maintain insurance or proof of financial responsibility in the amount set forth in the rule. ILL. S. CT. R. 722 (eff. Mar. 15, 2004).

161. For a discussion of how disclosure of the lack of insurance helps bridge the information gap, see *Law as a Profession*, *supra* note 21, at 197–98.

162. See *Uninsured Lawyers*, *supra* note 23, at 38 (citing a Virginia State Bar Association Report on Study Undertaken By Client Protection Subcommittee of the Special Committee on Lawyers Malpractice Insurance 2005–2006).

mandatory insurance rules.¹⁶³

Twenty-four states have adopted some form of disclosure of a lawyer's insurance status.¹⁶⁴ By adopting these rules, states took the middle ground between continuing the status quo and implementing mandatory insurance.¹⁶⁵ Rather than requiring all lawyers to maintain minimum levels of insurance, disclosure balances lawyer autonomy and client protection. Lawyers have the choice to decide to purchase insurance, understanding that they must disclose their lack of insurance to clients. When lawyers elect not to purchase and make the required disclosure, consumers are (theoretically) provided information before hiring counsel.¹⁶⁶ Assuming that consumers obtain the information at the time that they are selecting counsel, they can decide between lawyers who purchase insurance as a safety net and lawyers who go bare.¹⁶⁷

Although disclosure rules do not directly reduce the risk of asset insufficiency, such rules may reduce the number of uninsured lawyers. To avoid having to disclose their lack of insurance, lawyers may purchase insurance. In this sense, disclosure rules incentivize lawyers to buy insurance.

To determine whether disclosure rules have actually impacted the number of uninsured lawyers, Professor Levin systematically examined the number

163. A number of practitioner and student articles have examined whether lawyers should be required to disclose to clients whether they carry insurance. See Farbod Solaimani, Current Development, *Watching the Client's Back: A Defense of Mandatory Insurance Disclosure Laws*, 19 GEO. J. LEGAL ETHICS 963, 964 (2006) (arguing for modifications to the disclosure rule to balance the professional interests of attorneys and consumer protection); see also 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, 250 (2010) (suggesting Texas adopt a dual-disclosure rule, requiring disclosure to both clients and the state bar); James C. Gallagher, *Should Lawyers be Required to Disclose Whether They Have Malpractice Insurance?*, VT. B. J., Summer 2006, at 5, 5 (analyzing considerations as to Vermont's possible adoption of disclosure requirement); James E. Towery, *The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance*, VT. B. J., Fall 2007, at 35, 35 (advocating the adoption of a disclosure requirement as an obligation owed by attorneys pursuant to their license).

164. For background information on state rules and a Model ABA Court Rule on insurance disclosure, see *Law as a Profession*, *supra* note 21, at 193–96.

165. *Id.* at 193.

166. The actual receipt of information depends on whether the rule requires that prospective clients be directly provided information, as opposed to the information being available on regulators' websites.

167. Some suggest that lawyers who “go bare” may have a greater incentive to avoid liability because they have personal liability rather than insurance protection. Leubsdorf, *supra* note 43, at 156. The problem with this proposition is that lawyers who go bare likely know that the lack of insurance significantly lowers the likelihood of them being sued.

of uninsured lawyers in states with disclosure rules.¹⁶⁸ Based on the limited available data, she concluded that it is difficult to assess whether disclosure requirements have had a significant effect on the purchase of LPL insurance.¹⁶⁹ The following describes her findings on two states with rules requiring direct disclosure to clients:

The biggest success story may be South Dakota, where 94% of lawyers who engage in private practice in the state carry LPL insurance. This state also has the most demanding direct disclosure requirements. After South Dakota required uninsured lawyers to directly disclose their lack of insurance to clients in all written communications and advertising, the percentage of insured lawyers practicing in the state reportedly reached a high of 96%. . . . The state did not, however, gather data concerning the percentage of uninsured lawyers before 1990, when it adopted the direct disclosure requirement, so it is not possible to determine whether the percentage of uninsured lawyers significantly decreased thereafter.

It may not be a coincidence, however, that Pennsylvania—which requires direct disclosure to clients *and* posts lawyers' LPL insurance information on a website—reports the next highest rate of insured lawyers in private practice (93.1%).¹⁷⁰

Unlike South Dakota and Pennsylvania, New Mexico did not appear to have a significant reduction in the number of uninsured lawyers after adopting a direct disclosure rule.¹⁷¹ Professor Levin concludes that there is also “little evidence that uninsured lawyers are motivated to purchase LPL insurance simply because state regulators post their lack of insurance coverage on an official website.”¹⁷²

After examining the impact on the percentage of uninsured lawyers, Professor Levin turns to the limits of the disclosure, starting with the effectiveness of informing consumers of the lack of insurance.¹⁷³ Even with direct disclosure to consumers, she notes that it is unclear whether clients actually read the information or fully understand the implications of

168. For the study results and related analysis, see *Lawyers Going Bare*, *supra* note 41, at 1296–1309.

169. *Id.* at 1303.

170. *Id.* at 1305 (footnotes omitted).

171. *Id.* at 1306.

172. *Id.*

173. *Id.* at 1325.

their lawyers being uninsured.¹⁷⁴ She also notes that the timing of the disclosure may be problematic because the disclosure typically comes after the consumer has decided to engage the lawyer.¹⁷⁵ “Cognitive biases may also make it difficult for a client to change course once a decision to retain a lawyer is made.”¹⁷⁶

To address the concerns and better empower consumers to make informed choices, Professor Levin makes a number of recommendations for disclosure requirements to provide “meaningful information to the public before the client makes the decision to retain a lawyer.”¹⁷⁷ This would include direct disclosure to clients, as well as disclosure on the lawyer’s website and in written communications with potential clients.¹⁷⁸ In order for consumers to find information on a lawyer’s insurance status before contacting a prospective lawyer, she also recommends that state regulators make such information accessible through a simple internet search.¹⁷⁹ Regulators and bar groups interested in implementing meaningful disclosure rules that help bridge the information gap between consumers and clients, should make changes recommended by Professor Levin.

Even with improved disclosure rules, decision makers interested in public protection should recognize the disclosure rules are largely limited to providing information to prospective clients. From the standpoint of information asymmetry, this is a good thing. However, if the primary goal is to reduce the number of uninsured lawyers, it is unclear the extent to which a disclosure requirement incentivizes uninsured lawyers to purchase insurance.¹⁸⁰

Moreover, disclosure rules may provide no information or protection to nonclients who are victims of malpractice. Most often, the discourse on legal malpractice and insurance focuses on clients, without recognizing that some of the most serious malpractice claims involve nonclient victims.¹⁸¹ Therefore, from the standpoint of public protection, both clients and

174. *Id.*

175. *Id.* at 1326.

176. *Id.*

177. *Id.* at 1328.

178. *Id.*

179. *Id.*

180. *See infra* notes 168–72.

181. For an overview of liability claims brought by nonclients, see LEGAL MALPRACTICE LAW, *supra* note 84, at 179–258.

nonclients who are injured by uninsured lawyers would be better protected through a mandatory insurance rule.

B. *Proof of Financial Responsibility*

The second alternative to requiring insurance is to give lawyers the option to provide proof of financial responsibility as an alternative to malpractice insurance. In this context, proof of financial responsibility refers to specifically segregated and designated funds to satisfy a malpractice judgment.¹⁸² Although there is no assurance that the insurance proceeds or segregated funds will completely cover the plaintiff's losses, the funds provide a protected source of recovery and minimum level of protection for persons injured by the acts or omissions of a lawyer.

A few states allow for the use of proof of responsibility in connection with practice in limited liability firms. When enacting statutes or rules that allow lawyers to limit their liability for vicarious liability claims, some jurisdictions included insurance requirements. These requirements were intended to address public protection concerns related to the ability of a plaintiff to recover in the event of a malpractice judgment.¹⁸³ For those lawyers who wanted to convert to a limited liability firm, but did not want to purchase insurance, some state provisions allow lawyers to provide proof of financial responsibility as an alternative to insurance.

Statutes will indicate the type of proof required as well as the amount of funds. For example, the Illinois rule requires that the amount of funds be in a sum no less than the required annual aggregate for minimum insurance. Because the Illinois minimum annual aggregate for firms in Illinois is \$250,000 times the number of lawyers in the firm, the amount of designated or segregated funds is a large sum for firms of any size.¹⁸⁴

Unlike insurance policies with an expense-within-limits feature, the amount of the segregated or designated funds would not be reduced for defense costs.¹⁸⁵ As compared to insurance where coverage may be disputed or denied by the insurer, with proof of responsibility the

182. INSURANCE PURCHASING GUIDE, *supra* note 44, §§ 16–17.

183. See Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences—The Traps of Limited Liability Law Firms*, 54 WASH. & LEE L. REV. 717, 729–30 (1997) (“[L]egislatively mandated insurance addresses the concern that the elimination of vicarious liability leaves malpractice plaintiffs without recovery in the event of a judgment.”).

184. ILL. S. CT. R. 722 (eff. Mar. 15, 2004).

185. Policies that include an expense-within-limit provision require that defense costs be deducted from the limits of liability. *Legal Malpractice Insurance*, *supra* note 44, at 48.

malpractice plaintiff should have a source of recovery, provided that the funds are safely segregated and designated for payment in the event of a malpractice judgment.

Although it is doubtful that many lawyers would elect to rely on the proof of financial responsibility in lieu of purchasing insurance, it is an option for those persons who want to self-insure. From the standpoint of public protection, it should address the same issue of asset insufficiency, providing an amount that can be tapped in the event of a malpractice judgment. Therefore, any mandatory insurance regime requiring lawyers to purchase insurance in the open market should include the proof of responsibility option.

C. *Proactive Management-Based Regulation*

A third approach to dealing with concerns related to uninsured lawyers is to use proactive regulation. Proactive regulation refers to approaches and programs that seek to prevent lawyer regulatory and service problems from occurring, rather than dealing with alleged misconduct after complaints are filed.¹⁸⁶ Proactive regulatory measures that promote ethical law practice by assisting lawyers with practice management are referred to as proactive, management-based regulation (PMBR).¹⁸⁷

The development of PMBR can be traced to initiatives to liberalize the business structures available to Australian lawyers.¹⁸⁸ New South Wales (NSW) was the first Australian state to enact legislation allowing incorporated firms to include nonlawyer owners without restriction.¹⁸⁹ The statute imposed management-related provisions intended to allay concerns

186. *Proactive Regulation: Frequently Asked Questions*, NAT'L ORG. B. COUNS. (June 22, 2017), <https://nobc.org/resources/Documents/Entity%20Regulation/2017-6-22%20FAQs%20NOBC%20Proactive%20regulation%20Committee.pdf> [http://perma.cc/AMC6-5XE3]. For a thorough discussion of proactive regulation's role in promoting public protection by preventing problematic behavior, see Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717 (2016).

187. Ted Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 584 (2011).

188. See Susan Saab Fortney, *Promoting Public Protection through an "Attorney Integrity" System: Lessons from the Australian Experience with Proactive Regulation of Lawyers*, 23 PROF. LAW. 16, 17 (2015) [hereinafter *Attorney Integrity System*].

189. For an in-depth description for the development of PMBR in Australia, see Susan Saab Fortney & Tahlia Gordon, *Adopting Law Firm Management System to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L.J. 152 (2012) [hereinafter *Management-Based Regulation*].

related to new structures, called “incorporated legal practices” (ILPs).¹⁹⁰ First, the statute required that the incorporated firms appoint a legal practitioner director to be generally responsible for the management of the firm. Second, the statute required that the director ensure that “appropriate management systems” are implemented and maintained to enable the provision of legal services in accordance with obligation imposed by law.¹⁹¹

Because the statute did not define appropriate management systems, the Legal Services Commissioner for NSW worked with various stakeholders, including bar groups and legal malpractice insurers, to determine what approach to use.¹⁹² Rather than imposing prescriptive rules, they determined that the preferred approach would be to develop guidelines that addressed lawyers’ professional principles.¹⁹³ Using that approach, they articulated ten objectives of sound practice based on types of concerns that lead to complaints against practitioners, such as conflicts of interest and supervision lapses.¹⁹⁴

In an effort to give practitioners guidance in meeting the objectives, the Legal Services Commissioner also worked with stakeholders to devise a self-assessment process. The self-assessment process required that the firm’s director complete a self-assessment form (SAF).¹⁹⁵ The SAF listed the ten objectives with indicative criteria to guide the director in evaluating the firm’s implementation of appropriate management systems with respect to each objective.¹⁹⁶ The SAF required that the director rate the firm’s compliance with the each of the ten objectives on a scale ranging from “Fully Compliant” to “Non-Compliant.”¹⁹⁷ When the SAF indicated that the firm was “Non-Compliant” or “Partially Compliant,” a representative from the Commissioner’s Office worked with the firm to achieve compliance.¹⁹⁸ The entire process became known as “education towards

190. Susan Saab Fortney, *The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms*, 4 ST. MARY'S J. ON LEGAL MAL. & ETHICS 112, 118 (2014) [hereinafter *Ethics Audits*].

191. *Id.*

192. See *Management-Based Regulation*, *supra* note 189, at 160–65 (describing the development of the objectives and the self-assessment process).

193. *Id.* at 160.

194. *Id.* at 162.

195. *Id.* at 163.

196. “Specifically, the self-assessment document provides a list of objectives and the key concepts for [the] ILPs to consider when assessing each objective.” *Id.*

197. *Attorney Integrity System*, *supra* note 188, at 17.

198. *Id.*

compliance” because it gave the director the opportunity to first engage in self-examination of management practices and then obtain guidance from regulators.¹⁹⁹ Because the approach focuses on prevention and mitigation, Professor Ted Schneyer referred to the NSW program as the prototype for “proactive, management based regulation.”²⁰⁰

Empirical studies examined the impact of the NSW approach to proactive regulation. Dr. Christine Parker conducted the first study that focused on the complaint rates against firms that completed the self-assessment process.²⁰¹ Her study found that complaint rates for incorporated firms went down by two-thirds after the firms completed their initial self-assessment.²⁰² Another noteworthy finding was that the complaint rate for firms that completed the self-assessment process was one-third of the number of complaints registered against non-incorporated legal practices.²⁰³

Following publication of the study results, I was interested in knowing more about the impact of the “appropriate management systems” requirement and the self-assessment process. In 2012, I conducted a mixed-method study to learn more about how the self-assessment process affected lawyer conduct in firms and how the self-assessment process could be improved.²⁰⁴

First, to obtain data on the relationship between self-assessment and conduct, my questionnaire asked respondents to note the steps taken after the firm’s first completion of the self-assessment process. The majority (84%) reviewed firm policies and procedures and 71% indicated that they revised firm systems, policies, and procedures.²⁰⁵ Close to half (47%) reported that they actually adopted new systems, policies, and procedures.²⁰⁶

In interviews, directors also described how they learned from the process by systematically reviewing their firm’s practices and management controls. The majority (62%) indicated that they agreed or strongly agreed with the

199. *Id.*

200. Schneyer, *supra* note 66, at 584.

201. *See Management-Based Regulation, supra* note 189, at 166–67 (reviewing Dr. Parker’s research questions and results).

202. *Id.* at 167.

203. *Id.*

204. For a description of the methodology, see *id.* at 168–69.

205. For most steps taken by firms, there was no significant difference related to firm size and the steps taken. *Id.* at 173.

206. *Id.*

following statement: “The SAP was a learning exercise that enabled our firm to improve client service.”²⁰⁷ Only 15% disagreed or strongly disagreed with the statement.²⁰⁸ The respondents also recognized the positive effects of the self-assessment process in dealing with problems. Sixty-five percent of the respondents agreed that the self-assessment process assisted the firm in addressing problems.²⁰⁹ Only 13% disagreed with the statement.²¹⁰ “Quite simply, these findings point to the positive impact that the self-assessment process has in encouraging firms to examine and improve the firms’ management systems, training, and ethical infrastructure.”²¹¹

Following the Australian experience and studies, regulators in other countries examined and implemented PMBR programs. The Canadian Bar Association developed a voluntary, self-assessment form to assist Canadian law firms and lawyers in “systematically examin[ing] the ethical infrastructure that supports their legal practices.”²¹² Rather than using such a voluntary approach, the Canadian province of Nova Scotia moved forward with an ambitious agenda for regulatory reform to regulate in a manner they describe as “proactive, principled and proportional.”²¹³ A centerpiece of this reform is a comprehensive self-assessment tool that must be completed by all law firms.²¹⁴

In the southwest U.S., Colorado conducted a multi-year study that culminated in a comprehensive on-line self-assessment tool.²¹⁵ The Colorado approach is entirely voluntary, using outreach and incentives to encourage lawyers to complete the self-assessment process that

207. *Management-Based Regulation*, *supra* note 189, at 175 (quoting ILL. REPORT, at Question 18, #7).

208. *Id.*

209. *Id.* at 178 n.158. According to the report, 7% checked “strongly agree” and 58% checked “agree.” *Id.*

210. The 15% breaks down to 10% who disagreed with the statement and 3% who strongly disagreed. *Id.* at 178 n.159.

211. *Attorney Integrity System*, *supra* note 188, at 19.

212. *CBA Ethical Practices Self-Evaluation Tool*, CAN. B. ASS’N, <http://www.lians.ca/sites/default/files/documents/00077358.pdf> [<http://perma.cc/X4D3-MBPJ>].

213. *Legal Services Regulation*, NOVA SCOTIA BARRISTERS’ SOC’Y, <http://nsbs.org/legal-services-regulation> [<http://perma.cc/LN4U-4LHX>].

214. *Management Systems for Ethical Legal Practice (MSELP)*, NOVA SCOTIA BARRISTERS’ SOC’Y, <http://nsbs.org/management-systems-ethical-legal-practice-mselp> [<http://perma.cc/U95L-GBJZ>].

215. *Lawyer Self-Assessment Program*, COLO. SUP. CT OFF. OF ATTY REG., <http://www.coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp> [<http://perma.cc/5EHP-NLF6>].

emphasizes “high-quality client service, efficient law office management, and compliance with professional obligations.”²¹⁶

Moving to the Midwest, Illinois took the pioneering step in becoming the first jurisdiction in the U.S. to implement a form of PMBR to address concerns related to uninsured lawyers.²¹⁷ In 2017, the Illinois Supreme Court adopted a rule requiring that all uninsured lawyers complete an on-line self-assessment regarding the operation of their law firm.²¹⁸ Following the lawyers’ self-assessment, the Illinois regulator will provide the lawyer with a list of resources to improve those practices that are identified during the self-assessment process.²¹⁹

As explained by Lloyd A. Karmeier, the Chief Justice of the Supreme Court of Illinois, “PMBR promises a new level of protection for the public.”²²⁰ Rather than relying on the reactive disciplinary systems that deal with misconduct after it occurs, Chief Justice Karmeier explains that “PMBR is aimed at helping lawyers avoid disciplinary problems before they occur.”²²¹

The Illinois program was intended to provide assistance to uninsured lawyers with the expectation that such training will improve their practice management and lower the risk of disciplinary and malpractice complaints.²²² According to James Grogan, the deputy director of the Illinois Supreme Court’s Attorney Registration & Disciplinary Commission (Illinois Commission), the Commission chose to focus first on uninsured lawyers who are “most at risk.”²²³ Grogan also noted that the process of purchasing insurance forces lawyers to think about their protocols, suggesting that uninsured lawyers do not have that opportunity.²²⁴

The Illinois self-assessment process is an interactive online educational program covering professional responsibility requirements for operating a

216. *Id.*

217. Press Release, Supreme Court of Ill., Illinois Becomes First State to Adopt Proactive Management Based Regulation (Jan. 25, 2017), <http://www.illinoiscourts.gov/Media/PressRel/2017/012417.pdf>. [<http://perma.cc/YLA2-YT6T>] [hereinafter Illinois Supreme Court Press Release].

218. ILL. S. CT. R. 756(e) (eff. Mar. 15, 2004).

219. Ill. Supreme Court Press Release, *supra* note 217.

220. *Id.*

221. *Id.*

222. Joan C. Rogers, *Illinois Kicks Off Era of Proactive Lawyer Regulation*, BLOOMBERG NEWS, (Feb. 8, 2017), <https://www.bna.com/illinois-kicks-off-n57982083522/> [<http://perma.cc/5G7W-FD2S>].

223. *Id.*

224. *Id.*

law firm.²²⁵ Illinois-licensed attorneys who represent private clients, but who do not have malpractice insurance, must complete the four-hour interactive, online self-assessment course regarding the operation of their firms.²²⁶ Lawyers who complete the entire program receive four hours of free continuing legal education credit.²²⁷

The Illinois Supreme Court and the Illinois Commission should be recognized for their creative approach to helping uninsured lawyers improve their management practices. The hope is that uninsured lawyers will not just check the boxes but engage in serious self-examination of their management practices. The study results on PMBR in Australia suggest this self-examination will benefit both the lawyers and the clients they serve.

Since conducting an empirical study on PMBR, I have actively promoted PMBR through numerous articles, presentations, and workshops. Although I am a staunch proponent of PMBR and commend any PMBR initiative to assist uninsured lawyers, I do not think that PMBR substitutes for mandatory insurance.²²⁸ PMBR should help lawyers improve their practices and may lower their risk of disciplinary complaints and malpractice complaints. This clearly advances public protection by avoiding problems. PMBR, however, does not address the risk of asset insufficiency in the event of a malpractice claim.²²⁹ In order to provide a source of recovery (and the other benefits discussed in Part Two) states should require mandatory insurance for lawyers in private practice. Even with the best management systems in place, malpractice occurs. When it does, insurance provides a source of recovery for those harmed by attorney malpractice.

225. *Id.*

226. *PMBR Self-Assessment Course FAQs*, ILL. ATT'Y REGISTRATION & DISCIPLINARY COMMISSION, https://registration.iardc.org/attyreg/Registration/Registration_Department/PMBR_FAQs/Registration/regdept/Rule_756e2_Self-Assessment_FAQ_s.aspx [http://perma.cc/8EP6-FAK4].

227. *Id.*

228. A jurisdiction that is considering PMBR as an approach to dealing with uninsured lawyers can take steps to incentivize lawyers to purchase insurance. One way of doing so is to require that the uninsured lawyers complete a process similar to that used in Australia, where the results of the self-assessment are reported to the regulator, with the requirement that the lawyer address problem areas. Failure to do so can subject the firm to a practice audit by the regulator.

229. Because the Illinois PMBR requirement for uninsured lawyers is a free, online CLE that takes four hours, it is doubtful that it will incentivize many lawyers to purchase insurance.

V. CONCLUSION—EXPOSING LAWYERS' ETHICAL BLIND SPOTS

Given the compelling arguments in favor of insurance and the fact that the majority of lawyers in private practice carry insurance, the question remains why more states have not mandated insurance for lawyers in private practice.²³⁰ One explanation may be that lawyers and decisionmakers may be suffering from ethical blind spots on both the individual and organizational levels. Findings from the burgeoning field of behavioral ethics provide insights on how the lawyers and judges may not clearly see the ethical dimensions of conduct and decisions related to malpractice insurance.²³¹

Behavioral “research has shown that unethical behavior often stems from actions that actors do not recognize as unethical.”²³² On an individual level, decisionmakers experience ethical blind spots when they do not see the ethical issues involved in a decision or when they believe that any potential ethical challenges can easily be overcome.²³³ This psychological phenomenon may explain why many reputable attorneys do not purchase insurance and oppose mandatory malpractice insurance. Their ethical blind spot may impede their ability to recognize that the purchase of insurance involves ethical dimensions related to professional accountability and access to justice for malpractice victims. Lawyers who refuse to purchase insurance may not see the ethical imperative for lawyers to be financially accountable for those they harm. In this sense they may look at themselves in the mirror, and do not question the ethicality of their decisions because the insurance issue is in their blind spot.

Increasingly, lawyers are equating ethical conduct with the minimum standards for avoiding discipline under the professional rules of professional conduct. This approach is very narrow, reducing “ethics” to an exercise of determining whether the disciplinary rules address particular issues. When the rules do not address a situation, lawyers may stop deliberations and not

230. Recently, the Supreme Court of Nevada denied the Petition of the State Bar of Nevada asking the Court to adopt a new rule requiring insurance for lawyers in private practice. *Nevada Supreme Court Order*, *supra* note 16.

231. See MAX. H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 4 (2011) (introducing behavioral ethics as a field that seeks to understand how people actually behave when confronted with ethical dilemmas).

232. Ovul Sezer et al., *Ethical Blind Spots: Explaining Unintentional Unethical Behavior*, 6 *CURRENT OPINION IN PSYCHOL.* 77, 77 (2015).

233. Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 *ARIZ. ST. L.J.* 1007, 1116 (2013).

thoughtfully reflect on the ethical implications of their individual decisions.²³⁴

Ethical blindness also comes into play at the organizational level, when peers and organizational leaders fail to accurately assess the unethical behavior of individuals. In the context of lawyering this can occur within firms and bar groups when other lawyers ignore unethical conduct of individuals. A number of factors contribute to the tendency to not respond to the unethical behavior of others.²³⁵ To begin with, we may not believe it is our place to judge others and we are busy paying attention to other things.²³⁶ We also may be influenced by what theorists have called motivated blindness, defined as the “the tendency for people to overlook the unethical behavior of others when it is not in their best interest to notice the infraction.”²³⁷

As it relates the debate of mandatory insurance, ethical blindness and complacency may contribute to insured lawyers not getting involved. Attorneys who recognize their individual responsibility to carry insurance should consider the collective responsibility as members of a legal profession charged with self-regulation and keeping our houses clean. Rather than allowing the minority to dominate the discourse, lawyers should speak up and actively support mandating insurance coverage. Those who fail to support meaningful remedies for malpractice victims are abdicating moral authority and denying access to justice. As Professor Roger Cramton cautioned, “Justice is created or destroyed in countless ways every day: by our actions; by how we treat others; by how we adapt to, or shape, or blindly conform to the familiar routines of our workplace.”²³⁸

With additional states studying the issue of mandatory malpractice insurance, insured lawyers should get involved and help frame the discussion in ethical terms. By exposing and dealing with ethical blind spots lawyers help demonstrate that we are an accountable profession that can be trusted with self-regulation.

234. *See id.* at 1127 (suggesting lawyers may take a “minimalist approach to ethics, substituting rules that may only articulate minimum standards for thoughtful reflection on the ethical implications of a decision”).

235. For an analysis of various factors, see BAZERMAN & TENBRUNSEL, *supra* note 231, at 77–99.

236. *Id.* at 78.

237. *Id.* at 79.

238. Roger C. Cramton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 *FORDHAM L. REV.* 1599, 1600 (2002).

We all make mistakes. We are distinguished as professionals by the manner in which we handle mistakes and treat those we injure. If members of the bar refuse see or recognize their responsibility to injured persons and the profession, it is the role of the insured lawyers to advocate for malpractice insurance to help uphold the high standards of the legal profession. If lawyers refuse to deal with their blind spots and see the ethical dimensions of financial accountability, we do not deserve to be members of a protected profession.

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Subject: APR 26 Comments

Attached is a comment letter address to the Court Clerk for circulation to the members of the Court. The letter refers to a law review article that is also attached.

Please acknowledge receipt.

Thank you.

SSF

Susan Saab Fortney
Professor
Director, Program for the Advancement of Legal Ethics
Texas A&M University School of Law
1515 Commerce
Fort Worth, Texas 76102
Telephone 817-212-3902
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