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Law as a Profession: Examining the Role of Accountability

by

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In asserting that law is a profession and not a business, lawyers often refer to the role that self-governance plays in the legal profession. Julius Henry Cohen captured this sentiment in quoting 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

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 position between 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,

¹ JULIUS HENRY COHEN, THE LAW, BUSINESS OR PROFESSION? (referring to the “germ of the American guild-idea).
² Id. at 22. Cohen asserts that you destroy the basis of professional discipline if you make the law a business. Id. at 22-23.
³ See generally, id. Chapter X (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 they are less likely to exercise judgment in hiring lawyers. Id.
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, I will consider select developments that required lawyers, the organized bar, legislators, and jurists to balance lawyer self-interest and public protection. Specifically, the article will consider lawyers’ collective campaign to limit their vicarious liability and developments related to lawyers carrying to legal malpractice insurance. A review 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 due to 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.

Part I -- The Limited Liability Movement – Where Were the Lawyers (concerned about consumer protection)?

\(^5\) Id. at 288. 
\(^6\) See, e.g. id.
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.\(^7\) A review of events and available information reveals that advocates’ desire to obtain a limited liability shield prevailed and public protection was largely relegated to a secondary concern. 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. 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.\(^8\) 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.

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

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\(^7\) See Robert W. Hillman, *Organizational Choices of Professional Service Firms: An Empirical Study*, 58 Bus. Law. 1387, 1391-96 (2006) (tracing the development of the professional corporation, 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 genesis and effect of the LLP 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.

\(^8\) In 1997 when I wrote my first article on limited liability law firms, only a few scholars and commentators questioned the wisdom of allowing firm partners to limit their liability. See Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences—the Traps of Limited Liability Law Firms*, 54 Wash. & Lee. L. Rev. 717, 731-756 (1997) (analyzing the internal and external consequences of converting to limited liability law firms).
Insurance Corporation and the Federal Saving and Loan Insurance Corporation. 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. 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. In various cases, the amount of damages that the government alleged far exceeded the amount of legal malpractice insurance available to the defendant firms.

To many, the government appeared to have both an unlimited war chest and zeal to recover as much as possible, even if it meant pursuing the personal assets of partners not directly involved in this representation of the failed financial institutions. This was dramatically played out in litigation against Jenkens & Gilchrest (J & G), the now defunct Dallas-based law firm. In a meeting with J & G lawyers and their defense counsel, government lawyers

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9 For insights on the rise 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).

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

11 See Hamilton supra note 9, 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”).
made their intentions clear when they used an overhead projector to show their analysis of the non-exempt net worth of J & G partners.\footnote{Id. at 1071.}

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.\footnote{Id. (referring to the thousands of lawyers who watched the litigation unfold with the “but for the grace of God go I” reaction).} 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.

In Lubbock, Texas, the city where the government had sued J & G in federal court, partners in Crenshaw, Dupree and Milam (CDM), a 21-person law firm first proposed the limited liability partnership concept. Reportedly in a meeting, James H. Milam, a senior lawyer in the firm, questioned why general partners must be held jointly and severally liable.\footnote{Id.} 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.\footnote{Id.} 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.\footnote{ALAN. R. BROMBERG AND LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT (2001) 2011 ED. at 3.} The legislation eliminated vicarious liability for torts claims by adding the following language to the Texas version of the Uniform Partnership Act:

\begin{verbatim}
12 Id. at 1071.
13 Id. (referring to the thousands of lawyers who watched the litigation unfold with the “but for the grace of God go I” reaction).
14 Id.
15 Id.
\end{verbatim}
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 of the partnership by another partner, employee, or representation of the
partnership.\textsuperscript{17}

The bill that created a “limited liability partnership” structure passed the Texas Senate with
little attention or comment.\textsuperscript{18}

The initial reception in the Texas House of Representatives was far more negative.\textsuperscript{19} In the
House, critics questioned the following features of the proposed legislation:

1. Limiting coverage to professionals, particularly lawyers,
2. Relieving partners from responsibility for misconduct of persons the partners directed
   or supervised,
3. Failing to communicate to consumers that the professionals’ liability was limited in
   complete reversal to traditional partnership law, and
4. Failing to provide any substitute source of recovery for injured persons.\textsuperscript{20}

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

\textsuperscript{17} Id. at 3.
\textsuperscript{18} Id. at 4.
\textsuperscript{19} Hamilton \textit{supra} note 9, at 1073 (identifying some of the criticism).
\textsuperscript{20} BROMBERG & RIBSTEIN \textit{supra} note 16, at 4.
concept at the House hearing, later agreed to draft revisions to the bill to make it more acceptable.\textsuperscript{21} 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 persons whose work the partners supervise or direct,
3. Requiring annual registration of the firm with the state and the inclusion of L.L.P. or “limited liability partnership” in the firm name, and
4. Requiring the L.L.P. to carry at least $100,000 in insurance coverage.\textsuperscript{22}

With these changes, the revised bill was “quietly attached” to an omnibus bill proposed by the Texas Business Law Foundation, a not-for-profit corporation organized by a group of corporate lawyers from major Texas law firms.\textsuperscript{23}

With the adoption 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 wild fire.\textsuperscript{24} 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.\textsuperscript{25}

\begin{flushleft}
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Hamilton supra note 9, at 1074 (noting that Democratic Governor Ann Richards allowed the bill to become effective without her signature).
\textsuperscript{24} “In 1996, 13 states adopted LLP provisions . . . [and] about the same number had adopted LLP during only the first half of 1995.” Bromberg & Ribstein supra note 16, at 12. Around the world, various jurisdictions including the United Kingdom and Canadian provinces recognize the LLP form. Id. at 17.
\textsuperscript{25} “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.” Elizabeth S. Miller, the Perils and Pitfalls of Practicing Law in a Texas Limited Liability Partnership, 43 Tex. Tech. L. Rev. 563, 564 (2011).
\end{flushleft}
As the limited liability structure stretched nationwide, the protection provided by legislation also expanded. As noted above, the first proposed legislation initially only protected professionals. 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.\textsuperscript{26} In addition, the statute did not protect partners if the malpractice was committed by another firm partner or representative working under the supervision or direction of the first partner.\textsuperscript{27} 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.”\textsuperscript{28} Subsequently, other states eliminated the provisions that preserved vicarious liability for acts and omissions of supervised persons.\textsuperscript{29} By 2008, 80% of the states had adopted “full shield” statutes, providing a liability shield for all debts and obligations of the partnership.\textsuperscript{30}

Bar association groups eagerly supported LLP legislation that eliminated “even the moderate restrictions on limited liability.”\textsuperscript{31} Most notably, the American Bar Association (ABA),

\textsuperscript{26} *Id.* at 564-65 (describing the evolution of the Texas statute that originally shielded partners only from liability “arising out of the errors, omissions, negligence, incompetence, or malfeasance of other partners or representatives of the partnership”). Later in 1997, the LLP provisions in the Texas Revised Partnership Act were amended to provide protection from all debts and obligations of the partnership . . .” *Id.* at 565. Most statutes now eliminate partners’ vicarious liability for all types of classes of claims. Bromberg & Ribstein *supra* note 16, at 320.

\textsuperscript{27} For a discussion of the unresolved issues related to supervisory liability, see BROMBERG & RIBSTEIN *supra* note 16, at 126-28.

\textsuperscript{28} *Id.* at 10-11.

\textsuperscript{29} For a table outlining the different approaches to supervisory liability, see *id.* at 165-169.

\textsuperscript{30} *Id.* at 15.

\textsuperscript{31} *Id.*
Business Law Section, Committee on Partnership and Unincorporated Business Organizations Working Group on Registered Limited Liability Partnerships prepared prototype provisions for inclusion in the Revised Uniform Partnership Act. These provisions limited vicarious liability for all kinds of debts and extended protection to persons other than practicing professionals.

At the American Law Institute (ALI), an early draft of the Restatement of Law Governing Lawyers proposed a section stating that lawyers would be vicariously liable for the wrongful acts of firm principals and employees. In 1997, ALI members rejected this approach, adopting a version that recognized lawyers’ ability to limit their liability.

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

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32 Id. at 14.
33 Id.
34 Id. at 258-59.
35 For a critique of the ABA Ethics Opinion, see Susan Saab Fortney, Professional Responsibility and Liability Issues Related to Limited Liability Partnerships, 39 SOUTH TEXAS LAW REV. 339, 405-422 (1997)
36 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. Wisconsin Supreme Court Rules of Professional Conduct, Rule 20:5:7 (2012). The rule imposes other conditions, including that a limited liability law firm “include a written designation of the limited liability structure as part of the name.” Id. In addition, the firm
While lawyers and bar-related groups were pushing 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.” After some changes were made, the legislator withdrew his opposition. 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. 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.

While professionals and legislatures around the country jumped on the LLP bandwagon, state supreme courts could have used their inherent authority to prohibit lawyers from practicing in LLPs. The vast majority acceded to the popular will of lawyers, doing little to stem the tide. By contrast to many, the Illinois Supreme Court resisted the pressure to simply bless allowing lawyers to practice in limited liability firms. 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. Unlike the first Texas legislation

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37 Hamilton supra note 9, 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.


39 Until the time that Illinois adopted the rule, Illinois was the only state that imposed unlimited vicarious liability on principals in law firms. Illinois Rule 722 on Limited Liability Law Practice now allows lawyers to limit
that 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. 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. 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. Had a public watchdog or consumer advocate group been more involved in monitoring the limited liability movement, query whether decision-makers would have imposed adequate insurance requirements as the cost of doing business in a limited liability firm.

**Part II -- Mandatory Legal Malpractice Insurance – How the U.S. Differs from Other Countries (in not protecting consumers)?**

their liability under the applicable state statutes provided that the entity maintains adequate insurance or proof of financial responsibility as defined in the Rule. Illinois Supreme Court Rule 722(b)(1) (2011).

40 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 a or registered in any court of competent jurisdiction in Illinois, arising out of wrongful conduct.” Illinois Rule 722(b) (3) (2011).

41 See Petition of the Chicago Bar Association and the Illinois State Bar Association, filed in the Supreme Court of Illinois, in In Re Proposed Rules Regulating Vicarious Liability of Lawyers Practicing in Limited Liability Entities, filed March 27, 2002, at 1 (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”).
As the limited liability form spread to other countries, insurance need not be used as a quid pro quo for eliminating vicarious liability of firm principals. Around the world, injured persons (as well as lawyers) were already protected because jurisdictions, including most common law countries, require professional indemnity insurance for practicing lawyers. 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. 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. The SRA 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 claims including certain related defense costs, and regulatory awards 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.

Regulators from other countries share this perspective in asserting that PII protects consumers, as well as lawyers. Mandatory insurance protects injured persons who otherwise

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42 Jennifer Ip & Nora Rock, Mandatory professional indemnity insurance & a mandatory insurer: A global perspective, LawPRO Magazine, Vol. 10, Issue 2, at 10, 11 (noting that insurance is made mandatory by law, by the law society or by bar association regulation).

43 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 http://practicepro.ca/LawPROmag/ProfessionalIndemnity_AroundWorld.pdf

would be facing uncollectable losses because lawyers “go bare,” practicing with no insurance or inadequate limits of liability on their policies.\textsuperscript{45} Requiring minimum limits and types of insurance protects lawyers and clients from gaps in coverage.\textsuperscript{46} 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.\textsuperscript{47} Finally, mandatory insurance may improve the accessibility and affordability of insurance.\textsuperscript{48}

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. 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 U.S., legal malpractice insurance first gained prominence in the 1960s when property and casualty insurers offered legal malpractice insurance as an ancillary service.\textsuperscript{49} Lawyers became keenly interested in obtaining insurance in the 1970s when legal malpractice claims increased substantially.\textsuperscript{50} Many insurers responded to these claims by changing their

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\textsuperscript{45} Ip & Rock supra note 42, at 11.  \\
\textsuperscript{46} Id. (explaining that lawyers who obtain insurance on their own initiative expose themselves and their clients to “potentially dangerous gaps in coverage”).  \\
\textsuperscript{47} Id. at 12 (referring to this as a “free-rider” problem that Scandinavian regulators cited as a reasons for requiring that all members obtain insurance).  \\
\textsuperscript{48} See Bennett J. Wasserman & Krishna J. Shah, \textit{Mandatory Legal Malpractice Insurance: The Time Has Come}, NEW JERSEY 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.  \\
\textsuperscript{49} George M. Cohen, \textit{Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions}, 4 CONN. INS. L. J. 305, 307 (1997-98) See also Fredric L. Goldfein, \textit{Legal Malpractice Insurance}, 61 TEMPLE L. REV. 1285 (1988) (noting that it was not until the 1960s that insurers realized that they could make a profit).  \\
\textsuperscript{50} Cohen supra note 49, at 308 (tracing developments that contributed to the expansion of lawyers’ liability exposure)\
\end{flushright}
approaches to underwriting and by sharply raising premiums.\textsuperscript{51} Other insurance companies simply discontinued writing legal malpractice insurance in certain states.\textsuperscript{52} As a result of these changes, the cost of insurance increased, while the amount of coverage decreased.

By the late 1970s the market in various states became very restrictive, making legal malpractice insurance cost prohibitive for many and unavailable to others.\textsuperscript{53} Lawyer organizations around the U.S. evaluated options to deal with the tough and expensive insurance market. In some states, lawyers established bar-related mutual companies, owned by lawyers, to provide affordable insurance.\textsuperscript{54} In other states, including California and Washington, lawyers explored the possibility of lowering insurance costs by requiring all lawyers to purchase insurance.\textsuperscript{55} Although the California governor refused to sign proposed legislation requiring lawyers to carry insurance, the state of Oregon “borrowed the legislation and passed it as its own.”\textsuperscript{56} On July 1, 1978, Oregon established a mandatory insurance program in an attempt to deal with the insurance “crisis” where many lawyers were “simply

\begin{itemize}
  \item 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. \textit{Id.}
  \item “In some jurisdictions, such as California, insurers started dropping out of the legal malpractice insurance market and focusing on more profitable and stable areas.” \textit{Id.} (citing \textit{ISSUES IN FORMING A BAR-RELATED PROFESSIONAL LIABILITY INSURANCE COMPANY \textsuperscript{4} (ABA Standing Comm. On Lawyers' Professional Liability ed. 1989)}
  \item Goldfein \textit{supra} note 49, at 1285 (citing a magazine published for bar leaders).
  \item California and North Carolina organized the first bar-related insurance companies. Cohen \textit{supra} note 49 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 \url{http://www.nabrico.org/}. 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.” \textit{Id.}
  \item “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 \textit{supra} note 49, at 1296.
\end{itemize}
unable to obtain insurance at a reasonable price.”

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).

Interestingly, the Oregon Bar Association originally proposed the mandatory insurance program with the hope that it would “provide lower rates, make coverage available, and protect the public from harm by uninsured lawyers.”

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

In arguing for mandatory legal malpractice insurance, commentators often point to the success of the Oregon PDF program. Notwithstanding, the Oregon experience in making


\[\text{58 By legislative enactment, the board of governors for the unified state bar association has the authority to “require all active members of the state bar engaged the private practice of law who principal offices are in Oregon to carry professional liability insurance. Oregon Revised Statutes §752.035 (2011). Currently, the professional liability fund commission requires that qualified members of the profession carry professional liability insurance offered by the fund with primary liability limits of at least $200,000. Oregon Revised Statues §752.035 (2011). Goldfein supra note 49, at 1296.}\]


\[\text{61 See id. at 2610-2612 (analyzing the pricing structure). Although initially met by heavy criticism, past survey results suggest that members of the Oregon Bar are satisfied with services provided. Nicholas A. Marsh, Note, “Bonded & Insured? The Future of Mandatory Insurance Coverage and Disclosure Rules for Kentucky Attorneys, 92 Ky. L. J. 793, 800 (2003-2004) (citing the Oregon PLF website that reported on survey results indicating that 99% of the respondents indicated that they were “satisfied” and 87% reported that they were “very satisfied” with services provided by the PLF).}\]

\[\text{62 E.g. id at 2612 (asserting that “Oregon’s PDF has been a success and model for any insurance carrier.”), Cunitz, supra note 60, at 651-655. In advocating that every state should follow Oregon’s example, the vice-}\]
insurance and loss prevention services accessible to all lawyers in private practice, organized bar groups and other interested bodies have staunchly opposed mandatory insurance. As noted by Professor Leslie Levin, “bar resistance to mandatory insurance continues unabated in the U.S.,” while Australia, Canada, and the United Kingdom have long required lawyers to carry malpractice insurance. Some outspoken opponents of mandatory insurance support requiring lawyers to disclose the fact that they do not carry malpractice insurance. 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.

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

Lawyers in other states do not like it. The ABA is against it. Insurance carriers oppose it. Many attorneys would prefer not to pay several thousand dollars a year in premiums, and believe that the best insurance is to be “bare”; it is cheaper and most plaintiffs’ 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.


Harry Schneider, Jr., *Mandatory Malpractice Insurance, No: An invitation to Frivolous Suits*, A.B.A. J., November, 1993, at 45 (suggesting that insurance disclosure is “less divisive and less expensive” way of accomplishing the goal of public protection).
Part 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.67 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 liability insurance.68 Bar leaders representing large bar associations, as well as small ones, view mandatory disclosure of insurance status as a starting place on the road to improving client protection.69

In the U.S. 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.70 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.71 That same year, South Dakota used a similar approach in modifying the state professional conduct rules to

67 See, e.g. Robert L. Johnston & Kathryn L. Simpson, O Brothers, O Sisters, Art Thou Insured? 24 PA. LAW. 28, 29 (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).
68 For a discussion of insurance “status disclosure” as a 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, Current Developments 2005-2006, Watching the Client’s Back: A Defense of Mandatory Insurance Disclosure Laws, 19 GEORGETOWN J. LEGAL ETHICS 974-75 (2006).
69 Compare James E. Towery, The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance, PROF. LAW., Winter, 2003, at 22 (former president of the State Bar of California 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, VERMONT B. J., Summer, 2006, at 5 (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).
70 James E. Towery, Should Disclosure of Malpractice Insurance be Mandatory, PRO, GP SOLO, April/May, 2003, at 36. 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. at 38. This provision was later “sunsetted” and not reenacted. Id.
require insurance disclosure to clients and potential clients in communications with them.\textsuperscript{72}

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.\textsuperscript{73}

As 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).\textsuperscript{74} 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.\textsuperscript{75} 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

\textsuperscript{72} 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. \textit{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. \textit{Id.}

\textsuperscript{73} Towery \textit{supra} note 70, at 38. In a reported case, the Supreme Court of Ohio suspended a lawyer from the practice of law for 24 month for violations of the Ohio Professional Conduct Rules, including the rule that required the lawyer to inform a client, in a writing signed by the client, if the lawyer does not maintain professional liability insurance. Cincinnati Bar Association v. Trainor, 129 Ohio St. 3d 100, 950 N.E. 2d 524, 526 (2011).


\textsuperscript{75} ABA Standing Committee on Client Protection, ABA Model Court Rule on Disclosure (Aug. 2004), at \url{http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Model_Rule_InsuranceDisclosure.authcheckdam.pdf} [hereinafter \textit{ABA Model Court Rule}].
Although the ABA Model Court Rule was “lawyer friendly,” it only passed the House of Delegates by a narrow 11-vote margin.\(^77\)

As of August 9, 2011, eighteen states have adopted a mandatory disclosure rule that follows the ABA Model Court Rule approach in requiring disclosure on lawyers’ annual registration statements, rather than disclosure directly to clients and prospective clients.\(^78\)

Another seven states require disclosure directly to clients.\(^79\) 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.\(^80\)

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.\(^81\) North Carolina also joined the states that do not require disclosure. As of January 1, 2010, North Carolina

\(76\) Watters supra note 71, 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 75.

\(77\) RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE (2012 ed.) §38.1 (noting that the ABA rule focuses on the “fact and maintenance of insurance” rather than the amount of insurance).

\(78\) ABA Standing Committee on Client Protection, State Implementation of ABA Model Court Rule on Insurance Disclosure, at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrid_080911.authcheckdam.pdf [hereinafter State Implementation Chart]. States vary on public access to the information that lawyers disclose on their registration statements. Some make information available on the state website, others on request, and others do not allow public access to information. Watters supra note 71, at 256.

\(79\) The following states require disclosure directly to clients: Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania, and South Dakota. See State Implementation Chart supra note 78.

\(80\) HALT Status Update: Does Your State Require Lawyers to Make Their Insurance Status Known, at http://www.halt.org/reform_projects/lawyer_accountability/pdf/Malpractice_insurance_disclosure_091505.pdf. 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.

\(81\) The following states have rejected a disclosure rule: Arkansas, Connecticut, Florida, Kentucky, and Texas. State Implementation Rule supra note 78.
eliminated the requirement for lawyers to inform the state bar whether they maintain legal malpractice insurance. 82

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 review 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 lawyers to disclosure 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 position of lawyers and their client. 83 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 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

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82 The North Carolina State Bar FAQs, at http://www.ncbar.gov/faq/f_faq.asp (noting that clients must check with their lawyers if the clients want to obtain information on the lawyer’s legal malpractice insurance coverage).

carry professional liability insurance.⁸⁴ Lay consumers may assume that lawyers are required to carry insurance.⁸⁵

To address the asymmetry and lack of information, proponents maintain that states should require disclosure when lawyers do not carry professional liability insurance. 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 State Bar of California 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.⁸⁶

Unless consumers possess sufficient information on a lawyer’s insurance status, they cannot make an “efficient risk assessment” as to whether they wish to hire the lawyer.⁸⁷ To illustrate this point, consider the example of a claimant in a large personal injury case where

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⁸⁴ See Fortney supra note 8, at 752, n. 158 (referring to the results of a survey of members of the Austin, Texas Chamber of Commerce in which 73% of the respondents indicated that they did not know if lawyers were required to carry legal malpractice insurance). The members of a Chamber of Commerce presumably understand business structures and insurance better than members of the general public. Id.


⁸⁶ Towery supra note 69, at 22 (suggesting those attorneys who question the materiality of insurance information put the question to a cross-section of their clients).

⁸⁷ Mills & Petrova supra note 85, at 1034.
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.88

Beyond requirements imposed by professional rules of conduct, some proponents assert that the special nature of the attorney-client relationship militates in favor of disclosure. As described by James C. Gallagher, a former president of the Vermont Bar Association, members of the legal profession have a “heightened responsibility in business relationships with clients.”89 Because of the heightened obligation of lawyers to their clients, Mr. Gallagher urged adoption of a mandatory disclosure rule so that clients can make informed decisions about retaining the lawyer.90

Failure to require disclosure shifts risk of loss to consumers who relied on the superior position of their lawyers.91 As noted by member of the Pennsylvania Professional Liability Committee, clients with meritorious clients suffer double injury when they are first injured by a

88 According to a 2008 public opinion survey conducted by the State Bar of Texas Task Force on Insurance Disclosure, 80% 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 71, at 248. In addition, seventy percent of the respondents agreed that lawyers should inform potential clients whether or not the lawyer carries insurance. Id.
89 To support of his position, Mr. Gallagher refers to court opinions that describe the special nature of the lawyer-client relationship. Gallagher supra note 69, at 5.
90 Id.
91 “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” Mills & Petrova supra note 85, at 1032-33.
lawyer who they thought would protect them and second when they do not have recourse because the lawyer had no coverage.92

Typically, malpractice plaintiffs’ lawyers do not pursue actions against tortfeasors who do not have significant non-exempt assets. Recognizing this, practitioners may see “going naked” as an “effective strategy for avoiding lawsuits but it comes at the cost of protecting the interests of clients.”93 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 ones 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.94

The likelihood of being injured by an uninsured lawyer is significant because a substantial percentage of lawyers do not carry professional liability insurance.95 Although there is a great deal of speculation on the number of uninsured lawyers in private practice,

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92 Johnston & Simpson supra note 67, 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.

93 Acello supra note 74, at 29. In a Utah study, 61% of respondent-lawyers reported that they did not carry professional liability insurance because it was too expensive, 12% reported that they were “willing to take the risk,” and 12% indicated that they did not have active clients. Utah State Bar, 2001 Survey of Members, Questionnaire 2, http://www.utahbar.org/documents/2011_SurveyOfAttorneys.pdf [hereinafter Utah Survey].

94 Id.

95 See Johnston & Simpson supra note 67, at 28 (noting that in 2001 that insurance industry and bar officials estimated that the percentage of uninsured lawyers in the U.S. ranged from 20% to 50% at any given time).
surveys suggest that the percentages of uninsured attorneys range from 17% to 48%. Surveys reveal that the percentage of uninsured lawyers runs highest among solo practitioners. This poses a serious risk to many unsophisticated consumers who retain lawyers on a one-shot basis because malpractice studies have reported that the incidence of malpractice claims is the highest among solos and lawyers who practice in the personal injury and real estate fields.

The adoption of mandatory insurance disclosure rules reduces the number of uninsured lawyers by creating incentives for lawyers to buy insurance. 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 insurance status will contribute to lawyers recognizing 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

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96 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.* (quoting the chief counsel of the Illinois State Bar Association who noted that the “general feeling was that something needs to be done” even though the numbers came in slightly better than projected). The upper end of the estimate derives from 6,160 responses to a Professional Liability Survey distributed by the State Bar of Texas in 2008. PLI Disclosure – Attorney Survey Findings – Feb. 2008, at http://www.texasbar.com/pliflashdrive/material/11_Attorney_Survey_0208.pdf

97 *See Johnston & Simpson supra* note 67 (reporting that the in the study conducted for the Illinois Supreme Court that only 68% of solo practitioners indicated that they carried professional liability insurance).

98 According to the latest ABA study of legal malpractice claims conducted for the ABA Standing Committee on Lawyers’ Professional Liability, seven out of ten claims involved solos or lawyers in firms with five or fewer members, and real estate and personal injury work accounted for 42% of malpractice claims analyzed in the study. James Podger, *Malpractice Minefield*, A.B. A. J., Dec. 2008, at 54. One expert cautions against drawing conclusions based on the raw data because the ABA studies do not account for the percentage of the lawyer population who work in solo and small firm practice. *See Manual R. Ramos, Legal Malpractice: No Lawyer or Client is Safe, 47 FLORIDA L. REV. 1* (criticizing generalizations drawn from ABA data). Based on his own study, Professor Ramos concludes that lawyers in firms with five or fewer lawyers face legal malpractice in proportion to the numbers they represent in the general lawyer population. *Ibid.* at 43.

99 After South Dakota adopted a mandatory disclosure rule the number of insured attorneys in the state rose from 80% to 96%. Carole J. Buckner, *Malpractice Insurance Disclosure Lurches Toward Approval*, 50-APR ORANGE COUNTY LAWYER 50, 50 (2008).
management in an effort to avoid premium increases. 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 insureds in properly handling situations after the lawyers report errors to their carriers.

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

Finally, proponents argue that disclosure rules balance lawyer autonomy and client protection. 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. Thus, mandatory disclosure rules give

100 Mignone supra note 92, at 1083 (suggesting that disclosure rules would lead attorneys to deliver legal services with greater care).
101 See Johnston & Simpson supra note 67, at 28 (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).
102 Mills & Petrova supra note 85, at 1033 (citing an article by Ronald Mallen, the nation’s leading authority on legal malpractice, for the proposition that malpractice claims have increased). 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 Whiter Thou Goest? 2008 J. PROF LAW. 53, 66-69 (2008).
consumers choices. At the same time, disclosure rules do not force lawyers to purchase, but create incentives for lawyers to do so.

Lawyers who oppose mandatory disclosure rules do not see mandatory insurance rules as a compromise that preserves lawyer independence. Rather they assert that disclosure rules intrude on the choices lawyers should be able to make in representing clients. ¹⁰⁴ Specifically, they argue that mandatory disclosure rules interfere with a practitioner’s autonomy to decide whether to self-insure or purchase insurance. ¹⁰⁵ 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 requiring more disclosure and restrictions on how lawyers practice. ¹⁰⁶ Another concern related to lawyer independence is that mandatory insurance disclosure rules give too much power to insurance companies. ¹⁰⁷

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 of widespread occurrences of legal malpractice committed by uninsured lawyers. ¹⁰⁸

¹⁰⁴ See Acello supra note 74, at 41 (referring to a “don’t tread on me” attitude that may be at play in resisting mandatory disclosure).
¹⁰⁵ Steve N. Six, Mandatory Malpractice Insurance Disclosure: Is the Time Right for Kansas? J. KAN. BAR ASS’N, Mar., 2003, at 14 (noting that a mandatory rule makes no allowance for the fact that some lawyers have adequate financial resources to cover claims).
¹⁰⁸ Mills & Petrova supra note 85, at 1034 (articulating the counter argument that “absence of proof is not the proof of absence”). See also Towery supra note 69, at 22 (suggesting that the lack of evidence of unsatisfied
Opponents also argue that a mandatory disclosure rule is unnecessary because consumers may always inquire as to whether a lawyer carries insurance. Opponents argue that consumers consider a variety of factors when retaining counsel, including the lawyer’s experience and disciplinary record.

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

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

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).

Charles Wood, Few Fans of Mandatory Disclosure, MONTANA LAW., June/July 2002, at 11 (quoting a Montana attorney who insisted that potential clients should be accountable for asking about an attorney’s insurance status.

Edward C. Mendrzycki, Should Disclosure of Malpractice Insurance be Mandatory – Con, GP SOLO, Apr./May 2003, at 37 (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).

Mignone supra note 92, 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.

Cunitz supra note 60, at 656.

Marsh supra note 62, 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).
To lawyers familiar with professional liability coverage, the most persuasive criticism is that mandatory disclosure actually misleads lay people.\textsuperscript{114} 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.\textsuperscript{115} Unlike occurrence policies, claims-made policies cover claims that are made and reported during the policy term. Therefore, lawyers who disclose that they carry insurance at the commencement of relationship may not be insured at the time that the actual claim is made and reported.\textsuperscript{116} Other concerns relate to the fact that limits of liability, deductibles, insuring agreements, exclusions, and even conditions vary widely.\textsuperscript{117} Because of the complexity of professional liability policies, the ABA Standing Committee on Lawyers Professional Liability has opposed adoption of mandatory disclosure rules because the lack of protection potentially misleads the client into believing remedies exist to recoup losses.\textsuperscript{118}

In 2010, the Supreme Court of Texas weighed the arguments related to adoption of a mandatory disclosure rule.\textsuperscript{119} 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

\textsuperscript{114} 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. Mendrzycki \textit{supra} note 110, at 37.

\textsuperscript{115} \textit{Id.} at 37-41

\textsuperscript{116} For a discussion of the differences between occurrence and claims made policies and other terms of professional liability policies, see Susan Saab Fortney, \textit{Legal Malpractice Insurance: Surviving the Perfect Storm}, J. Legal Prof. 41, 43 (2003-2004).

\textsuperscript{117} Some argue that the effort to provide more detailed disclosure addressing the finer points of coverage may actually create more confusion. Gallagher \textit{supra} note 69, at 5.

\textsuperscript{118} Mignone \textit{supra} note 92, at 1084. Many members of the ABA Standing Committee on Professional Liability are affiliated with professional liability insurers or law firms that defend legal malpractice cases.

\textsuperscript{119} See Terry Tottenham, \textit{Rain Nowhere}, \textit{Tex. B. J.}, Oct. 2010, at 728 (generally describing the debate and how the State Bar “worked hard” to engage members in considering the recommendation to the Supreme Court of Texas).
quo” and not adopt any form of disclosure rule. This decision came after a lengthy debate and conflicting recommendations. First in 2008, the State Bar of Texas Task Force on Insurance Disclosure voted against adoption of an insurance disclosure rule. Within a year, the Grievance Oversight Committee (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. Thereafter, the Supreme Court of Texas asked the State Bar Board of Directors to take a position. Before doing

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120 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*, Texas Supreme Court Advisory, Apr. 16, 2010. [http://www.supreme.courts.state.tx.us/advisories/Professional_Insurance_Disclosure_041610.htm](http://www.supreme.courts.state.tx.us/advisories/Professional_Insurance_Disclosure_041610.htm)

121 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 [http://www.texasbar.com/pliflashdrive/home.html](http://www.texasbar.com/pliflashdrive/home.html) (last visited June 15, 2012).

122 By a 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 Beck, Chair, Task Force on Insurance Disclosure, dated June 11, 2008. [http://www.texasbar.com/pliflashdrive/material/3_TaskForce_Report_June08.pdf](http://www.texasbar.com/pliflashdrive/material/3_TaskForce_Report_June08.pdf) The Task Force’s due diligence included surveying lawyers and members of the public. In the survey of lawyers, 77% of respondents were against requiring disclosure of whether they carried professional liability insurance. By contrast, in the survey of members of the public, 70% reported that they believed that lawyers should be required to inform a potential client whether they carried professional liability insurance. *Id.* at 3.

123 The final recommendation of the Grievance Oversight Committee (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 the same issues, and 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 . . . “

Excerpt from the Grievance Oversight Committee 2009 Report to the Supreme Court of Texas, at [http://www.texasbar.com/pliflashdrive/material/8_Grievance%20Report.pdf](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.* By way of full disclosure, I previously served as GOC and special counsel to the GOC. I also participated in some of the GOC’s discussions of the mandatory disclosure rule.
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.¹²⁴

To obtain the perspectives of consumers of legal services, State Bar leadership included the public in hearings and conducted a public opinion survey.¹²⁵ The survey conducted in November 2009 started with open-ended questions related to the factors respondents believed were important when hiring lawyers.¹²⁶ In response to these questions, respondents did not identify professional liability coverage as a factor.¹²⁷ When asked a specific question about insurance, forty-nine percent of respondents indicated that a lawyer’s lack of insurance would affect the decision to hire the lawyer.¹²⁸ Eighty-eight percent reported that they less likely to hire a lawyer who does not carry professional liability insurance.¹²⁹ Sixty-four percent also believed that lawyers should be required to disclose to their clients whether or not they carry professional liability insurance. Somewhat telling about the importance of their lawyers carrying insurance, thirty-six per cent of the respondents indicated that they would actually pay

¹²⁴ 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, at http://www.texasbar.com/pliflashdrive/material/ExecSummaryFinal.pdf [hereinafter Executive Summary]. The TEXAS BAR JOURNAL also published pro and con commentaries. See Charles Herring, Professional Liability Insurance Disclosure: Should be Required, TEX. B. J., Nov., 2009, at 822 and Bill Miller, Professional Liability Insurance Disclosure: Should Not be Required, TEX. B.J., Nov. 2009 at 824.

¹²⁵ The State Bar of Texas contracted with North Texas State University to conduct a telephone survey of 500 residents of Texas, reflective of the demographics of Texas. For the survey report, see http://www.texasbar.com/pliflashdrive/material/PublicSurvey.pdf

¹²⁶ The first question was an open-ended one that asked, “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. Eleven percent indicated that they had asked if their attorneys carried professional liability insurance. Id. at Question 4.

¹²⁷ 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. 36% answered “no” and 15% indicated “don’t know/no response.” Id. at Question 9.
more in fees in order to ensure that the lawyer carries professional liability insurance.\textsuperscript{130} Although most prospective clients may not ask whether a lawyer carries insurance, these results suggest many consumers view insurance status as material information.\textsuperscript{131}

Despite strong public support for a disclosure rule and the Grievance Oversight Committee recommendation, the State Bar Board of Directors recommended against requiring disclosure, siding with the majority of practitioners who opposed mandatory disclosure.\textsuperscript{132}

Practitioner opinions voiced in both written submissions and hearing testimony, overwhelmingly opposed requiring disclosure. The email invitation soliciting opinions, generated 182 letters and comments, with 83% opposed to mandatory disclosure, 12% in favor and 5% neutral.\textsuperscript{133} On the Texas Bar Blog, 92% of comments were opposed to disclosure and

\textsuperscript{130} Id. at Questions 13 and 16. By comparison 66% believed that doctors should be required to disclose to their clients whether or not they carry professional liability insurance and 55% reported that mechanics should be required to do so. Id. at Questions 14 and 15.

\textsuperscript{131} 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. 4 Executive Summary supra note 124. After hearing a definition of professional liability insurance, 74% of the focus group participants thought attorneys should be required to disclose whether they carried insurance. See Executive Summary, in Personal Liability Insurance: Public Opinion Focus Group Study, by Chris Fick and Greg Liddell, at \url{http://www.texasbar.com/pliflashdrive/material/SBOT%20FG%20Report_Final_V3.pdf}, The researchers report that this percent went down to 65% after hearing “unbiased arguments for and against disclosure.” Id.

\textsuperscript{132} State Bar of Texas Board of Directors, Official Minutes, January 28-29, 2010, at \url{http://www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_and_Minutes&Template=/CM/ContentDisplay.cfm&ContentFileID=319}. On the following recommendation, thirty-nine directors voted against the following recommendation and for voted for the recommendation: The State Bar Board of Directors recommends to the Supreme Court of Texas that on the issue of whether Texas lawyers should be required to disclose (absent a request from a client or prospective client) the existence or non-existence of professional liability insurance. Id. If the Supreme Court of Texas determined that disclosure should be required, the Board of Directors unanimously approved (with one abstaining) recommending to 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 80.

\textsuperscript{133} Executive Summary supra note 121.
8% were in favor of disclosure. Of the eight responses received from State Bar Sections and Committees, six were against requiring disclosure and two were neutral. At public hearing conducted in seven cities, 125 people indicated that their opinions, with six indicating that they supported a disclosure requirement, twelve indicating “no position” and 107 opposing a disclosure requirement.

To learn more about the basis for the opposition to mandatory disclosure, I analyzed the hearing testimony as summarized on the State Bar of Texas website. The largest number of lawyers opposed the disclosure because there was no evidence of a problem. Other common complaints were that disclosure would be misleading and increase malpractice suits. Other concerns related how a disclosure requirement would unfairly impact segments

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134 Id. (reporting that 10 of the 16 comments in favor of a disclosure rule appeared to be from physicians and non-lawyers).
135 Id.
136 Sixty-one persons testified at the hearings. Id. For links to audio recordings and hearing reports, see http://www.texasbar.com/pliflashdrive/home.html [hereinafter Hearing Reports]
137 To categorize the positions, I largely relied on the arguments used by the researchers who conducted focus groups with non-lawyers in Texas. See supra note 128 (discussing the focus groups conducted for the State Bar of Texas). Using codes, I identified the up to two arguments made by each person.
139 Eleven lawyer expressed concerns 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.’” Hearing Report Hearing Report supra note 134, at Hearing Report, Houston, Oct. 16, 2009.
140 Twelve lawyers discussed how disclosure would increase the number of legal malpractice claims. See Hearing Report supra note 134. 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 AND 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 ALABAMA L. REV. 453, 491-502 (2008) (using a number of aspects of legal malpractice cases to show that lawyers “enjoy” several unique
of the bar and stigmatize uninsured lawyers. A number of lawyers also referred to the costs of insurance.\textsuperscript{141} Those few who supported adoption of a disclosure rule tended to make public protection arguments.

A review of the written comments submitted by email, letters, and blog postings reveals similar pattern. Some opponents of disclosure challenged the public protection justification for requiring disclosure, asserting that the insurance is for the benefit of the insured.\textsuperscript{142} 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.”\textsuperscript{143}

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.\textsuperscript{144} David J. Beck, former advantages when sued for legal malpractice and that it is much harder to prove legal malpractice cases compared to medical malpractice cases).

\textsuperscript{141} It is unclear whether those who mentioned “costs of insurance” knew the actual cost of insurance or if they think that any amount is unreasonable. As noted in the GOC report, a non-profit insurer in Texas offers special rates for new lawyers with first year polices costing $500 per year for coverage of $100,000 per claim and a $300,000 limit for claims aggregated. After four years of practice, the premium goes up to $1,750 per year. Because numerous factors go into premium calculation for experienced attorneys, it is difficult to determine an average premium for experienced attorneys. The GOC Report noted that an informal survey of the members of the Task Force on Insurance Disclosure indicated that each was paying approximately $4,000 per year. See GOC Report supra note 123.

\textsuperscript{142} Although it is true that liability policies protect the insured, they only cover claims for damages brought by third parties. See http://www.businessdictionary.com/definition/third-party-insurance.html#ixzz1y8Bk5vcp (defining third party insurance as “Liability insurance purchased by the 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 of a third party”).

\textsuperscript{143} Letter from Chair of the Law Practice Management Committee to Gib Walton, June 16, 2008, 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 the protection of the client.” Id.

\textsuperscript{144} See Letter from Broadus A. Spivey to Roland Johnson, Nov. 20, 2009 and W. Frank Newton to Roland Johnson, December 9, 2009 (on file with the 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.
bar president and chair of the State Bar of Texas Task Force on Insurance Disclosure, explained his support by explaining as follows:

Recognizing that there are persuasive arguments on both sides of the issues, 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 should come down on the side of the public. Practicing law is a privilege and our basic goal must be to serve the public.145

Another Texas lawyer prefaced his comments by noting that he considers law to be a “profession and not merely a business.” In capturing 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 lawyers’ well-being over that of the clients. In my mind, that is contrary to our basic obligations.”146

The opinions expressed in the Texas debate over a mandatory disclosure rule reflect lawyer attitudes about disclosure and financial accountability for misdeeds. Many lawyers espouse professionalism rhetoric, while placing their own financial interests over those of

145 Letter from David J. Beck, to Roland K. Johnson, Esq., 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 their 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 injury 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.


146 Letter from Roger W. Anderson to State Bar of Texas, Oct. 16, 2009 (on file with author)
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 focused on the dynamics involved when lawyers had the opportunity to make choices related to public protection. The review of events reveals that lawyers have tended to elevate their own self-interest over consumer interests.\(^{147}\)

As illustrated by the birth and growth of the LLP form, no organized group played a role in articulating the interests and concerns of consumers of legal services and other persons injured by lawyer malpractice. Apparently, the LLP legislation swept through the U.S. under the radar of consumer advocacy groups. Sophisticated consumers of legal services, such as business groups, benefitted from the LLP legislation because many states do not restrict LLPs to professionals, but allow a variety of enterprises to organize as LLPs. Moreover, experienced users of legal services, such as corporations, did not rely on unlimited liability of general partnerships when retaining lawyers. Such sophisticated consumers competently protected their own interests by requiring that their lawyers maintain malpractice insurance. Therefore the persons left without protection were inexperienced users of legal services who may have

\(^{147}\) In a survey conducted by the Utah Bar Association, 32% of the attorney-respondents agreed with the following statement, “The public believes that attorneys put their own interests ahead of their clients” and 9% “strongly agreed” with the statement. *Utah Survey supra* note 93, at Questionnaire 2, Question 51.
assumed that lawyers carry insurance.\textsuperscript{148} Such consumer did not know the effect and consequences of their lawyers practicing in LLPs.\textsuperscript{149}

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 allowing firm principals to limit their vicarious liability. The vast 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.

Various considerations may explain courts’ failure 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.\textsuperscript{150} Second, in states with judicial elections, judges rely heavily on financial and other support from the practicing bar.\textsuperscript{151} Third, individual judges may not have focused on the

\textsuperscript{148} 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. State Bar of Texas , PLI Disclosure Survey of the Public, Nov. 2009, Question 4 at http://www.texasbar.com/pliflashdrive/material/PublicSurvey.pdf Approximately, 70\% of the 500 respondents indicated that they did not know if their attorneys carried professional liability insurance. Id. at Question 5.

\textsuperscript{149} 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. Fortney supra note 8, at 752, n. 158.

\textsuperscript{150} See Barton supra note 140, 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”).

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.  

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. By doing so, the 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. 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. It is not surprising because virtually no critics successfully championed the concerns of consumers of legal services and persons injured by lawyer misdeeds.  

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“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.

152 See Barton supra note 138, 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 view of the world control judicial thinking and outcomes in a way that is favorable to the legal profession”).

153 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. Persons close to the process attribute the insurance requirements in the rule to the influence of lawyers who handle legal malpractice cases.
Consumers should not look to the ABA to protect their interests. The ABA functions more as a trade group representing lawyer interests than a professional group committed to client protection. Although the ABA states that its mission is “To serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession,” the ABA’s goals and objectives do not describe consumer protection concerns. Most revealing is the first goal 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 “role of law” first. 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.

Greco’s recommendation was rejected and the ABA adopted the proposed mission statement that “puts lawyers first.”

Within the ABA there are pockets of consumer-minded individuals, such as the ABA Client Protection and Professional Committees. These groups have supported initiatives such

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155 *Id.*

156 *See id.* (quoting the incoming chair of the ABA’s membership committee who stated the following in defending the proposed mission: “Our members are the soul of this association. Our members are those who we are bound to serve”).

157 According to the website for the ABA Professionalism Committee:

[The Committee] is now charged to encourage, recommend and provide assistance to ABA entities in the development and coordination of professionalism initiatives; encourage and provide assistance to state
as the ABA Model Rule requiring lawyers to disclose their lack of insurance. Despite the diligent efforts of these individuals, strong sectors within the bar convinced a number of state supreme courts to not adopt a mandatory disclosure rule. Those states that declined to pass a mandatory disclosure rule were not persuaded that such a rule was necessary to protect consumers or those lawyers who act responsibly in carrying insurance.

The debate over the mandatory disclosure rule, as well as events surrounding the genesis and growth of the LLP, illuminates needs associated with lawyer regulation and the status of law as a profession. The review of the history of the LLP and the mandatory disclosure debate reveals that there is no widely recognized national group that advocates on behalf of the consumers of legal services. In the short run, it is doubtful that lawyers will support such a body unless lawyers see it in their own interest to do so.

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

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and local bar associations, the judiciary, the law schools, and the legal community in their efforts to improve lawyer professionalism and competence; educate members of the legal profession, the judiciary, the law school community and the public about professionalism, competence and advertising issues; and evaluate and report on trends and developments impacting lawyer professionalism, competence and advertising and recommend initiatives and policies to address them. ABA Standing Committee on Professionalism, [http://apps.americanbar.org/dch/committee.cfm?com=SC133500&new](http://apps.americanbar.org/dch/committee.cfm?com=SC133500&new) (noting that the mandate was expanded in 1989 and 2004).

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

[159] E.g. Public Citizen Letter supra note 146 (warning that the Texas legislature is likely to address the insurance disclosure issue if the Supreme Court of Texas did not do so).
A non-profit organization established in 2010, the Texas Coalition on Lawyer Accountability, will likely support proposed legislation that is intended to protect consumer interests.\(^{161}\)

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 of opinion on ethical and professional dimensions of lawyer accountability. For example, a distinguished bar leader opposed adoption of a disciplinary rule requiring that lawyers disclose their insurance status, asserting that neither the purchase of insurance nor the failure to purchase insurance implicates “ethical tenets.”\(^{162}\)

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.\(^{163}\)

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 being lawyers being

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\(^{160}\) See Herring \textit{supra} note 124, 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-governance may be numbered,” Professor Fisher explains that self-regulation may become a “victim of lawyer success or, as some critics would have it, lawyer excess.” Fischer \textit{supra} note 158, at 108.

\(^{161}\) According to its website, the Texas Coalition on Lawyer Accountability was initially established “to provide input from the public perspective on proposed amendments to the Texas Disciplinary Rules of Professional Conduct.” \url{http://www.txscla.org/} The Coalition’s website notes that public advocates “were not involved in the lengthy drafting process” and a “number of proposals posed significant risk to the interests of clients and the public as a whole.” \textit{Id.} Since 2010, the Coalition has provided testimony and take action such as filing grievances against prosecutors. \textit{Id.}

\(^{162}\) Mendrzycki \textit{supra} note 110, at 37. Mr. Mendzycki chaired the ABA Standing Committee on Lawyer’s Professional Liability.

accountable for their acts and omissions. In regulating lawyers, courts should hold lawyers to strict accountability for the performance and observance of their professional duties. Finally, those who espouse the status of law as a profession should recognize and promote financial responsibility as a professional virtue.

If we fail to protect those who rely on us, we fail to fulfill our obligations as a protected profession. As suggested by former ABA president, Michael Greco, the choice is ours. 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. Rather, law is a business of relationships in which lawyer conduct should be guided by professional ideals and values. What distinguishes law practice from other business pursuits is how we treat, and remain accountable, to those who trust us.

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164 See Ramos supra note 56, at 2618-2623 (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 on 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.” Ten 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”. (results on file with the author).

165 James C. Gallagher, supra note 69, at 5 (quoting court opinions that underscored responsibilities that lawyer-fiduciaries owe clients).

166 For an interdisciplinary analysis of the common characteristics of professionals, see Sande L. Buhai, Profession: A Definition, FORDHAM URBAN L. J. (this issues), at XXX. Debra Lyn Bassett, Redefining the “Public” Profession, 36 RUTGERS L. J. 721 (2005).