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Law as a Profession: Examining the Role of Accountability

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LAW AS A PROFESSION: EXAMINING THE ROLE OF ACCOUNTABILITY

*Susan Saab Fortney**

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INTRODUCTION

In asserting that law is a profession and not a business, lawyers often refer to the role self-governance plays in the legal profession. Julius Henry Cohen captured this sentiment in making the following exhortation: "Ours is a profession We are all in a boat. The sins of one of us are the sins of all of us. Come, gentlemen, let us clean house."¹ As members of a profession, Cohen asserts that lawyers may be brought to prompt and summary accountability through a collective enterprise.²

* Howard Lichtenstein Distinguished Professor of Legal Ethics, Maurice A. Deane School of Law at Hofstra University. I thank the members of the *Fordham Urban Law Journal*, Professors Bruce Green, Sam Levine, and Russ Pearce for inviting me to participate in the conference *The Law: Business or Profession?* Thanks also to Professors Monroe Freedman, Stephen Gillers, and Joan Loughrey for their comments. Finally, thanks to my research assistants, Steven Hollander and Chris Leo.

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

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

When Cohen and other bar leaders speak of accountability, their focus is often on the role that professional discipline plays in protecting the public. A similar concern relates to protecting the public by limiting law practice to attorneys who complete a course of education and demonstrate the requisite character befitting a member of the bar.³

In his essays, Cohen recognizes the disparate positions of lawyers and their clients. For example, he notes that clients may not have the background or expertise to make informed judgments in retaining a lawyer.⁴ Because lawyers stand in a position of trust and confidence, Cohen advocates limiting law practice to persons who possess “adequate learning and purity of character.”⁵ This approach to public protection targets the qualities of those who enter the door of the profession. Once admitted, the focus turns to policing those practitioners whose conduct runs afoul of the minimum standards to avoid professional discipline.⁶ Far less attention is devoted to considering accountability of lawyers who depart from standards of care applicable in professional liability cases.

This Article will address this gap by examining accountability in the context of professional liability. To do so, it will consider select developments that required lawyers, the organized bar, legislators, and jurists to balance lawyer self-interest and public protection. Specifically, this Article will consider lawyers’ collective campaign to limit their vicarious liability, as well as developments related to lawyers carrying legal malpractice insurance. An examination of legislation and regulatory decisions related to lawyers’ professional liability over the last two decades reveals that accountability concerns may not have been adequately considered because of the absence of advocacy on behalf of consumers and the public. For lawyers and law professors committed to advancing the status of law as a profession, this Article ends by urging them to take steps to promote financial responsibility as a basic tenet of professionalism and to support initiatives that protect consumers injured by lawyers’ professional misconduct.

3. See generally *id.* at 125–41 (calling for more demanding educational requirements for lawyers). The chapter ends by noting that “Education for the Bar must include *moral training*—if it is to be education for the Bar.” *Id.* at 141.

4. *Id.* at 288. Cohen suggests that the “poor, ignorant and helpless” need more protection than more sophisticated clients because they are less likely to exercise judgment in hiring lawyers. *Id.*

5. *Id.*

6. See generally *id.* at 3–22.

I. THE LIMITED LIABILITY MOVEMENT: WHERE WERE THE LAWYERS?

Over the last century, the limited liability movement resulted in the most radical departure from a civil liability regime holding lawyers accountable for the acts and omissions of their law partners. Unlike the business and tax-related interests behind allowing lawyers to practice in professional corporations, the push behind the limited liability partnership structure was the desire of lawyers to limit their vicarious liability for their partners' professional malpractice.⁷ In lawyers' campaign for limited liability, public protection was largely a secondary concern.⁸ While a few states included insurance requirements and other protections to provide some degree of public protection, injured parties' ability to hold firm partners jointly and severally liable was virtually eliminated once the law firm converted to limited liability status.⁹ As the limited liability structure spread nationwide, few lawyers and commentators critically questioned the limited liability organizational structure as a retreat from public protection in favor of lawyer protection. The following account of the genesis and growth of the limited liability partnership form illustrates that lawyers' own interest in self-protection dominated both the discourse and outcome.

7. See Robert W. Hillman, *Organizational Choices of Professional Service Firms: An Empirical Study*, 58 BUS. LAW. 1387, 1391–96 (2006) (tracing the development of professional corporations, limited liability companies, and limited liability partnerships). Although similar issues arise with respect to all limited liability vehicles that lawyers use to avoid vicarious liability, this Article focuses on the development and effect of the limited liability partnership structure. Unlike the professional corporation and limited liability company structures, the LLP form stemmed solely from lawyers' desire to escape liability for the acts and omissions of their partners.

8. For a discussion of the successful and rapid campaign of lawyers to gain limited liability protection, see Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 360 (1998). Professor Wolfram warned that injured claimants “will end up paying for the gains lawyers thereby achieved.” *Id.*; see also Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences—the Traps of Limited Liability Law Firms*, 54 WASH. & LEE L. REV. 717, 724–29 (1997) (analyzing the internal and external consequences of converting to limited liability law firms).

9. See ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT (2001) 165–66 tbl.3-1 (2011) (outlining statutory approaches to limit partners' liability for partnership debts and obligations). Only a few states impose insurance requirements in the LLP statute as a substitute for a partner's individual liability. *Id.* § 2.06.

The birth of the LLP structure dates back to the 1980s and the savings and loan debacle involving the collapse of numerous financial institutions insured by the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation.¹⁰ In an effort to recoup hundreds of millions in losses, the government filed numerous cases against lawyers, accountants, and other professionals, alleging that the defendants' conduct caused the financial institutions (and eventually the government) to suffer damages.¹¹ In addition to suing the professionals' firms, the government pursued claims against individual law firm partners, including those who were directly involved in the representation of the failed institutions, as well as other partners whose liability arose from their status as general partners in the defendant law firms.¹² In various cases, the amount of damages that the government alleged far exceeded the amount of legal malpractice insurance available to the defendant firms.¹³

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

10. For insights on the evolution of the LLP structure from the vantage point of the law professor who served as chair of the legislative committee for a Texas non-profit group organized to support business-related legislation, see Robert W. Hamilton, *Registered Limited Liability Partnerships, Present at the Birth (Nearly)*, 66 U. COLO. L. REV. 1065 (1995).

11. See Ethan S. Burger, *The Use of Limited Liability Entities for the Practice of Law: Have Lawyers Been Lulled into a False Sense of Security?*, 40 TEX. J. BUS. L. 175, 179 (2004) (describing the government's efforts to recoup billions lost in connection with the savings and loan crisis).

12. In an attempt to maximize recovery, the government asserted both vicarious liability and direct liability claims against firm attorneys who were not directly involved in the representation. The direct liability claims asserted that partners have an affirmative duty to monitor their peers. For an analysis of the government's allegations, see Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329, 329-35 (1995). See also John S. Dzienkowski, *Legal Malpractice and the Multistate Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 981 n.68 (1995) (noting that in a high-profile case the government sued firm partners regardless of whether they were at the defendant firm at the time of suit). "By doing this, the government was suing different firms with different insurance policies and thus sought to obtain judgments against as many potential defendants as possible." *Id.*

13. While in private practice, I represented a legal malpractice carrier that insured a number of law firms sued by the government in connection with failed financial institutions. In connection with the claims against Jenkins & Gilchrest (J & G), the carrier attempted to obtain a declaratory judgment allowing it to tender to the court the amount remaining under the policy's limits of liability. After the trial court denied the petition, the government settled the cases against the insured law firm. Thereafter, the government continued to pursue claims to recover amounts under insurance policies issued to other firms who hired former J & G partners.

pursuing the personal assets of partners who were not directly involved in this representation of the failed financial institutions.¹⁴ This was dramatically played out in litigation against Jenkins & Gilchrest (J & G), the now defunct Dallas-based law firm. In a meeting with J & G lawyers and their defense counsel, government lawyers made their intentions clear when they used an overhead projector to show their analysis of the non-exempt net worth of J & G partners.¹⁵

Beyond the individual defendants involved in the actions filed by the federal agencies, the litigation and the government's aggressive posture captured the attention of thousands of lawyers who represented financial institutions.¹⁶ Other lawyers familiar with the litigation became concerned about the prospect of "innocent" partners being held jointly and severally liable for the acts and omissions of their peers.¹⁷

In Lubbock, Texas, the city where the government had sued J & G in federal court, partners in Crenshaw, Dupree and Milam (CDM), a twenty-one-person law firm, first proposed the limited liability partnership concept.¹⁸ Because this was an established principle of partnership law, the CDM lawyers evidently recognized that it would take legislative action to eliminate unlimited liability for partners' malpractice.¹⁹ The proponents elicited the assistance of a powerful state senator who introduced Texas Senate Bill 302, exclusively providing for limited liability for certain classes of professionals, including lawyers and accountants.²⁰ The legislation eliminated vicarious liability for torts claims by adding the following language to the Texas version of the Uniform Partnership Act:

A partner in a professional partnership is not individually liable, except to the extent of the partner's interest in partnership property, for the errors, omissions, negligence, incompetence or malfeasance committed in the course of rendering professional service on behalf

14. See Hamilton, *supra* note 10, at 1069 (noting that the government agencies devoted a "significant part of their total resources to the recovery of funds lost in the collapse of Texas institutions").

15. *Id.* at 1071.

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

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

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

19. *Id.* at 1072-73.

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

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

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

The initial reception in the Texas House of Representatives was far more negative.²³ In the House, critics questioned the following features of the proposed legislation:

- (1) Including only professionals, particularly lawyers,
- (2) Relieving partners from responsibility for misconduct of those they directed or supervised (such as a doctor's nurse or technician, a lawyer's junior associate),
- (3) Failing to signal to patients and clients that their professionals' liability was limited in complete reversal of historic and familiar partnership law, and
- (4) Failing to provide any substitute source of recovery for injured patients and clients.²⁴

Despite these objections, the pressure to pass the legislation was substantial. Professor Alan R. Bromberg, a partnership law expert who had originally criticized the limited liability concept at the House hearing, later agreed to draft revisions to the bill to make it more acceptable.²⁵ The revisions were designed to address the concerns by doing the following:

- (1) Extending the liability limitation to all partnerships,
- (2) Denying protection to partners for misconduct of those working under their supervision or direction,
- (3) Requiring annual registration [of the firm] with the state and the inclusion of "L.L.P." or "registered limited liability partnership in the firm name," and
- (4) Requiring [the L.L.P. to carry] liability insurance in an arbitrary and admittedly often inadequate amount of \$100,000.²⁶

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

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

22. *Id.* at 4.

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

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

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

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

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

With the enactment of the first limited liability legislation in Texas, the ember of change that started in a conference room of a small law firm in Lubbock, Texas spread like wildfire.²⁸ State by state, professionals lobbied for adoption of new legislation, arguing that it would be essential for the state to remain competitive in attracting and retaining business.²⁹

While lawyers and bar-related groups were lobbying for adoption of limited liability statutes, there appeared to be little resistance to passing legislation. One Texas legislator who was a partner with a plaintiff's firm first questioned the proposed Texas legislation as a "radical and undesirable proposal."³⁰ After some changes were made, the legislator withdrew his opposition.³¹ Consumer and client advocacy groups also did not play a significant role in challenging sweeping changes that allowed lawyers to practice in limited liability firms.³²

27. Hamilton, *supra* note 10, at 1072, 1074 (noting that Democratic Governor Ann Richards allowed the bill to become effective without her signature). While lawyers and bar-related groups were pushing for adoption of limited liability statutes, there appeared to be little resistance to passing legislation. *Id.* One Texas legislator who was a partner with a plaintiff's firm first questioned the proposed Texas legislation as a "radical and undesirable proposal." *Id.* at 1073. After some changes were made, the legislator withdrew his opposition. *Id.*

28. See BROMBERG & RIBSTEIN, *supra* note 9, at 12 ("In 1994, 13 states adopted LLP provisions . . . [and] [a]bout the same number had adopted LLP during only the first half of 1995."). Around the world, various jurisdictions (including the United Kingdom and Canadian provinces) recognize the LLP form. *Id.* at 17.

29. See Elizabeth S. Miller, *The Perils and Pitfalls of Practicing Law in a Texas Limited Liability Partnership*, 43 TEX. TECH L. REV. 563, 564 (2011) ("The [LLP] concept was quickly copied in other states, and all states and the District of Columbia have since added LLP provisions to their partnership statutes.").

30. Hamilton, *supra* note 10, at 1073. "Two other legislators argued to lawyer witnesses, 'You want your cake and yet you want to eat it too,' and 'If you want to swim with the sharks, you should recognize that you might get eaten by them.'" *Id.* Others questioned whether the bill was necessary because lawyers could limit their liability as Professional Corporations and resisted the legislation as "help-a-lawyer bill." *Id.*

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

32. See Martin C. McWilliams, Jr., *Who Bears the Costs of Lawyers' Mistakes?—Against Limited Liability*, 36 ARIZ. ST. L.J. 885, 889 (2004) (noting that "legislatures adopted the new limited liability entity formats with minimal inquiry into normative consequences").

As the limited liability movement spread across the nation, the protection that legislation provided actually expanded.³³ As noted above, the first proposed legislation initially only protected professionals.³⁴ The first statute that was adopted did not restrict protection to professionals, but limited the liability shield to vicarious liability claims relating to the malpractice of another firm partner.³⁵ In addition, the statute did not protect partners if another firm partner or representative working under the supervision or direction of the first partner committed the malpractice.³⁶ In this sense, the first Texas statute only provided a “partial shield” because it only covered tort-type claims and preserved supervisory liability. Subsequent statutes broadened the liability shield. For example, the Delaware legislation covered contract as well as tort claims, and it narrowed supervisory liability to misconduct of someone under the partners’ “direct supervision and control.”³⁷ Subsequently, other states eliminated the provisions that preserved vicarious liability for acts and omissions of supervised persons.³⁸ By 2008, eighty percent of the states had adopted “full-shield” statutes, providing a liability shield for all debts and obligations of the partnership.³⁹

Bar association groups eagerly supported LLP legislation that eliminated “even the moderate restrictions on limited liability.”⁴⁰ Most notably, the American Bar Association (ABA), Business Law Section Committee on Partnerships and Unincorporated Business Organizations Working Group on Registered Limited Liability Partnerships prepared prototype provisions for inclusion in the

33. For an account of how Delaware and other states expanded the statutory protection to extend to all liabilities, see BROMBERG & RIBSTEIN, *supra* note 9, § 1.01(b).

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

35. Miller, *supra* note 29, at 564 (describing the evolution of the Texas statute that originally shielded partners only from liability “arising out of the errors, omissions, negligence, incompetence, or malfeasance of other partners or representatives of the partnership”). Later, “[i]n 1997, the LLP provisions in the Texas Revised Partnership Act were amended to provide protection from all debts and obligations of the partnership.” *Id.* at 564–65. Most statutes now eliminate partners’ vicarious liability for all types of classes of claims. BROMBERG & RIBSTEIN, *supra* note 9, § 101(c)-(d).

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

37. *Id.* at 10–11.

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

39. *Id.* at 15.

40. *Id.* at 14.

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

At the American Law Institute (ALI), a tentative draft of the Restatement of the Law Governing Lawyers included a section subjecting principals in a law firm to vicarious liability for the wrongful acts of firm principals and employees.⁴³ At the 1997 annual meeting, ALI members rejected this approach, adopting a version that recognized lawyers' ability to limit their liability.⁴⁴ The ALI vote on the Restatement section related to the liability of firm principals exemplifies how lawyer self-interest influenced what should have been an impartial restatement of legal principles.⁴⁵ In an insightful assessment of ALI deliberations and decisions on the content of the Restatement (Third) of the Law Governing Lawyers, Professor Monroe Freedman zeroed in on ALI members' "conflict of interest" in allowing their independent judgment to be "materially and adversely affected by their own financial interests."⁴⁶

Other bar-related groups, such as Professional Ethics Committees, also greased the way for law firms to practice as limited liability partnerships. Both the American Bar Association Standing Committee on Professional Ethics and various state ethics committees opined that practice in limited liability firms did not

41. *Id.*

42. *Id.*

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

44. *Id.* at 362. The ALI membership adopted the following provision: "Each of the principals of a law firm organized as a general partnership *without limited liability* is liable jointly and severally with the firm." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 (2000) (emphasis added). Based on this final version, Professors Bromberg and Ribstein state that the "Restatement explicitly recognizes limitation of lawyers' liability in LLPs under applicable law." BROMBERG & RIBSTEIN, *supra* note 9, at 258–59.

45. See Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641, 646–60 (1998) (analyzing three different issues that illustrate how lawyers' own financial interests affected their independence in formulating sections of the Restatement of Law Governing Lawyers).

46. *Id.* Professor Freedman warns that these conflicts of interest have compromised the integrity of the ALI's Restatements of the Law to the point that no judge, scholar, or student can rely on a Restatement rule or comment as representing the objective judgment of members, unaffected by the partisanship of advocates who are creating precedents to protect their clients' and their own interests in future litigation.

Id. at 660.

violate applicable ethics rules, provided that firms comply with statutory provisions, such as those requiring that the firms use the words "Limited Liability Partnership" or the initials "LLP" in their name.⁴⁷ Disappointingly, few opinions urged lawyers to take additional steps to communicate their limited liability status to clients and prospective clients.⁴⁸

Bar leaders and other lawyers who preached the status of law as a profession said little about how the limited liability movement dramatically changed the remedies available to persons injured by lawyers' acts and omissions.⁴⁹ Rather, lawyers operated out of self-interest.⁵⁰ In contrasting "professionalism" rhetoric with the bar's role in lobbying for limited liability protection for lawyers, Professor Roger C. Cramton observed:

In any setting in which lawyer professionalism is discussed, the profession laments the decline of mentoring in law firms and urges greater quality control measures. Yet [in pushing for the enactment of state legislation eliminating the traditional rule that a law partner's assets are at risk when a firm member's negligence leads to a malpractice or third-party award] it rejected the principles of monitoring, group responsibility and quality control that underlie the traditional partnership rule. Pocket-book interests have prevailed over "traditional professional values." Also, the organized bar usually takes the position that state legislatures have no business regulating the profession. But when the common law rule proved

47. For a critique of the ABA Ethics Opinion, see Susan Saab Fortney, *Professional Responsibility and Liability Issues Related to Limited Liability Partnerships*, 39 S. TEX. L. REV. 339, 405-22 (1998).

48. In Wisconsin, the Supreme Court recognized that lawyers seeking limited liability should do more than comply with the minimum statutory provisions. The Wisconsin Supreme Court amended the Wisconsin Supreme Court Rules of Professional Conduct for Attorneys, allowing lawyers to practice in LLPs and other limited liability organizations, provided that the lawyers give public and actual notice to clients. WIS. SUP. CT. R. OF PROF'L CONDUCT FOR ATTORNEYS R. 20:5.7. The rule imposes other conditions, including that a limited liability law firm "[i]nclude a written designation of the limited liability structure as part of its name." *Id.* In addition, the firm must "[p]rovide to clients and potential clients in writing a plain-English summary of the features of the limited liability law under which [the firm] is organized." *Id.*

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

50. *Id.*

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

Although professionals successfully lobbied for the enactment of limited liability legislation, state supreme courts could have exercised their inherent authority to prohibit or regulate practice in limited liability law firms.⁵² The vast majority acceded to the popular will of lawyers, doing little to stem the tide.⁵³ In contrast to many, the Illinois Supreme Court resisted the pressure to simply bless allowing lawyers to practice in limited liability firms.⁵⁴ After an extended period of study and submissions by interested groups, the Illinois Supreme Court eventually adopted a rule that allowed lawyers to limit their liability, provided that they complied with safeguards in the rule, including insurance and financial responsibility provisions.⁵⁵

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

52. "Bar associations have played a pivotal, if not very public, role in obtaining the legislation. Indeed, very few bar groups opposed the legislation, and their opposition can be adequately explained on the ground of self-interest." Wolfram, *supra* note 8, at 362 (analyzing the inherent powers doctrine and courts' response to the organized bar's push for limited liability legislation). According to Professor Wolfram, the state's highest court claim of exclusive "inherent powers" is embodied in two principles:

The milder version of the claim involves judicial assertion of a constitutional power to regulate lawyers even in the absence of legislation. Quite beyond that, most state supreme courts also claim the exclusive power to regulate lawyers as the court sees fit—even if the state's legislature has enacted legislation that on its face is applicable to lawyers. Under the latter claim, courts say they have both the power and the duty to strike down legislation interfering with the judicial power to regulate lawyers.

Id.

53. *Id.* ("In contrast to the robust and highly successful bar activity, [Professor Wolfram notes] that most courts have not been involved in the LLP adoption process in any way.").

54. The Illinois Bar Association and Chicago Bar Association petitioned the Illinois Supreme Court, proposing rules to allow lawyers to use statutory vehicles to limit lawyers' vicarious liability. The Illinois Supreme Court adopted rules "nearly identical" to those proposed in the petition. See Sheldon I. Banoff & Steven F. Pflaum, *Limited Liability Legal Practice: New Opportunities and Responsibilities for Illinois Lawyers*, CBA RECORD (Apr. 2003), available at <http://www.kattenlaw.com/files/Publication/577a24dc-3a89-446f-a62a-e577ba99ada0/Presentation/PublicationAttachment/f08f5eab-12c9-44c4-bbf4-5bf5c287b0dc/Limited%20Liability%20Legal%20Practice.pdf> (providing a detailed analysis of the Illinois approach from the perspectives of authors who participated in the drafting of the petition submitted to the Illinois Supreme Court).

55. Until Illinois adopted the rule, it was the only state that imposed unlimited vicarious liability on principals in law firms. Illinois Rule 722 on Limited Liability Legal Practice now allows lawyers to limit their liability under the applicable state

Unlike the first Texas legislation, which merely required that firms carry limits of liability of \$100,000, the Illinois rule set the minimum limits of liability for professional liability insurance as \$100,000 per claim and \$250,000 annual aggregate, multiplied by the number of lawyers in the firm, provided that the firm's insurance need not exceed \$5,000,000 per claim and \$10,000,000 annual aggregate.⁵⁶ Through this rule, Illinois imposed meaningful financial responsibility requirements on lawyers seeking to limit their liability.

Although a few other jurisdictions used insurance to address questions of public protection, most jurisdictions did not.⁵⁷ Therefore, consumers in most states lost the unlimited liability protection afforded under general partnership law with limited or no assurance that firms would carry insurance or maintain assets adequate to pay claims.⁵⁸ Had a public watchdog or consumer advocate group been more involved in monitoring the limited liability movement, the question is whether decision-makers would have imposed adequate insurance requirements as the cost of doing business in a limited liability firm.

II. MANDATORY LEGAL MALPRACTICE INSURANCE: HOW THE UNITED STATES DIFFERS FROM OTHER COUNTRIES (IN NOT PROTECTING CONSUMERS)

As the limited liability form spread to other countries, insurance need not be used as a quid pro quo for eliminating vicarious liability

statutes provided that the entity maintains adequate insurance or proof of financial responsibility as defined in the Rule. *See* ILL. SUP. CT. R. 722(b)(1).

56. As an alternative to purchasing insurance, the Illinois Rule provides that law firms may maintain proof of financial responsibility in a sum no less than the minimum required annual aggregate for adequate insurance for a limited liability entity. Under the Rule, "proof of financial responsibility" means funds that are "specifically designated and segregated for the satisfaction of any judgments against a limited liability entity, and any of its owners or employees, entered by or registered in any court of competent jurisdiction in Illinois, arising out of wrongful conduct." ILL. SUP. CT. R. 722(b)(3) (internal quotation marks omitted).

57. *See* BROMBERG & RIBSTEIN, *supra* note 9, at 64–65 (identifying eight statutes that impose insurance requirements). In some states, other applicable law, such as licensing statutes or professional conduct rules, may require insurance or financial responsibility for limited liability firms. *Id.* at 65.

58. *See* Petition of the Chicago Bar Association and the Illinois State Bar Association at 1, *In re Proposed Rules Regulating Vicarious Liability of Lawyers Practicing in Limited Liability Entities*, No. 18095 (Ill. Mar. 27, 2002) (arguing that the protections in the proposed rule provided "more effective [protection] than vicarious liability as a means of ensuring that clients receive compensation for losses suffered due to malpractice").

of firm principals. Around the world, injured persons (as well as lawyers) were already protected because other jurisdictions, including most common law countries, require professional indemnity insurance for practicing lawyers.⁵⁹ For example, law firms in the United Kingdom (UK) must carry at least £2,000,000 per claim and a limited liability company must carry at least £3,000,000 per claim.⁶⁰ In its Handbook explaining standards of practice, the Solicitors Regulation Authority (SRA), the new national regulator in the UK, advises solicitors that they need professional indemnity insurance to practice.⁶¹ The Law Society for England and Wales describes the justification for mandating that solicitors maintain professional indemnity insurance (PII) as follows:

PII also increases your financial security and serves an important public interest function by covering civil liability claims, including: certain related defence costs, and regulatory awards made against you. It ensures that the public does not suffer loss as a result of your civil liability, which might otherwise be uncompensated. This is important in maintaining public confidence in the integrity and standing of solicitors.⁶²

Regulators from other countries share this perspective in asserting that PII protects consumers as well as lawyers.⁶³ Mandatory insurance protects injured persons who otherwise would be facing uncollectable losses because lawyers “go bare,” practicing with no insurance or inadequate limits of liability on their policies.⁶⁴ Requiring minimum limits and types of insurance protects lawyers and clients from gaps in

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

60. *Id.* at 10 (discussing the increased difficulty UK firms encountered in obtaining affordable PII for the 2009-2010 and 2010-2011 insurance years). For a table of PII requirements worldwide, see *Professional Indemnity Insurance Requirements Around the World*, PRACTICEPRO, http://practicepro.ca/LawPROmag/ProfessionalIndemnity_AroundWorld.pdf (last visited Aug. 23, 2012).

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

62. *Id.*

63. “In most common law jurisdictions, professional indemnity insurance for lawyers is made mandatory by law or by law society or bar association regulation.” Ip & Rock, *supra* note 59, at 11 (citing *Professional Indemnity Insurance Requirements Around the World*, LAWPRO MAG., http://www.practicepro.ca/LAWPROmag/ProfessionalIndemnity_AroundWorld.pdf (last visited Jan. 29, 2013)).

64. *Id.*

coverage.⁶⁵ Mandatory insurance also addresses the moral hazard of some uninsured lawyers negatively affecting the reputation of the legal profession when injured persons are left without recovery.⁶⁶ Finally, mandatory insurance may improve the accessibility and affordability of insurance.⁶⁷

Interestingly, the need to create a source for affordable insurance is what prompted Oregon decision makers to enact a mandatory insurance program in the 1970s.⁶⁸ A brief historical note on legal malpractice insurance and the evolution of the Oregon system provides another example of how market forces and lawyer self-interest sparked change.

In the United States, legal malpractice insurance first gained prominence in the 1960s when property and casualty insurers offered legal malpractice insurance as an ancillary service.⁶⁹ Lawyers became keenly interested in obtaining insurance in the 1970s when legal malpractice claims increased substantially.⁷⁰ Many insurers responded to these claims by changing their approaches to underwriting and by sharply raising premiums.⁷¹ Other insurance companies simply discontinued writing legal malpractice insurance in certain states.⁷² Because of these changes, the coverage provided decreased and the cost of insurance increased.⁷³

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

66. *Id.* at 12 (referring to this as a “free-rider” problem that Scandinavian regulators cited as a reason for requiring that all members obtain insurance).

67. See Bennett J. Wasserman & Krishna J. Shah, *Mandatory Legal Malpractice Insurance: The Time Has Come*, N.J. L.J., Jan. 14, 2010 (arguing that the extension of insurance to all lawyers would make premiums more affordable). “With increased competition in the insurance marketplace . . . the resulting revenue infusion to carriers by mandating insurance coverage would not only lower premiums, but it would extend protection to all clients . . .” *Id.*

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

69. George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 307 (1998); see also Fredric L. Goldfein, *Legal Malpractice Insurance*, 61 TEMP. L. REV. 1285, 1285 (1988) (noting that it was not until the 1960s that insurers realized that they could make a profit).

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

71. Insurers radically changed the coverage provided by changing policies to be “claims-made” rather than occurrence policies and by revising the insuring agreements to provide for deducting defense costs from the limits of liability available to pay damages. *Id.*

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

By the late 1970s, the market in various states became very restrictive, making legal malpractice insurance cost prohibitive for many and unavailable to others.⁷⁴ Lawyer organizations around the United States evaluated options to deal with the tough and expensive insurance market.⁷⁵ In some states, lawyers established bar-related mutual companies, owned by lawyers, to provide affordable insurance.⁷⁶ In other states, including California and Washington, lawyers explored the possibility of lowering insurance costs by requiring all lawyers to purchase insurance.⁷⁷ Although the California governor refused to sign proposed legislation requiring lawyers to carry insurance, the state of Oregon “borrowed the proposed California legislation and passed it as its own.”⁷⁸ On July 1, 1978, Oregon established a mandatory insurance program in an attempt to deal with the insurance “crisis” where many lawyers were “simply unable to obtain insurance at a reasonable price.”⁷⁹ Thus, Oregon became the first state in the U.S. to require that all lawyers in private practice obtain insurance through the state’s professional liability fund (PLF).⁸⁰

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

73. See Goldfein, *supra* note 69, at 1285 (“By the end of the 1970’s, premiums began to increase sharply.”). For a description of how “claims-made” coverage is more restrictive than “occurrence” coverage, see *id.* at 1286–90.

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

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

76. California and North Carolina organized the first bar-related insurance companies. See *id.* at 308. Numerous states followed, creating bar-related companies that write insurance and provide risk management services. For a listing of the bar-related companies, see NATIONAL ASSOCIATION OF BAR-RELATED INSURANCE COMPANIES, <http://www.nabrico.org> (last visited Oct. 3, 2012). As stated on the website for the National Association of Bar-Related Insurance Companies, affiliated member companies are “dedicated to personal service, quality coverage, and the satisfaction of their insureds.” *Id.*

77. “Legislators believed that [mandatory coverage through state-endorsed funds] would greatly assist a growing number of attorneys who were unable to obtain insurance, as well as protect clients who were represented by uninsured attorneys.” Goldfein, *supra* note 69, at 1296.

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

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

80. By legislative enactment, the board of governors for the unified state bar association has the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional

Interestingly, the Oregon Bar Association originally proposed the mandatory insurance program with the hope that it would “provide lower rates, make coverage more available, and protect the public from harm by uninsured attorneys.”⁸¹ “The Oregon State Bar Association determined that [the PLF] would cost individual [lawyers] less than comparable . . . insurance.”⁸² In commenting on the Oregon Bar Association’s role in supporting a mandatory insurance program, one malpractice expert noted that “[a]ltruism, or concern for the consumer, was not entirely behind Oregon’s decision to establish the PLF.”⁸³ Lawyers and bar leaders recognized that the mandatory insurance program made economic sense for lawyers.⁸⁴

In arguing for mandatory legal malpractice insurance, commentators often point to the success of the Oregon PLF program.⁸⁵ Notwithstanding the Oregon experience in making insurance and loss prevention services accessible to all lawyers in private practice, organized bar groups and other interested bodies have staunchly and successfully opposed mandatory insurance.⁸⁶ As

liability insurance. See OR. REV. STAT. § 752.035 (2011). Currently, the professional liability fund commission requires that “qualified members of the profession . . . carry professional liability insurance offered by the fund with primary liability limits of at least \$200,000.” *Id.*

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

82. Nicole A. Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO. J. LEGAL ETHICS 637, 652 (1995).

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

84. See *id.* at 2610–12 (analyzing the pricing structure). Although initially met by heavy criticism, past survey results suggest that members of the Oregon Bar are satisfied with services provided. See Nicholas A. Marsh, Note, “Bonded & Insured?": *The Future of Mandatory Insurance Coverage and Disclosure Rules for Kentucky Attorneys*, 92 KY. L.J. 793, 800 n.56 (2004) (citing the Oregon PLF website that reported on survey results indicating that 99% of the respondents indicated that they were “satisfied” and 87% reported that they were “very satisfied” with services provided by the PLF).

85. See, e.g., Ramos, *supra* note 78, at 2611–12 (asserting that “Oregon’s PLF has been a success and a model for any insurance carrier”); Cunitz, *supra* note 82, at 651–52. In advocating that every state should follow Oregon’s example, the vice-president of an international insurance broker and risk-management consulting group notes that most of the arguments against mandatory insurance deal mostly with “logistics, not substance.” David Z. Webster, *Mandatory Malpractice Insurance, Yes: It’s Essential to Public Trust*, 79 A.B.A. J. 44, 44 (1993). Mr. Webster concludes by stating: “Oregon has solved the logistics problem and, as an added benefit, has reduced cost and developed a credible loss-control program and a workable claims statistical base. But most important, Oregon has assured the client public protection in the event of lawyer malpractice.” *Id.*

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

noted by Professor Leslie Levin, “[w]hile Australia, Canada, and the United Kingdom have long required lawyers to carry malpractice insurance, bar resistance to mandatory insurance continues unabated in the U.S.”⁸⁷ Some outspoken opponents of mandatory insurance would require lawyers to disclose that they do not carry malpractice insurance.⁸⁸ As discussed in the next section, the debate over a mandatory disclosure rule reflects different perspectives on consumer protection and law as a business or profession.

III. MANDATORY DISCLOSURE OF INSURANCE: WHAT THE DEBATE REVEALS ABOUT LAWYER ATTITUDES

Following study and examination by bar groups, various states have rejected proposals for mandatory insurance programs.⁸⁹ As a middle ground approach to requiring insurance or continuing the status quo, a number of jurisdictions have adopted rules requiring that lawyers disclose the fact that they do not carry professional

Lawyers in other states do not like it. The ABA is against it. Insurance carriers oppose it. Many attorneys would prefer not to pay several thousand dollars a year in premiums, and believe that the best insurance is to be “bare”: it is cheaper and most plaintiff’s attorneys will simply not bother to prosecute a legal malpractice case against them. Insurance carriers do not like the idea of legislation that might put them out of business. ALAS, the nation’s largest legal malpractice insurer based on premium income, is opposed to mandatory insurance because “it simply does not work.” The Alliance of American Insurance is also against mandatory legal malpractice insurance: “Guaranteeing injured clients the means to collect gets beyond what the insurance product is designed to do.” Because any mandatory . . . insurance program must cover all lawyers, it is unlikely that any insurance carrier will commit to writing a state’s mandatory program. Insurance companies relegated to offering excess coverage would soon see premium income decrease substantially. Some might even go out of business.

Manuel R. Ramos, *Legal Malpractice Insurance: The Profession’s Dirty Little Secret*, 47 VAND. L. REV. 1657, 1728–29 (1994) (footnotes omitted). Professor Ramos concludes by stating that these arguments against mandatory legal malpractice insurance are unsupportable from the standpoint of consumer protection. *See id.*

87. Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 GEO. J. LEGAL ETHICS 1549, 1588 (2009) (reviewing RICHARD ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008)).

88. Harry H. Schneider, Jr., *Mandatory Malpractice Insurance, No: An Invitation to Frivolous Suits*, 79 A.B.A. J. 45 (1993) (suggesting that insurance disclosure is a “less divisive and less expensive” way of accomplishing the goal of public protection).

89. *See, e.g.*, Robert I. Johnston & Kathryn Lease Simpson, *O Brothers, O Sisters, Art Thou Insured?*, 24 PA. LAW. 28, 30 (2002) (explaining that studies conducted by the Pennsylvania Bar Association Professional Liability Committee concluded that a mandatory insurance proposal was not realistic in a state with a bar the size of Pennsylvania).

liability insurance.⁹⁰ Bar leaders representing large bar associations, as well as small ones, view mandatory disclosure of insurance status as a starting point on the road to improving client protection.⁹¹

In the United States, state supreme courts, rather than bar associations, led the trend to adopt rules of professional conduct that require that lawyers disclose their lack of insurance.⁹² The Supreme Court of Alaska broke new ground in 1999 when it became the first state to amend its professional conduct rules to mandate disclosure of a lack of insurance.⁹³ That same year, South Dakota used a similar approach in modifying the state professional conduct rules to require insurance disclosure to clients and potential clients in communications with them.⁹⁴ Within a couple of years, other courts, including the Supreme Courts of Ohio and New Hampshire, adopted rules requiring lawyers who lack malpractice insurance to notify their clients.⁹⁵

90. For a discussion of insurance “status disclosure” as an ideological compromise between camps that are concerned about interests of the “lawyers and health of the legal profession on one side and the rights of the consuming public on the others,” see Farbod Solaimani, *Watching the Client's Back: A Defense of Mandatory Insurance Disclosure Laws*, 19 GEO. J. LEGAL ETHICS 963, 974–75 (2006).

91. Compare James E. Towery, *The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance*, 14 PROF. LAW. 22 (2003) (the former president of the California Bar Association arguing that a lawyer's lack of insurance is a “material fact” clients are entitled to know), with James C. Gallagher, *Should Lawyers Be Required to Disclose Whether They Have Malpractice Insurance?*, 32 VT. B. J. 5 (2006) (former president of the Vermont Bar Association asserting that lawyers should have to disclose their insurance status because of the heightened obligations lawyers owe clients).

92. James E. Towery, *Should Disclosure of Malpractice Insurance Be Mandatory*, GP SOLO, Apr.–May 2003, available at http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/towery.html. Mr. Towery chaired the ABA Standing Committee on Client Protection and served past president of the State Bar of California. By statute enacted in 1988, California first required a form of malpractice insurance disclosure in certain fee contracts. *Id.* This provision was later “sunsetting” and not reenacted. *Id.*

93. Jeffrey D. Watters, *What They Don't Know Can Hurt Them: Why Clients Should Know if Their Attorney Does Not Carry Malpractice Insurance*, 62 BAYLOR L. REV. 245, 257 (2010).

94. South Dakota's rule now is considered to be the most stringent reporting requirement because it requires disclosure to the client or potential client in every communication with them. *Id.* The Rule also covers the presentation of the disclosure and extends the requirements to every advertisement by the attorney, whether written or in the media. *Id.*

95. Towery, *supra* note 92, at 38. In a reported case, the Supreme Court of Ohio suspended a lawyer from the practice of law for twenty-four months for violations of the Ohio Professional Conduct Rules, including the rule that required the lawyer to inform a client, in a writing signed by the client, if the lawyer does not maintain

While additional state high courts were considering the disclosure issue, the ABA Client Protection Committee tackled the disclosure issue. After unsuccessfully floating proposals, including one to amend the Model Rules of Professional Conduct, the Committee changed its approach and recommended an ABA Model Court Rule on Insurance Disclosure (ABA Model Court Rule).⁹⁶ Unlike professional conduct rules that required lawyers to disclose their lack of insurance directly to clients, the ABA Model Court Rule requires that lawyers disclose on their annual registration statements whether they intend to maintain professional liability insurance for their private law practices.⁹⁷ The ABA Model Court Rule was considered to be more “lawyer friendly” than the professional conduct rules, adopted in states such as Alaska and South Dakota, because violation of a court rule would not subject a lawyer to professional discipline.⁹⁸ Although the ABA Model Court Rule was “lawyer friendly,” it only passed the House of Delegates by a narrow eleven-vote margin.⁹⁹

As of August 9, 2011, seventeen states have adopted mandatory disclosure rules that follow the ABA Model Court Rule approach that requires disclosure on lawyers’ annual registration statements, rather than disclosure directly to clients and prospective clients.¹⁰⁰

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

96. Richard Acello, *Climate Change: States Warm to the Disclosure of Liability Coverage*, A.B.A. J. (Nov. 1, 2009, 8:00 PM), http://www.abajournal.com/magazine/article/climate_change/.

97. *ABA Model Court Rule on Insurance Disclosure*, ABA STANDING COMM. ON CLIENT PROTECTION (Aug. 9, 2004), http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Model_Rule_InsuranceDisclosure.authcheckdam.pdf [hereinafter *ABA Model Court Rule*].

98. Watters, *supra* note 93, at 255. Under the ABA Model Court Rule, the highest court of the jurisdiction will designate the means for making disclosure information available to the public. *ABA Model Court Rule*, *supra* note 97.

99. 5 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 38.1 (2012) (noting that the ABA rule focuses on the “fact and maintenance of insurance” rather than the amount of insurance).

100. *State Implementation of ABA Model Court Rule on Insurance Disclosure*, ABA STANDING COMM. ON CLIENT PROTECTION (Aug. 9, 2011), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrd_080911.authcheckdam.pdf [hereinafter *State Implementation Chart*]. States vary on public access to the information that lawyers disclose on their registration statements. Some make information available on the state website, others on request, and others do not allow public access to information. *See* Watters, *supra* note 93, at 256.

Another seven states require disclosure directly to clients.¹⁰¹ HALT, a self-described legal reform group, strongly urged that states go beyond the ABA “baseline recommendation” by requiring that lawyers directly disclose to clients whether or not they carry malpractice insurance.¹⁰²

Although the ABA Model Rule attempts to balance lawyer and consumer interests, five states have declined to adopt any version of an insurance disclosure rule.¹⁰³ North Carolina also joined the states that do not require disclosure. As of January 1, 2010, North Carolina eliminated the requirement for lawyers to inform the state bar whether they maintain legal malpractice insurance.¹⁰⁴

In each state that considered a mandatory insurance disclosure rule, lawyers passionately asserted arguments supporting their positions. The arguments articulated in favor of adoption of a rule largely focused on public protection concerns, while opposing arguments pointed to the negative consequences of adoption of such a mandatory disclosure rule. The following synopsis of the main arguments reveals that the proponents and opponents fundamentally differ on their perspectives of lawyer duties and the effects of adopting a rule related to a lawyer’s insurance status.

Proponents advance a number of justifications for mandating that lawyers disclose whether they carry professional liability insurance. These arguments cover both client protection issues, as well as lawyer protection issues. A common client protection argument relates to disparate positions of lawyers and their clients. The vast majority of lay people enter an attorney-client relationship with little or no information on a lawyer’s insurance status or the lawyer’s ability to pay damages in the event of loss. Unless the person is a sophisticated

101. The following states require disclosure directly to clients: Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania, and South Dakota. *State Implementation Chart*, *supra* note 100.

102. *HALT Status Update: Does Your State Require Lawyers to Make Their Insurance Status Known*, HALT, http://www.halt.org/reform_projects/lawyer_accountability/pdf/Malpractice_insurance_disclosure_091505.pdf (last visited Aug. 23, 2012) [hereinafter *HALT Report*]. In comments to the Illinois Supreme Court, HALT argued that disclosure in registration papers merely assures that the high court will be informed of an attorney’s insurance status, but does not guarantee that clients will have access to the information. *Id.*

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

104. *Frequently Asked Questions*, N.C. St. B., http://www.ncbar.gov/faq/f_faq.asp (last visited Aug. 23, 2012) (noting that clients must check with their lawyers if the clients want to obtain information on the lawyer’s legal malpractice insurance coverage).

consumer of legal services, prospective clients likely do not inquire about insurance. Study results suggest that the majority of consumers do not know whether lawyers are required to carry professional liability insurance.¹⁰⁵ Lay consumers may assume that lawyers are required to carry insurance.¹⁰⁶

To address the asymmetry and lack of information, proponents maintain that states should require disclosure when lawyers do not carry professional liability insurance.¹⁰⁷ This argument is based on the duty of lawyers to disclose information that is material to representation. As stated by James Towery, a former president of the California Bar Association and supporter of mandatory disclosure:

[W]hen a client hires a lawyer, is the lawyer's lack of insurance a material fact that the client is entitled to know? It is hard to fashion a persuasive argument that clients are not entitled to that information. Lawyers operate under a state license, and have a monopoly on "practicing law." With that monopoly go certain obligations. Full disclosure to clients of material information regarding the representation is certainly one of those obligations.¹⁰⁸

The special nature of the attorney-client relationship also militates in favor of disclosure. Because members of the legal profession have a "heightened responsibility in business relationships with clients," James C. Gallagher, a former president of the Vermont Bar Association, urged adoption of a mandatory disclosure rule so that clients can make informed decisions about retaining a lawyer.¹⁰⁹

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

105. According to a public opinion survey conducted for the State Bar of Texas, eighty-seven percent of respondents reported that they did not ask if their attorneys carried professional liability insurance. *PLI Disclosure Survey of the Public*, ST. B. TEX. (Nov. 2009), <http://www.texasbar.com/pliflashdrive/material/PublicSurvey.pdf>. The State Bar of Texas contracted with North Texas State University to conduct a telephone survey of 500 Texas residents, reflective of the demographics of Texas. *Id.*

106. Devin S. Mills & Galina Petrova, *Modeling Optimal Mandates: A Case Study on the Controversy over Mandatory Professional Liability Coverage and Its Disclosure*, 22 GEO. J. LEGAL ETHICS 1029, 1033 (2009) (referring to studies that reveal that most clients assume that their attorneys are covered).

107. For a analysis of the asymmetric distribution of information in the attorney-client relationship, see Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 751-55 (2008).

108. Towery, *supra* note 91, at 23 (suggesting those attorneys who question the materiality of insurance information put the question to a cross-section of their clients).

109. To support his position, Mr. Gallagher refers to court opinions that describe the special nature of the lawyer-client relationship. Gallagher, *supra* note 91, at 5.

to whether they wish to hire the lawyer.¹¹⁰ To illustrate this point, consider the example of a claimant in a large personal injury case where the claimant is selecting between two different personal injury lawyers. The lawyers charge the same contingency fee, but one maintains legal malpractice insurance and the other does not. Retaining a lawyer without knowing whether the lawyer carries insurance is like purchasing a car without airbags. Unless the lawyer has substantial non-exempt assets, there is likely no safety mechanism to protect the client in the event of lawyer error or misconduct.¹¹¹

Failure to require disclosure shifts risk of loss to consumers who rely on the superior position of their lawyers.¹¹² As noted by a member of the Pennsylvania Professional Liability Committee, clients with meritorious claims suffer double injury when they are injured, first by a lawyer who they thought would protect them, and second when they do not have recourse because the lawyer had no coverage.¹¹³

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

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

111. According to a 2008 public opinion survey conducted by the State Bar of Texas Task Force on Insurance Disclosure, eighty percent of respondents indicated that it was "very important" or "moderately important" for them to know whether the attorney they are hiring carries insurance. Watters, *supra* note 93, at 247. In addition, seventy percent of the respondents agreed that lawyers should inform potential clients whether or not the lawyer carries insurance. *Id.* at 247-48.

112. See Mills & Petrova, *supra* note 106, at 1032-33 ("Not requiring malpractice insurance, and not requiring attorneys to disclose any lack of coverage, unfairly forces legal clients to bear the burden of risk of loss Furthermore, when lawyers are the casual agents of malpractice damages, and their clients are the victims, it seems incongruous that potential victims should be the ones to carry the risk of malpractice resulting in financial loss.").

113. Johnston & Simpson, *supra* note 89, at 32; see also Nicole D. Mignone, Comment, *The Emperor's New Clothes? Cloaking Client Protection Under the New Model Court Rule on Insurance Disclosure*, 36 ST. MARY'S L.J. 1069, 1083 (2005) (noting that the grievance process inadequately provides financial compensation for aggrieved clients). In most states, Client Protection Fund programs provide limited recovery for a narrow class of claims. For a discussion of the scope of coverage protected by client protection funds, see LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 148 (3d ed. 2012) (explaining that client protection funds are state-sponsored programs designed to reimburse clients whose lawyers have stolen their money). "Many client protection funds reimburse only a fraction of the valid claims that are submitted to them." *Id.* at 152.

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

protecting the interests of clients.”¹¹⁵ As explained by Robert Fellmeth, Executive Director of the Center for Public Interest Law at the University of San Diego School of Law:

When you run naked it means you're immune—no one's going to sue you. Malpractice attorneys don't sue attorneys who don't have coverage. What's the point of getting a judgment and you don't know whether you can execute on it? Attorneys know how to hide assets. If you're a marginal practitioner, it pays to go naked. So the consumer has no recourse, and it's a disgrace.¹¹⁶

The likelihood of being injured by an uninsured lawyer is significant because a substantial percentage of lawyers do not carry professional liability insurance.¹¹⁷ Although there is a great deal of speculation on the number of uninsured lawyers in private practice, surveys suggest that the percentages of uninsured attorneys range from seventeen percent to forty-eight percent.¹¹⁸

The adoption of mandatory insurance disclosure rules reduces the number of uninsured lawyers by creating incentives for lawyers to buy insurance.¹¹⁹ First, the “strategy of going naked” becomes far less attractive if lawyers must disclose that they do not carry insurance. Second, the prospect of having to disclose one's insurance status may help lawyers recognize that costs associated with insurance coverage are part of the costs of practicing law.

Some proponents also assert that mandatory disclosure rules deter lawyer misconduct. The deterrence argument is based on the assumption that lawyers will engage in risk management in an effort

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

116. *Id.*

117. See Johnston & Simpson, *supra* note 89, at 28 (noting that in 2001 the insurance industry and bar officials estimated that the percentage of uninsured lawyers in the United States ranged from twenty percent to fifty percent at any given time).

118. The lower end of this estimate is based on findings in a mandatory survey of lawyers conducted at the direction of the Illinois Supreme Court. *Id.* at 29 (quoting the chief counsel of the Illinois State Bar Association who noted that that the “general feeling was that something needs to be done” even though the numbers came in slightly better than projected). The upper end of the estimate derives from 6,160 responses to a Professional Liability Survey distributed by the State Bar of Texas in 2008. See *PLI Disclosure—Attorney Survey Findings*, ST. B. TEX. (Feb. 2008), http://www.texasbar.com/pliflashdrive/material/11_Attorney_Survey_0208.pdf.

119. After South Dakota adopted a mandatory disclosure rule the number of insured attorneys in the state rose from eighty percent to ninety-six percent. Carole J. Buckner, *Malpractice Insurance Disclosure Lurches Toward Approval*, ORANGE COUNTY LAW, April 2008, at 51.

to avoid premium increases.¹²⁰ The positive effects of purchasing insurance first occur when an uninsured lawyer applies for insurance, completing application questions that require a description of practice management controls such as conflict and calendar systems. Thereafter, insurers may provide risk management guidance and assist the insured in properly handling situations after the lawyers report errors to their carriers.¹²¹

Many insured lawyers support mandatory disclosure rules. These lawyers have observed how innocent lawyers get sucked into litigation when the actual tortfeasors do not carry insurance.¹²² The increased number of malpractice claims makes this more of a threat for responsible lawyers who carry insurance.¹²³

Finally, proponents argue that disclosure rules balance lawyer autonomy and client protection.¹²⁴ Mandatory disclosure rules allow lawyers to elect to purchase insurance or disclose their insurance status. At the same time, consumers of legal services are provided information so that they can make informed choices. Once lawyers disclose their insurance status, consumers can make the choice to retain other counsel, disregard the lack of insurance, or to request that the lawyer obtain coverage.¹²⁵ Thus, mandatory disclosure rules give consumers choices. At the same time, disclosure rules do not force lawyers to purchase malpractice insurance, but create incentives for them to do so.

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

121. See Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209, 220–25 (1996) (describing the types and effectiveness of risk management programs conducted by insurers).

122. See Johnston & Simpson, *supra* note 89, at 32 (explaining that members of the Pennsylvania Professional Liability Committee have seen responsible lawyers drawn into malpractice suits because another lawyer involved in the matter proved to be uninsured).

123. Mills & Petrova, *supra* note 106, at 1033 (citing Ronald E. Mallen, *Cutting Through the Malpractice Maze*, THE BRIEF, Summer 1986, at 10, 12–13). For a discussion of the statistical evidence of a dramatic increase in legal malpractice claims, see Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection Whither Thou Goest?*, J. PROF. LAW. 2008, at 66–69.

124. See, e.g., Solaimani, *supra* note 90, at 974–75 (analyzing whether mandatory insurance disclosure is a “perfect ideological compromise” between client and lawyer interests).

125. Arguably, a “materiality-based” communications rule, such as one advocated by Professor Eli Wald, would cover a disclosure of a lawyer’s insurance status. See Wald, *supra* note 107, at 751–55, 779–80 (justifying a “materiality-based” disclosure rule on the basis of the nature of the attorney-client relationship and the asymmetric distribution of information in the relationship).

Lawyers who oppose mandatory disclosure rules do not see those rules as a compromise that preserves lawyer independence.¹²⁶ Rather they assert that disclosure rules intrude on the choices lawyers should be able to make in representing clients.¹²⁷ Specifically, they argue that mandatory disclosure rules interfere with a practitioner's autonomy to decide whether to self-insure or purchase insurance.¹²⁸ By opening the door to more regulation of the business aspects of running a law practice, some fear that mandating disclosure is the beginning of a slippery slope of more restrictions on how lawyers practice.¹²⁹ Another concern related to lawyer independence is that mandatory insurance disclosure rules give too much power to insurance companies.¹³⁰

Those who oppose mandatory disclosure maintain that proponents have failed to demonstrate an actual need for mandating disclosure of insurance status. Specifically, they point to the lack of evidence for widespread occurrences of legal malpractice committed by uninsured lawyers.¹³¹ Opponents also argue that a mandatory disclosure rule is unnecessary because consumers may always inquire as to whether a lawyer carries insurance.¹³² Opponents maintain that consumers

126. See, e.g., Charles Wood, *Few Fans of Mandatory Disclosure*, MONT. LAW., June–July 2002, at 11 (referring to opposition of Montana attorneys who argued that mandating insurance disclosure was “playing into the hands of the malpractice insurance companies by forcing more lawyers to buy coverage rather than be embarrassed by a disclosure statement”).

127. See Acello, *supra* note 96, at 41 (referring to a “don’t tread on me” attitude that may be at play in resisting mandatory disclosure).

128. Steve N. Six, *Mandatory Malpractice Insurance Disclosure: Is the Time Right for Kansas?*, 72 J. KAN. B. ASS’N 14, 14 (2003) (noting that a mandatory rule makes no allowance for the fact that some lawyers have adequate financial resources to cover claims).

129. Mignone, *supra* note 113, at 1086; see also Mark Hansen, *More States Require Lawyers to Say Whether They Carry Malpractice Insurance*, A.B.A. J., May 23, 2006, available at http://www.abajournal.com/magazine/article/disclosure_rules/.

130. See Hansen, *supra* note 129. For a discussion of the emerging role of insurers as regulators of the legal profession, see Davis, *supra* note 121, at 220–32. See generally Charles Silver, *Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis*, 65 FORDHAM L. REV. 233 (1996).

131. See Mills & Petrova, *supra* note 106, at 1034 (articulating the counter argument that “absence of proof is not the proof of absence”); see also Towery, *supra* note 91, at 23 (suggesting that the lack of evidence of unsatisfied judgments against uninsured lawyers can be attributed to the fact that claims against uninsured lawyers are “often abandoned, precisely because there is no available insurance”).

132. See Wood, *supra* note 126, at 11 (quoting a Montana attorney who insisted that potential clients should be accountable for asking about an attorney’s insurance status).

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

In opposing mandatory disclosure, critics point to a variety of unintended consequences that arise from mandating disclosure. Most notably, they warn that more information on insurance will "invite frivolous lawsuits."¹³⁴ They also argue that the mandatory insurance rule will eventually increase the cost of legal fees because lawyers likely would transfer insurance costs to consumers of legal services.¹³⁵

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

To lawyers familiar with professional liability coverage, the most persuasive criticism is that mandatory disclosure actually misleads lay people.¹³⁸ Because of the claims-made nature of professional liability insurance, opponents argue that disclosure will adversely affect clients who assume that coverage exists when it does not.¹³⁹ Unlike occurrence policies, claims-made policies cover claims that are made and reported during the policy term. Therefore, lawyers who disclose

133. Edward C. Mendrzycki, *Should Disclosure of Malpractice Insurance Be Mandatory?—Con*, GP SOLO, Apr.–May 2003, available at http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/towery.html (asserting that there is "no empirical evidence showing that simply stating that a lawyer is uninsured offers any useful information to a client who is making a decision whether to hire counsel").

134. Mignone, *supra* note 113, at 1086 (referring to opposition expressed by an ABA delegate). In supporting their position, critics can use the proponents' own argument that malpractice lawyers do not pursue claims against uninsured professionals.

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

136. See Buckner, *supra* note 119, at 51–52 (noting that opponents of the proposed disclosure rule "predicted consequences ranging from premium increases, rising costs for legal services, reduction in availability of low-cost legal services, increases in malpractice claims and the demise of small firm and solo law practices").

137. Marsh, *supra* note 84, at 810 (suggesting that stigma is "especially problematic for attorneys operating on limited budgets" because they may be forced out of practice if they are required to choose between purchasing insurance and bearing a negative stigma).

138. For example, in a commentary in opposition to mandatory disclosure, Edward Mendrzycki, the former chair of the ABA Standing Committee on Lawyers' Professional Liability, identified various features of malpractice policies that could lead clients to believe that they could recover sums under an attorney's professional liability policy. See Mendrzycki, *supra* note 133.

139. See *id.*

that they carry insurance at the beginning of the attorney-client relationship may not be insured at the time that the actual claim is made and reported.¹⁴⁰ Other concerns relate to the fact that limits of liability, deductibles, insuring agreements, exclusions, and even conditions vary widely.¹⁴¹ Because of the complexity of professional liability policies, the ABA Standing Committee on Lawyers' Professional Liability has opposed the adoption of mandatory disclosure rules because the lack of protection potentially misleads the client into believing remedies exist to recoup losses.¹⁴²

In 2010, the Supreme Court of Texas weighed the arguments related to adoption of a mandatory disclosure rule.¹⁴³ Following a recommendation from the Board of Directors of the State Bar of Texas, the Supreme Court of Texas concluded that it would maintain the status quo and not adopt any form of disclosure rule.¹⁴⁴ This decision came after a lengthy debate and conflicting recommendations.¹⁴⁵ First, in 2008, the State Bar of Texas Task Force on Insurance Disclosure voted against adoption of an insurance disclosure rule.¹⁴⁶ Within a year, the Grievance Oversight Committee

140. For a discussion of the differences between occurrence and claims-made policies and other terms of professional liability policies, see Susan Saab Fortney, *Legal Malpractice Insurance: Surviving the Perfect Storm*, 28 J. LEGAL PROF. 41, 43–44 (2004).

141. Some argue that “the effort to provide more detailed disclosure addressing these finer points [of coverage] may cause even more confusion.” Gallagher, *supra* note 91, at 6.

142. Mignone, *supra* note 113, at 1084. Many members of the ABA Standing Committee on Lawyers' Professional Liability are affiliated with professional liability insurers or law firms that defend legal malpractice cases.

143. See generally Terry Tottenham, *Radio Nowhere*, 33 TEX. B.J. 728 (2010) (describing the debate and how the State Bar “worked hard” to engage members in considering the recommendation to the Supreme Court of Texas).

144. In a letter dated April 14, 2010 to the President of the State Bar of Texas, the Supreme Court of Texas reported its decision to not adopt an insurance disclosure rule. *Court Decides Against Mandatory Professional-Liability Insurance Disclosure*, TEX. SUP. CT. (Apr. 16, 2010), http://www.supreme.courts.state.tx.us/advisories/Professional_Insurance_Disclosure_041610.htm.

145. The State Bar of Texas website contains a great deal of information on the State Bar's consideration of the insurance disclosure issue, including reports from various bodies and findings from surveys. For a Table of Contents and links to pertinent documents, see generally *Professional Liability Insurance Disclosure—Table of Contents*, ST. B. TEX., <http://www.texasbar.com/pliflashdrive/home.html> (last visited Oct. 12, 2012).

146. By a margin of one vote, the State Bar of Texas Task Force on Insurance Disclosure recommended against requiring attorneys to inform prospective clients of whether or not the attorney carried professional liability insurance. Memorandum from David J. Beck, Chair, Task Force on Insurance Disclosure for State Bar of Texas Board of Directors (June 11, 2008), *available at* <http://www.texasbar.com>

(GOC), a body appointed by the Supreme Court of Texas, recommended that the Supreme Court of Texas adopt a rule requiring that lawyers disclose to their clients the fact that they do not carry professional liability insurance.¹⁴⁷ The Supreme Court of Texas then asked the State Bar Board of Directors to take a position.¹⁴⁸ Before doing so, the Board of Directors conducted a multi-phase inquiry and study process that included reports, public hearings, written submissions, blog postings, and published commentaries.¹⁴⁹

/pliflashdrive/material/3_TaskForce_Report_June08.pdf. The Task Force's due diligence included surveying lawyers and members of the public. In the survey of lawyers, seventy-seven percent of respondents were against requiring disclosure of whether they carried professional liability insurance. In contrast, in the survey of members of the public, seventy percent reported that they believed that lawyers should be required to inform a potential client whether they carried professional liability insurance. *Id.*

147. The final recommendation of the GOC stated:

The Committee, having studied the recommendations of the State Bar's Task Force on insurance disclosure, and having reviewed how other states have addressed these same issues, and after having studied the cost and availability of professional liability insurance in Texas, recommends that the State Bar of Texas, at the direction [of] the Texas Supreme Court, implement a Professional Liability Insurance Disclosure rule. The rule, the Committee believes, should be made part of the Disciplinary Rules of Professional Conduct so that any violation of the rule will be handled through the grievance process

GRIEVANCE OVERSIGHT COMMITTEE APPOINTED BY THE SUPREME COURT OF TEXAS, EXCERPT FROM THE GRIEVANCE OVERSIGHT COMMITTEE 2009 REPORT TO THE SUPREME COURT (2009), *available at* http://www.texasbar.com/pliflashdrive/material/8_Grievance%20Report.pdf [hereinafter GOC REPORT]. The GOC provided specific provisions for the proposed disclosure rule, including the recommendation that the rule require disclosure at the time a client engages a lawyer when the lawyer does not carry at least \$100,000 per claim and \$300,000 in the aggregate." *Id.* at 6. By way of full disclosure, I previously served as the chairperson of the GOC. I also participated in some of the GOC's discussions of the mandatory disclosure rule.

148. Letter from Wallace B. Jefferson, Chief Justice of the Supreme Court of Texas, to Harper Estes, President, Board of Directors, State Bar of Texas and Roland Johnson, President Elect, Board of Directors, State Bar of Texas (June 23, 2009), *available at* http://www.texasbar.com/pliflashdrive/material/SCT_Letter_062309.pdf.

149. Bar leadership designed the study to obtain information from both attorneys and members of the bar. Bar directors sought feedback from attorneys by sending first class letters to their constituents, through the Texas Bar Blog, email submissions, and responses from State Bar Sections, Committees and local bar associations. *See Executive Summary*, ST. B. TEX., <http://www.texasbar.com/pliflashdrive/material/ExecSummaryFinal.pdf> (last visited Oct. 12, 2012). The TEXAS BAR JOURNAL also published pro and con commentaries. *See generally* Chuck Herring & Bill Miller, *Pro/Con Professional Liability Insurance Disclosure: Should Be Required*, 72 TEX. B.J. 822 (2009).

To obtain the perspectives of consumers of legal services, State Bar leadership included the public in hearings and conducted a public opinion survey.¹⁵⁰ The survey conducted in November 2009 started with open-ended questions related to the factors respondents believed were important when hiring lawyers.¹⁵¹ In response to these questions, respondents did not identify professional liability coverage as a factor.¹⁵² When asked a specific question about insurance, forty-nine percent of respondents indicated that a lawyer's lack of insurance would affect their decision to hire the lawyer.¹⁵³ Eighty-eight percent reported that they would be less likely to hire a lawyer who does not carry professional liability insurance.¹⁵⁴ Sixty-four percent also believed that lawyers should be required to disclose to their clients whether or not they carry professional liability insurance.¹⁵⁵ A somewhat telling fact regarding the importance of lawyers carrying insurance, thirty-six percent of the respondents indicated that they would actually pay more in fees in order to ensure that their lawyer carries professional liability insurance.¹⁵⁶ Although most prospective clients might not ask whether a lawyer carries insurance, these results suggest that many consumers view insurance status as material information.¹⁵⁷

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

151. The first question was an open-ended one asking, "What are the top five things you would want to know about an attorney before you would hire them?" *Id.* The second question asked, "Of those top five you indicated, which is the most important to you?" *Id.*

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

153. The question asked, "If a lawyer were to inform you that he or she does not carry professional liability insurance, would that information affect whether or not you hire them?" *Id.* at Question 8. Thirty-six percent answered "no" and fifteen percent indicated "Don't Know/No Response." *Id.*

154. *Id.* at Question 9.

155. *Id.* at Question 13. By comparison sixty-six percent of respondents believed that doctors should be required to disclose to their clients whether or not they carry professional liability insurance, and fifty-five percent reported that mechanics should be required to do so. *Id.* at Questions 14 and 15.

156. *Id.* at Question 16. A somewhat higher percentage of respondents (forty-nine percent) indicated that they would pay more in fees to ensure that their doctor carries professional liability insurance. *Id.* at Question 17.

157. To build on data obtained from the telephone survey and "to gain further insight into the public's knowledge, understanding and opinions [related to] professional liability insurance," the State Bar of Texas retained consultants to conduct focus groups in four Texas cities. ST. B. TEX., *supra* note 149, at 4. After hearing a definition of professional liability insurance, seventy percent of the focus group participants thought attorneys should be required to disclose whether they carried insurance. See Chris Fick & Greg Liddell, *Personal Liability Insurance:*

Despite strong public support for a disclosure rule and the GOC recommendation, the State Bar Board of Directors recommended against requiring disclosure, siding with the majority of practitioners who opposed mandatory disclosure.¹⁵⁸ Practitioner opinions voiced in both written submissions and hearing testimony overwhelmingly opposed requiring disclosure.¹⁵⁹ The email invitation soliciting opinions generated 182 letters and comments, with 83% opposed to mandatory disclosure, 12% in favor of it, and 5% neutral on the matter.¹⁶⁰ On the Texas Bar Blog, 92% of comments were opposed to disclosure and 8% were in favor of disclosure.¹⁶¹ Of the eight responses received from State Bar Sections and Committees, six were against requiring disclosure and two were neutral.¹⁶² At public hearings conducted in seven cities, 125 people gave their opinions, with six indicating that they supported a disclosure requirement, twelve indicating that they took no position, and 107 opposing a disclosure requirement.¹⁶³

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

Public Opinion Focus Group Study, HUMAN INTERFACES INC. (Jan. 15, 2010), http://www.texasbar.com/pliflashdrive/material/SBOT%20FG%20Report_Final_V3.pdf. The researchers report that this percentage went down to sixty-five percent after hearing unbiased arguments for and against disclosure. *Id.* at 10–11.

158. *State Bar of Texas Board of Directors, Official Minutes*, ST. B. TEX. (Jan. 28–29, 2010), http://www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_and_Minutes&Template=/CM/ContentDisplay.cfm&ContentFileID=319. On the recommendation in question, thirty-nine directors voted against the recommendation and one voted for the recommendation. *Id.* If the Supreme Court of Texas determined that disclosure should be required, the Board of Directors unanimously approved (with one abstaining) recommending that the Supreme Court adopt an administrative rule (not a disciplinary rule) that requires each Texas lawyer to disclose the existence or non-existence of professional liability insurance on the State Bar of Texas website. *Id.* With the second recommendation, the Board opted for the approach that is considered more “lawyer-friendly” because the requirement is set forth in an administrative, court rule rather than a disciplinary rule. Consumer advocates also prefer disclosure directly to clients, rather than on a website. *See HALT Report*, *supra* note 102.

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

160. *Id.* at 2.

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

162. *Id.*

163. *Id.* at 3. Sixty-one persons testified at the hearings. *Id.* For links to audio recordings and hearing reports, see ST. B. TEX., *supra* note 145.

State Bar of Texas website.¹⁶⁴ The largest number of lawyers opposed the disclosure because there was no evidence of a problem.¹⁶⁵ Other common complaints were that disclosure would be misleading¹⁶⁶ and would increase malpractice suits.¹⁶⁷ Other concerns related to how a disclosure requirement would unfairly impact segments of the bar and stigmatize uninsured lawyers. A number of lawyers also referred to the costs of insurance.¹⁶⁸ Those few who supported adoption of a disclosure rule tended to make public protection arguments.¹⁶⁹

164. See ST. B. TEX., *supra* note 145. To categorize the positions, I largely relied on the arguments used by the researchers who conducted focus groups with non-lawyers in Texas. See Mignone, *supra* note 113, at 1083–87 (discussing the focus groups conducted for the State Bar of Texas). Using codes, I identified the up to two arguments made by each person.

165. As stated by a solo practitioner in the Public Hearing in San Antonio on October 14, 2009, “If it ain’t broke, don’t fix it.” *San Antonio—Oct. 14, 2009*, ST. B. TEX., http://www.texasbar.com/pliflashdrive/material/PLI_SanAntonio_Hearing_upload.mp3 (last visited Oct. 12, 2012).

166. A number of lawyers expressed the concern that disclosure would mislead clients. As stated by a family law practitioner in Houston, “These are claims-made policies, not occurrence policies like car insurance. If disclosure were required, the public would be confused and think, ‘If there’s a bad result, I can make a claim.’” *Houston—Oct. 16, 2009*, ST. B. TEX., http://www.texasbar.com/pliflashdrive/material/PLI_Houston_Hearing_upload.mp3 (last visited Oct. 12, 2012).

167. As stated in testimony at the Houston Hearing, “A disclosure requirement would open the floodgates to frivolous litigation.” *Id.* Those who claim that requiring insurance will “simply put a target on lawyers’ backs” may not fully appreciate the hurdles that plaintiffs must overcome in a legal malpractice case. Experienced lawyers who handle legal malpractice cases recognize the numerous challenges in winning a legal malpractice case, including expenses associated with retaining expert witnesses and establishing causation. These challenges include the “case within the case requirement” in cases involving civil litigation and the “exoneration requirement” in cases involving criminal defense work. For a discussion of the elements and burdens in legal malpractice cases, see SUSAN SAAB FORTNEY & VINCENT JOHNSON, *LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION* (2008). See also Benjamin H. Barton, *Do Judges Systematically Favor the Interest of the Legal Profession?*, 59 ALA. L. REV. 453, 491–502 (2008) (using a number of aspects of legal malpractice cases to show that lawyers “enjoy” several unique advantages when sued for legal malpractice and that it is much harder to prove legal malpractice cases compared to medical malpractice cases).

168. See, e.g., *Lubbock—Oct. 29, 2009*, ST. B. TEX., http://www.texasbar.com/pliflashdrive/material/PLI_Lubbock_Hearing_upload.mp3 (last visited Oct. 12, 2012). It is unclear whether those who mentioned “costs of insurance” knew the actual cost of insurance or if they think that any amount is unreasonable. As noted in the GOC report, a non-profit insurer in Texas offers special rates for new lawyers with first year policies costing \$500 per year for coverage of \$100,000 per claim and a \$300,000 limit for claims aggregated. GOC REPORT, *supra* note 147, at 5. After four years of practice, the premium goes up to \$1,750 per year. *Id.* Because numerous factors go into premium calculation for experienced attorneys, it is difficult to determine an average premium for experienced attorneys. The GOC Report noted that an

An examination of the written comments submitted by email, letters, and blog postings reveals a similar pattern. Some opponents of disclosure challenged the public protection justification for requiring disclosure, asserting that insurance is for the benefit of the insured.¹⁷⁰ As stated in the letter from the Chair of the Law Practice Management Committee, “Mandatory disclosure inverts the intention and beneficiary of coverage Legal malpractice insurance is not for the protection of clients or the public but rather the protection of the insured”¹⁷¹

In stark contrast to the vast majority of submissions, three former presidents of the State Bar of Texas wrote letters supporting the adoption of a new rule.¹⁷² David J. Beck, former bar president and chair of the State Bar of Texas Task Force on Insurance Disclosure, explained his support:

Recognizing that there are persuasive arguments on both sides of the issue, the principal reason I decided in favor of disclosure is that the issue squarely pits the interests of lawyers on one side against the interests of the public on the other. I firmly believe that we

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

169. One lawyer who handles legal malpractice cases testified in support of a mandatory disclosure rule explaining that he approaches the issue “from the perspective of what’s best for the client.” *Dallas—Oct. 28, 2009*, ST. B. TEX., http://www.texasbar.com/pliflashdrive/material/PLI_Dallas_Hearing_upload.mp3 (last visited Oct. 12, 2012).

170. Although it is true that liability policies protect the insured, they only cover claims for damages brought by third parties. *See Third-Party Insurance Definition*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/third-party-insurance.html#ixzz1y8Bk5vcp> (“Liability insurance purchased by an insured (the first party) from an insurer (the second party) for protection against the claims of another (the third) party. The first party is responsible for its own damages or losses whether caused by itself or a third party.”).

171. Letter from Philip Farlow, Chair of the Law Practice Mgmt. Comm., to Gib Walton, Attorney, Vinson & Elkins LLP (June 16, 2008), *available at* http://www.texasbar.com/pliflashdrive/material/Sections_CommitteesResponses.pdf. The Chair-Elect of the Council of the General Practice, Solo, and Small Firm Section warned, “Once the principle that malpractice insurance is for the benefit of the client or ‘the public’ and not the insured the next logical implication of that principle is that malpractice insurance should be mandatory for protection of the client.” *See* Letter from Wendy Buskop, Chair-Elect, Council of the Gen. Practice, Solo, and Small Firm Section to State Bar of Texas (n.d.), *available at* http://www.texasbar.com/pliflashdrive/material/sections_committeesResponses.pdf.

172. *See* Letter from Broadus A. Spivey, Attorney, to Roland Johnson, President, State Bar of Texas (Nov. 20, 2009) (on file with author); Letter From W. Frank Newton to Roland Johnson, President, State Bar of Texas (Dec. 9, 2009) (on file with author). Mr. Spivey represents plaintiffs in legal malpractice cases and Mr. Newton manages a non-profit foundation and previously served as a law school dean.

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

Another Texas lawyer prefaced his comments by noting that he considers law to be a “profession and not merely a business.”¹⁷⁴ The lawyer described the tension between lawyer and client interests as follows: “I have heard the arguments expressed by the opponents to disclosure. I truly feel they simply beg the question and unfortunately place the attorneys [sic] well-being over that of the clients. In my mind, that is contrary to our basic obligations.”¹⁷⁵

The opinions expressed in the Texas debate over a mandatory disclosure rule reflect lawyers’ attitudes about disclosure and financial accountability for misdeeds. Many lawyers espouse the rhetoric of professionalism while placing their own financial interests over those of clients and injured persons. Evidently, they do not agree that financial accountability is an important aspect of practicing law as a profession.

CONCLUSION: EMBRACING ACCOUNTABILITY AND DISTINGUISHING LAW PRACTICE AS A PROFESSION

In discussing limited liability and insurance initiatives, this Article focuses on the dynamics involved when lawyers have the opportunity to make choices related to public protection. Reviewing the course of

173. See Letter from David J. Beck, Attorney, Beck Redden & Secret, to Roland K. Johnson, President, State Bar of Texas (Dec. 16, 2009) (on file with author). A director of Public Citizen made a similar observation related to lawyers’ special position, in stating:

Having a law license is an important right. It also is a privilege granted by the State. Lawyers should be honest and forthright in dealings with clients. An uninsured lawyer who injures a client is likely to leave the client without any practical remedy. Texas law requires drivers to have insurance, but does not require lawyers to have insurance—even though lawyers have great power and great potential to injure clients financially. This proposed rule would cost lawyers nothing. It does not require that they carry insurance. It simply requires honesty and forthright disclosure of insurance status. Texas consumers are entitled to at least that much information.

See Letter from Tom “Smitty” Smith, Dir., Pub. Citizen, Texas Office, to Roland K. Johnson, President, State Bar of Texas (Dec. 30, 2009) (on file with author) [hereinafter Public Citizen Letter].

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

175. *Id.*

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

The birth and growth of the LLP form illustrates that no organized group played a role in articulating the interests and concerns of consumers of legal services and other persons injured by lawyer malpractice. The LLP legislation apparently swept through the United States under the radar of consumer advocacy groups. Because many states do not restrict the LLP structure to professionals, allowing a variety of enterprises to organize as LLPs benefitted experienced consumers of legal services, such as business owners.¹⁷⁷ Moreover, sophisticated users of legal services, such as corporations, did not need to rely on unlimited liability of general partnerships when retaining lawyers. In engaging counsel, such consumers could protect their own interests by requiring their lawyers to maintain malpractice insurance as a condition of employment.¹⁷⁸ Therefore, the persons left without protection were inexperienced users of legal services who may have assumed that lawyers carry insurance.¹⁷⁹ Such consumers likely do not know the effect and consequences of their lawyers practicing in LLPs.¹⁸⁰

Regardless of legislative action, state supreme courts could have taken steps to prohibit or regulate lawyers practicing in LLPs. Using their inherent authority, the courts could have refused to recognize the LLP shield or required additional safeguards as a condition of

176. In a survey conducted by the Utah Bar Association, thirty-two percent of the attorney-respondents agreed with the statement, "The public believes that attorneys put their own interests ahead of their clients," and nine percent "strongly agreed" with the statement. Utah State Bar, 2001 SURVEY OF MEMBERS, Questionnaire 2, Question 51, *available at* http://www.utahbar.org/documents/2011_SurveyOfAttorneys.pdf.

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

178. Corporations have increasingly dictated the terms of engagement in Outside Counsel (OC) Guidelines. These guidelines cover a range of concerns, including insurance, billing, and staffing. For a fascinating analysis of OC Guidelines' influence on the conduct of lawyers, see generally Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 FORDHAM L. REV. 2577 (2012).

179. In a November 2009 public opinion survey conducted for the State Bar of Texas, 87.1% of respondents indicated that they did not ask their attorneys whether the attorneys carried professional liability insurance. See ST. B. TEX., *supra* note 105. Approximately 70% of the 500 respondents indicated that they did not know if their attorneys carried professional liability insurance. *Id.* at Question 5.

180. According to a survey I conducted of members of the Austin Chamber of Commerce in June 1996, 91.27% of the respondents did not understand the effect of law firms practicing as LLPs or LLCs. See Fortney, *supra* note 8, at 752 n.158.

allowing firm principals to limit their vicarious liability. The majority of high courts did not use their authority to regulate law practice, but simply allowed firm partners to limit their liability and practice as if they were members of business organizations, rather than professional organizations with special responsibilities.¹⁸¹

Various considerations may explain the failure of courts to do more with respect to client protection. First, the vast majority of judges practiced law before assuming their judicial positions. These judges may have empathized with firm principals' desire to limit their liability.¹⁸² Second, in states with judicial elections, judges rely heavily on financial and other support from the practicing bar.¹⁸³ Third, individual judges may not have focused on the changing economics of law firms and the consequences of eliminating vicarious liability for thinly capitalized firms. Finally, on a more subconscious level, judges may make decisions that favor lawyer interests over public interests because judges respond to the world as lawyers.¹⁸⁴

A small number of state supreme courts carefully considered the consequences of lawyers practicing in LLPs. For example, the Illinois Supreme Court took steps to provide some degree of public protection by imposing adequate insurance requirements for limited liability firms, determined on a per-lawyer basis.¹⁸⁵ By doing so, the

181. As noted by Professor Wolfram, most courts have not been involved in the LLP adoption process in any way and "[i]n only a very few states have the courts played a role in implementing their local legislation that is more consistent with inherent powers claims." Wolfram, *supra* note 8, at 361–62.

182. See Barton, *supra* note 167, at 456 (identifying a number of "conscious factors" that might influence judges to favor the interests of the legal profession: "[the judges] are all lawyers, many of their friends and colleagues are lawyers, and (whether they are elected or appointed) they likely have their job in large part because of the efforts of other lawyers").

183. For a critical analysis of judicial selection and cause for concern about impartiality, see *Judicial Selection in the States, How It Works/Why It Matters*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (2008), http://iaals.du.edu/images/wygwam/documents/publications/Judicial_Selection_States2008.pdf.

"In the last four election cycles, candidates for state high courts have raised nearly double the amount raised by candidates in the 1990s." *Id.* at 4.

184. See Barton, *supra* note 167, at 456 (using the theory of "new institutionalism" to explain how judges share with lawyers a set of norms, thought patterns, and behaviors and that these "deeply ingrained biases, thought-processes, and views of the world . . . control judicial thinking and outcomes" in a way that is favorable to the legal profession).

185. Illinois was the last state to adopt a rule allowing lawyers to practice in limited liability firms. The Illinois Supreme Court adopted this rule after a lengthy debate and evaluation process in which interested groups submitted position papers. See *supra* notes 54–56 and accompanying text.

Illinois court conditioned the elimination of vicarious liability of firm partners on their firms carrying insurance at higher levels than the \$100,000-per-firm amount required in the first LLP legislation.¹⁸⁶ In this sense, insurance became a trade-off for firm principals who demonstrated their financial responsibility in the form of insurance or other assets.

Other than Illinois and a few other states that imposed meaningful insurance requirements, client interests appeared to receive little attention. This fact is unsurprising for virtually no critics successfully championed the concerns of consumers of legal services and persons injured by lawyers' misdeeds.

Consumers should not look to the ABA to protect their interests. The ABA functions more as a trade group that represents lawyers' interests than as a professional group committed to client protection. Although the ABA states that its mission is "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession," the ABA's goals and objectives do not describe consumer protection concerns. Most revealing is the first goal of the ABA, which reads "serve our members." When the ABA mission statement was proposed in 2008, former ABA president Michael Greco asserted that the mission statement should put the "rule of law" first.¹⁸⁷ In describing his opposition to the proposed amendment, he stated:

The issue is whether the American Bar Association from this day forward will define itself as a trade association or as a noble profession—whether it's changing its highest priority from serving the people we are bound to serve or serving our own interests The proposed statement will tell the world that the goals lead off with serving ourselves.¹⁸⁸

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

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

187. See *House of Delegates Passionately Debates ABA's Goals*, A.B.A. J. (Aug. 12, 2008, 9:00 AM), http://www.abajournal.com/news/article/house_of_delegates_passionately_debates_abas_goals/.

188. *Id.*

189. See *id.* ("Our members are the soul of this association. Our members are those who we are bound to serve." (quoting the incoming chair of the ABA's membership committee defending the proposed mission) (internal quotation marks omitted)).

Within the ABA there are pockets of consumer-minded individuals, such as the ABA Standing Committee on Client Protection.¹⁹⁰ These groups have supported initiatives such as the ABA Model Rule that requires lawyers to disclose their lack of insurance.¹⁹¹ Despite the diligent efforts of these groups, strong sectors within the bar convinced a number of state supreme courts to not adopt a mandatory disclosure rule.¹⁹² Evidently, decision-makers in states that declined to pass mandatory disclosure rules were not persuaded that such a rule was necessary to protect consumers or those lawyers who act responsibly in carrying insurance.¹⁹³

While courts will continue to assume primary responsibility for lawyer regulation, lawyers may face legislative action.¹⁹⁴ For example, proponents of mandatory disclosure have threatened to resurrect a bill proposed by a Texas legislator.¹⁹⁵ Now that the Supreme Court of Texas has declined to adopt a disclosure rule, the proposed legislation may garner more support from those who believe that lawyers elevated their own interests above the public interest.¹⁹⁶

190. For a description of the charge of the ABA Standing Committee on Client Protection, see *Who We Are*, STANDING COMMITTEES: CLIENT PROTECTION, <http://apps.americanbar.org/dch/committee.cfm?com=SC105020&new> (last visited Aug. 24, 2012).

191. In 2004, the ABA Standing Committee recommended the Model Rule on Insurance Disclosure that the ABA House of Delegates approved by a slim margin. See Mills & Petrova, *supra* note 106, at 1036–37 (chronicling the Committee's effort).

192. For example, in Texas, state bar sections, committees, and local bar associations overwhelmingly opposed adoption of a mandatory disclosure rule. According to its Executive Summary, the State Bar of Texas received eight responses "from State Bar Sections and Committees with six [against a mandatory disclosure rule] and two neutral. . . . Likewise, six responses were received from local bar associations with five against (in the form of resolutions and polls) and one neutral (an informational newsletter article)." ST. B. TEX., *supra* note 149.

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

194. James Fischer, *External Control Over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 108 (2006) (suggesting that there may be increased flashpoints between legislators and the bar over lawyers' professional and public duties).

195. See, e.g., Public Citizen Letter, *supra* note 173 (warning that the Texas legislature was likely to address the insurance disclosure issue if the Supreme Court of Texas did not do so).

196. See Herring & Miller, *supra* note 149, at 822 (noting that the previously proposed legislation did not move forward because it appeared as if the court would mandate disclosure). In warning that the "days of self-regulation may be numbered," Professor Fischer explains that self-regulation may become a "victim of lawyer success or, as some critics would have it, lawyer excess." Fischer, *supra* note 194, at 109.

In the long run, the support for various consumer protection initiatives will increase if more lawyers view financial responsibility as a defining feature of professional practice. Currently, there appears to be no consensus on the ethical and professional dimensions of lawyer accountability. For example, one distinguished bar leader opposed the adoption of a disciplinary rule that required lawyers to disclose their insurance status, asserting that neither the purchase of insurance nor the failure to purchase insurance implicates “ethical tenets.”¹⁹⁷ Beyond the ethics rules that represent minimum standards to avoid professional discipline, professionalism creeds often refer generally to civility and public service, with limited attention to client protection concerns.¹⁹⁸

Law school educators and bar leaders should challenge lawyers to examine the role that client protection plays in professional practice. Starting in law school, professors should devote more attention to legal malpractice and the importance of lawyers being accountable for their acts and omissions.¹⁹⁹ In regulating lawyers, courts should hold them to strict accountability for the performance and observance of their professional duties.²⁰⁰ Finally, those who espouse the status of law as a profession should recognize financial responsibility as a professional virtue and promote it as such.²⁰¹

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

198. See, e.g., The Supreme Court of Ohio Commission on Professionalism, *Professionalism CLE Guidelines*, adopted June 14, 2002, <http://www.supremecourt.ohio.gov/Boards/CP/guidelines.pdf> (surveying various definitions of professionalism).

199. See Ramos, *supra* note 78, at 2618–23 (suggesting that the failure to cover legal malpractice in law school amounts to a form of malpractice by law school professors). At the Fordham-Touro Symposium, *The Law: Business or Profession?*, I circulated a short questionnaire asking professors about coverage in their professional responsibility classes. In the small sample, only two professors answered the following question in the affirmative, “In your classes, do you discuss whether lawyers have a professional responsibility to cover damages arising from their acts or omissions?” Nine reported that they did not cover the topic, with one professor noting that s/he does not “directly” cover the topic and that it “seems pretty obvious.” Another indicated that s/he “sometimes” discusses the issues. See Survey from Fordham-Touro Symposium, *The Law: Business or Profession?* (Apr. 23–24, 2012) (on file with author).

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

201. For an interdisciplinary analysis of the common characteristics of professionals, see Sande L. Buhai, *Profession: A Definition*, 40 FORDHAM URB. L.J. 241 (2012); Debra Lyn Bassett, *Redefining the “Public” Profession*, 36 RUTGERS L.J. 721, 771 (2005).

If we fail to protect those who rely on us, we fail to fulfill our obligations as a protected profession. As former ABA president Michael Greco suggested, the choice is ours.²⁰² Will lawyers function as a trade group protecting their own personal interests over public interests, or will lawyers embrace accountability as a defining attribute of law as a profession? To answer this question, we need not take a position that law is a business or profession.²⁰³ Rather, law is a business of relationships in which lawyers' conduct should be guided by professional ideals and values. What distinguishes the practice of law from other business pursuits is how we treat, and remain accountable, to those who trust us.

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

203. See Christine Parker, *Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible*, 23 U. QUEENSLAND L.J. 347, 380 (2004) (suggesting that there is no justification for drawing stark distinctions between law as a business and profession).

