


4. E-mail from Jim Grogan, Deputy Admin. & Chief Counsel, Ill. Attorney Registration & Disciplinary Comm’n, to author (July 19, 2016) (on file with author).

5. Lawyer professional liability can arise from negligence, breach of fiduciary duty, breach of contract, and intentional torts such as fraud and misrepresentation. See RONALD E. MALLEN, *LEGAL MALPRACTICE* § 8:1 (West 2020). The term “malpractice” is used in this Article to encompass all of these causes of action.

6. The percentage of insured private practitioners ranges from about 80% in Arizona and Michigan to 94% in South Dakota. See Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 FLA. L. REV. 1281, 1299, 1301–02. A much higher percentage of solo lawyers are uninsured.


12. Case studies have significant limitations. See Paul Brace et al., *Placing Supreme Courts in State Politics*, 1 STATE POL. & POL’Y Q. 81, 83–84 (2001). They can be useful, however, to help identify factors that subsequently can be studied in a larger number of states, using quantitative methods. See, e.g., Richard P. Caldarone et al., *Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions*, 71 J. POL. 560, 569 (2009) (using quantitative methods to determine how intensity of public opinion, timing of elections, and type of contested election affects judicial decisions on abortion in eighteen states).

Institutions as Barriers to Recognizing Conflicts of Interest

Insurance companies to provide more affordable LPL insurance to lawyers. See C. Levin, CONN. L. REV. 553, 565 (2016).

34. Cohen, supra note 33, at 1285–86, 1295 (1988); Mary Ann Galante, About the Standards for Imposing Lawyer Discipline Sanctions of the American Bar Association on Conflicts of Interest, 22 GEO. J. LEGAL ETHICS 1029, 1036 (2009). That organization, now known as Responsive Law, does not appear to have been active in the more recent insurance debates. See Advocacy, RESPONSIVE LAW, https://www.responsive-law.org/advocacy.html [https://perma.cc/9WZW-38LV].

35. Goldfein, supra note 34, at 1285–86, 1295 (1988); Mary Ann Galante, About the Standards for Imposing Lawyer Discipline Sanctions of the American Bar Association on Conflicts of Interest, 22 GEO. J. LEGAL ETHICS 1029, 1036 (2009). That organization, now known as Responsive Law, does not appear to have been active in the more recent insurance debates. See Advocacy, RESPONSIVE LAW, https://www.responsive-law.org/advocacy.html [https://perma.cc/9WZW-38LV].

36. Some of the largest states that do not require either insurance or disclosure that a lawyer is uninsured include Florida, New York, and Texas.


39. Goldfein, supra note 34, at 1296; Schultz, supra note 33, at 18.


42. See, e.g., supra note 4 and accompanying text; Petition of the State Bar of Nevada, supra note 9, at Ex. C.

43. See Kritzer & Vidmar, supra note 37, at 148.
41. *Id.* at 1313; see also Wolfson, *supra* note 8 (quoting plaintiff’s malpractice lawyer who noted that some lawyers do not purchase insurance because they know “[t]hey can duck into bankruptcy court and protect virtually everything, making it impossible to bring justice”).


43. See, e.g., Levin, *supra* note 6, at 1311–16 (describing cases in which clients were unable to recover); Thomas G. Bousquet, *It’s Time for Mandatory Malpractice Insurance: Public Policy Reasons that Supported the Move to Mandatory Automobile Insurance Also Advocate Protecting Clients*, TEX. LAW., Dec. 6, 1993, at 11.


45. Levin, *supra* note 6, at 1320.

46. For example, the average cost of comparable coverage for New Jersey lawyers in solo and two-person firms is about $4100. E-mail from Mike Mooney, Senior Vice President, Prof’l Liab. Practice Leader, USI Affinity (July 9, 2018, 8:45 EDT) (on file with the author).

47. In Missouri, the mean claim payment for solo lawyers was $52,678 and the median payment was $24,351. Kritz & Vidmar, *supra* note 37, at 114. For lawyers in firms of two to five lawyers, the mean paid was $110,994 and the median payment was $34,034. *Id.*


49. See Leslie C. Levin, *When Lawyers Screw Up*, 32 GEO. J. LEGAL ETHICS 109, 123 (2019). Of course, there are some states in which LPL insurance premiums are higher than in Idaho or Oregon.


51. Levin, *supra* note 6, at 1321 n.220.


53. If a malpractice claims fund were formed to compensate the victims of uninsured lawyers, low-income uninsured lawyers could, in lieu of purchasing LPL insurance, be required to contribute a lesser sum annually to that fund. See Levin, *supra* note 6, at 122.


56. In surveys in Nevada, New Mexico, and New Jersey, five or fewer lawyers in each of those states indicated that the main reason they were uninsured was because they could not obtain coverage or their claims experiences were unacceptable. See Levin, *supra* note 6, at 1293 (describing results of New Mexico survey); Petition of the State Bar of Nevada, ADKT 534, *supra* note 9, Ex. C, at 5; REPORT OF THE SUPREME COURT AD HOC COMM. ON ATTORNEY MALPRACTICE INSURANCE, June 2017, at app. Z, at 10, https://www.njcourts.gov/courts/assets/supreme/reports/2017/attmalpracticeinsurance.pdf [https://perma.cc/PZ9V-ZWNY]. It is unclear in some of those cases whether the lawyers truly could not obtain coverage or whether they simply could not afford it at the price at which it was offered.

57. In Oregon, only private practitioners are required to carry insurance. OR. REV. STAT. § 9.080 (2)(a)(A) (2018). In Idaho, in-house counsel are required to maintain insurance, but it is often purchased by the corporate employer.


59. *See id.* at 2.
62. Id. Arizona, Colorado, Illinois, Massachusetts, Minnesota, Nebraska, Virginia, Washington, and West Virginia post the information on websites.
63. In Delaware, Kansas, Nevada, North Dakota, and Rhode Island the public can obtain this information by contacting state authorities. Hawaii and Michigan collect the information but will not disclose it to the public. Levin, supra note 6, at 1300.
67. This is especially true in jurisdictions that do not require written acknowledgement from clients. See, e.g., Alaska Rules of Prof’l Conduct R. 1.4(c) (2018).
68. Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure 67 (2014). Mandated disclosures fail to inform even when disclosure occurs under “ideal circumstances” and when people should be attending to the information because it involves life-and-death matters. Id. at 42–53.
69. For example, in Ohio, the notice to clients states: “Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.” Ohio Rules of Prof’l Conduct R. 1.4(c) (2018). This notice does not clearly convey that the lawyer may carry no LPL insurance whatsoever or that the lawyer may be unable to satisfy a malpractice judgment as a result.
71. The exception may be South Dakota, as lawyers there must include this information in advertising. See S.D. Rules of Prof’l Conduct R. 1.4(d), 7.2(l) (2019).
72. Cognitive biases may also make it difficult for a client to change course once a decision to retain a lawyer is made. Levin, supra note 6, at 1326–27.
74. See Nancy McCarthy, Bar Board Will Tackle Malpractice Insurance Disclosure Again, Cal. B.J., Nov. 2007; State by State, Mandatory Malpractice Disclosure Gathers Steam, B. Leader, Mar.–Apr. 2004. Indeed, I have spoken with many lawyers who were surprised to learn that lawyers in private practice are not required to maintain LPL insurance.
75. For example, the Washington State Bar Association website states that not all lawyers maintain LPL insurance and that “[s]ome lawyers may make a responsible decision not to maintain insurance because . . . the lawyer may choose to be financially responsible (self-insured).” Professional Liability Insurance, Wash. State Bar Ass’n, https://www.wsba.org/for-legal-professionals/license-renewal/license-renewal-faqs/professional-liability-insurance [https://perma.cc/V87V-HJ32] (last visited Mar. 2, 2020). This statement may suggest to the public that they need not be concerned about uninsured lawyers because those lawyers will “self-insure.”
76. Ideally, case studies should compare cases that occurred more or less contemporaneously. For the sake of completeness, however, and because the experience in Oregon is also instructive, it is included in this.

77. Texas decided the issue in 2010, less recently than the other states considered here. It is included for geographic diversity and because it is a large state with a state bar that is subject by law to some legislative oversight.

78. ANDREW GELMAN, RED STATE, BLUE STATE, RICH STATE, POOR STATE 20–23 (2008).

79. See, e.g., Joel Lieske, The Changing Regional Subcultures of the American States and the Utility of a New Cultural Measure, Pol. Res. Q. 538, 538 (2010). Political culture is distinct from political ideology. States of any of the three subcultures can be liberal or conservative. For example, Utah and Minnesota are both moralistic states. Daniel J. Elazar, Minnesota—The Epitome of the Moralistic Political Culture, in MINNESOTA GOVERNMENT AND POLITICS (Daniel J. Elazar et al. eds., 1999).

80. DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 115 (3d ed. 1984). He also labeled some states as “moralistic/individualistic” (meaning closer to moralistic), “individualistic/moralistic” (meaning closer to individualistic), etc. Id. at 136–37.


82. Id. at 744.


86. Fisher, supra note 84, at 702.

87. See, e.g., id. at 703; Lieske, supra note 79, at 548.


92. WASH. STATE BAR ASS’N, MANDATORY MALPRACTICE INS. TASK FORCE, REPORT TO WSBA BOARD OF GOVERNORS, supra note 55, at 8. Of the lawyers licensed to practice in Washington in 2017, 19,813 were private practitioners. Id.


100. OR. REV. STAT. § 9.010(2) (2017); About the Oregon State Bar, supra note 89.
104. Insurance Survey, OR. STATE B. BULL., April 1970, at 23. Of the 725 questionnaires returned, 605 lawyers favored such an arrangement, 34 opposed it, and 86 were undecided. Id.
105. Id.
107. Id. at 2–3.
108. Id. at 3.
109. Id.
113. Cunitz, supra note 10, at 652.
116. Id. at 87–88, 100.
117. In re Kaufman, 206 P.2d 528, 539 (Idaho 1949) (finding that the legislature could set minimum, but not maximum, requirements for bar admission). See also State v. McCoy, 486 P.2d 247, 252 (Idaho 1971) (noting “that control and administration of the organized Bar had always been recognized as a function peculiar to the judiciary”).
119. There has only been one instance in more than thirty-five years in which the Supreme Court has initiated a rule change. Telephone Interview with Diane Minnich, Exec. Dir., Idaho State Bar (May 11, 2018) (on file with author).
120. About Us, IDAHO ST. B., https://isb.idaho.gov/about-us/ [https://perma.cc/RN8B-EXZA] [last visited May 26, 2020] [hereinafter Idaho About Us]. Some lawyers asked the legislature to form the ISB. For a discussion of the legislation and opposition to it by some lawyer-legislators, see Jess B. Hawley, Bar Integration in Idaho, J. AM. JUD. SOC. 141, 142 (1931).
121. See supra note 90 and accompanying text.
122. Idaho About Us, supra note 120.
123. IDAHO CODE § 3-408 (2018); IDAHO BAR COMM’N RULES R. 906(a) (2019). Any bar member can recommend changes to the rules of the bar by proposing a resolution. IDAHO BAR COMM’N RULES R. 906(b) (2019).
124. IDAHO BAR COMM’N RULES R. 905(b), 906(b) (2019).
127. Id.
131. IDAHO BOARD OF COMM’RS, Resolution 05-1 (on file with author); Telephone Interview with Diane Minnich, supra note 119.
134. See Telephone Interview with Annette Strauser, MCLE & IT Adm’r, Idaho State Bar (May 22, 2015) (on file with author).
135. Telephone Interview with Diane Minnich, supra note 119.
136. Telephone Interview with Michelle Points, former ISB President (May 8, 2018) (on file with author).
137. Id.
140. Telephone Interview with Michelle Points, supra note 136.
142. Telephone Interview with Michelle Points, supra note 136.
145. The Northwest Tri-State Compact between Washington, Oregon, and Idaho became effective in 2002 and enabled lawyers to gain reciprocal admission after three years of continuous practice in one of the states. See Mark J. Fucile, Reciprocity, In-House Counsel Admissions and Multi-Jurisdiction Practice in Washington (and Beyond) 6-4–6-5 (2015). The required period of practice is now five years. OR. RULES FOR ADMISSION OF ATTORNEYS 15.05(1) (2018).
146. OR. RULES FOR ADMISSION OF ATTORNEYS 15.05(6) (2019).
148. See Telephone Interview with Diane Minnich, supra note 119.
149. See WASH. STATE BAR ASS’N, MANDATORY MALPRACTICE INS. TASK FORCE, REPORT TO WSBA BOARD OF GOVERNORS, supra note 55, at 30 (noting that the average premiums paid by Idaho solo lawyers to ALPS, a bar-affiliated insurer, was $2200).
150. Lieske, supra note 79, at 544; Mead, supra note 85, at 275.
151. Mead, supra note 85, at 275.
152. How Appellate Court and Supreme Court Justices are Selected, CAL. COURTS, http://www.courts.ca.gov/7434.htm [https://perma.cc/WEJ7-ZPYT].
153. Id. Justices are typically elected to twelve-year terms. Id.
154. Santa Clara County Counsel Attorneys Ass’n v. Woodside, 869 P.2d 1142, 1151 (Cal. 1994).
157. CAL. CONST. art. 6, § 9.
158. See supra note 91 and accompanying text.
159. CAL. BUS. & PROF. CODE §§ 6001.2(a), 6013.5(a), 6076 (West 2019). In 2017, the legislature enacted legislation requiring the formation of a separate voluntary lawyers association so that the California State Bar could focus on admissions and discipline while the voluntary association could focus on section activities and educational programs. See Frequently Asked Questions, CAL. LAWYERS ASS’N, https://calawyers.org/frequently-asked-questions/ [https://perma.cc/EU3R-SDE3].
160. The California legislature meets throughout the year and pays its members more than $110,000 annually. States with a full-time legislature, BALLOTPEDIA, https://ballotpedia.org/States_with_a_full-time_legislature [https://perma.cc/WVX4-KMPW]; Comparison of State Legislative Salaries, BALLOTPEDIA, https://ballotpedia.org/Comparison_of_state_legislative_salaries [https://perma.cc/FDM8-6ZVQ].
161. See CAL. BUS. & PROF. CODE § 6140.1 (West 2019).
162. See Dan Morain, Justices Reject California Bar’s Financial Plea, L.A. TIMES, Nov. 20, 1985, at A20 (noting that Assembly Republicans were “angry at the Bar for failings in its lawyer discipline system and for taking stands on legislation and blocking judicial races”); see also RICHARD L. ABEL, LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT 19–20, 22–23 (2011); Gallagher, supra note 156, at 490, 546–49.
164.  ABEL, supra note 162, at 14; see also Galante, supra note 34, at 19.

165.  Ralph J. Gampell, President’s Message: Malpractice Insurance: Equal Burden for All?, 51 CAL. ST. B. J. 575, 577 (1976). The proposal emanated from concerns about obtaining coverage for members, but the president also noted that the profession has “duties to society at large, including the ability to compensate a consumer who has suffered a negligent loss at our hands.” Id.


170.  Id. The opponents included the Los Angeles County Bar Association, which would lose its voluntary insurance program and associated commission payments, if all lawyers were required to belong to a single fund. Id. Other opponents included some solo lawyers, and criminal defense lawyers who did not think that they needed LPL insurance. Id. Insurance carriers also opposed it because they feared a mandatory insurance liability fund would end their voluntary insurance programs with the bar. See Telephone Interview with Terry Anderlini, former president, Cal. State Bar (June 25, 2019).

171.  Telephone Interview with Terry Anderlini, supra note 170.

172.  CAL. BUS. & PROF. CODE § 6147(a)(6) (West 1992); CAL. BUS. & PROF § 6148(a)(4) (West 1992); Telephone Interview with Terry Anderlini, supra note 170.

173.  James E. Towery, Should Disclosure of Malpractice Insurance Be Mandatory?: Pro, GPSOLO MAG., Apr./May 2003, at 36, 38. For an explanation of the political reasons why this occurred, see Mignone, supra note 64, at 1079 n.50.

174.  Towery Memorandum, supra note 66, at 2. The Task Force included an adviser to the California Supreme Court and one member of the public. Id.

175.  Id. at 12–14. Most of the 112 comments received in 2006 came from attorneys and 78.5% opposed the proposal in whole or in part. Id. Likewise, during a second comment period after revisions, 78% of the comments opposed the proposal. Id.

176.  Id. at 3.

177.  Id. at 7.


182.  McCarthy, supra note 74.

183.  See Levine, supra note 181.


185.  CAL. BUS. & PROF. CODE § 6069.5(a)-(b) (West 2019).


187.  STATE Bar OF CAL., MALPRACTICE INSURANCE WORKING GROUP, CHARTER, http://www.calbar.ca.gov/Portals/0/documents/cc/Malpractice-Insurance-Working-Group-Charter.pdf [https://perma.cc/6V9V-7YDD]. Four members of the Board of Trustees served on the Task Force. Id. There was one consumer advocate. Id.


189.  Id. at 12.

190.  Id. at 12–13.

191.  Letter from Leah T. Wilson, Exec. Dir. & Jason P. Lee, Chair, Cal. State Bar Board of Trustees, to Supreme Court of Cal. (Mar. 27, 2019) at 1.


199. For example, in 1997, the legislature passed a law that promoted the suspension of the occupational licenses of individuals who failed to pay child support. WASH. REV. CODE § 74.20A.320 (1997). It added a note stating that it was mindful of the separation of powers among the branches of government, and therefore “strongly encourages the state supreme court to adopt rules providing for suspension and denial of licenses related to the practice of law to those individuals who are in noncompliance” with a support or visitation order. 1997 Wash. Sess. Laws ch. 58, § 809.


201. Id.

202. Id.

203. WASH. STATE BAR ASS’N, BYLAWS 25 (2018). The president is also a member of the Board. Id.


207. Grayson, supra note 207; Memorandum from Douglas J. Ende, Chief Disciplinary Counsel, to Mandatory Malpractice Insurance Task Force, Jan. 17, 2018, at 1. A referendum was not required, but the Board of Governors did so “[i]n view of the importance of the issue.” Professional Liability Fund Plans Finalized, supra note 343, at 30.

208. Memorandum from Douglas J. Ende, supra note 208, at 1.


217. Wash. State Bar Ass’n, Mandatory Malpractice Insurance Task Force, supra note 55, at 1, app. B.
218. Id. at 3.
219. Id. at 7, 33–34. ALPS estimated that the annual cost of $250,000/$500,000 for a solo corporate lawyer in Seattle would be about $2400. Id. at 33–34.
221. See id.
222. Telephone Interview with Kevin Whatley, Exec. Dir., Equal Justice Wash. (June 12, 2020). Whatley’s uninsured lawyer had neglected his personal injury case against an airline, which resulted in it being dismissed with prejudice. As a result of his experience, Whatley had spoken in favor of mandatory LPL insurance both before the WSBA’s Task Force and at the Board of Governors’ hearing. Telephone Interview with Kevin Whatley, Exec. Dir., Equal Justice Wash. (Apr. 15, 2020).
227. The Rule would require lawyers to disclose to clients if they do not carry a minimum of $100,000/$300,000 in malpractice insurance. See November 2020 – Proposed Rules Published for Comment, Rules of Professional Conduct, Wash. Courts, https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedDetails&proposedId=2152.
228. The comment period for the WSBA’s proposed rule runs until April 30, 2021. Id.
230. See Mead, supra note 85, at 275.
233. Nev. Const. art. 4, § 2; Damore, supra note 229. The legislature meets for about four months and legislators and are only paid for the first sixty days of the session, plus a per diem thereafter. Nev. Const. art. 4, §§ 2, 3, 4; Damore, supra note 229.
234. Damore, supra note 229.
237. See Lieske, supra note 79 and accompanying text.
242. See Goldfein, supra note 34, at 1296.
244. Id.
245. Id.
247. The only mention of the subject in the Nevada Lawyer refers to the Board’s approval of the petition to be filed in the Supreme Court “seeking the imposition of mandatory disclosure of professional liability insurance by all Nevada attorneys.” See Allen Kimbrough, Board of Governors Meets in Reno, 13 Nev. Law. 42, 42 (2005).
249. Id. at 4.
250. Id. at 2. The petition included: draft rule language; Welden’s 2004 letter to the Nevada Chief Justice, accompanied by the attachments previously sent to the Court; and a summary of the Bar’s findings about the availability of insurance in Nevada.
251. This approach was consistent with the ABA Model Court Rule, which states that insurance information “will be made available by such means as designated by the highest court in the jurisdiction.” See ABA Model Court Rule on Insurance Disclosure (2004).
253. Id.
254. See ABA STANDING COMM. ON CLIENT PROTECTION, STATE IMPLEMENTATION OF ABA MODEL COURT RULE, supra note 61, at 5.
256. Id.
259. See Petition of the State Bar of Nevada, ADKT 534, supra note 9, at Ex. C.
261. See Join the Discussion, supra note 257, at 29.
262. State Bar of Nevada, Minutes of Board of Governors Meeting, Nov. 8, 2017, at 2. It also recommended, alternatively, that if lawyers did not maintain insurance, they must disclose this information in writing to clients. Id. at 2.
263. Id. at 2.
264. See Petition of the State Bar of Nevada, ADKT 534, supra note 9, at Ex. D.
265. Id. This is not the first occasion that the State Bar’s leadership evidenced a greater commitment to the public than some of its members. In the 1990s, the State Bar of Nevada Board of Governors approved and filed a petition with the Supreme Court to implement a mandatory pro bono plan. They subsequently withdrew the petition because they had not consulted with members, who voiced strong opposition. See Kendra Emi Nitta, An Ethical Evaluation of Mandatory Pro Bono, 29 LOY. L.A. L. REV. 909, 913–17 (1996).
266. Petition of the State Bar of Nevada, ADKT 534, supra note 9, at Ex. D.
267. Id. at 11–12.
269. See, e.g., Robert Prince & Eglet Prince, Comment Filed In Re Amendments to Supreme Court Rule 79 Regarding Professional Liability Insurance, ADKT 0534 ( Jul. 10, 2018); Nancy Avanzino-Gilbert, Comment Filed In Re Amendments to Supreme Court Rule 79 Regarding Professional Liability Insurance, ADKT 0534 ( Jul. 16, 2018); Mark Knobel & McDonald Carano, Comment Filed In Re Amendments to Supreme Court Rule 79 Regarding Professional Liability Insurance, ADKT 0534 ( Jul. 16, 2018).
270. Id.
272. Order Denying Petition for Amendment to Supreme Court Rule 79, ADKT 534, supra note 30.
275. N.J. Const. art. VI, § VI (I). The State Bar reviews the qualifications of a governor’s intended nominees, but a compact with the governor’s office requires the Bar to keep the vetting process confidential and to report only to the governor on whether it deems a candidate qualified. Michael Booth, Supreme Court Nominee Faces Resistance as
Hearing Looms, N.J. L.J., May 25, 2012. The bar reserves the right to testify at a confirmation hearing, however, if the bar gives the candidate a “not qualified” rating and the governor nominates the candidate anyway. *Id.*

276. N.J. CONST. art. VI, § VI (3).
277. Nevertheless, in the past decade, one Governor declined to renominate sitting justices, the judge’s qualifications. See *NJSBA Resolution Urges Constitutional Amendment to Protect Judicial Independence*, N.J. L.J., Apr. 11.
279. N.J. CONST. art. VI, § II.
280. *See* McKeown-Brand v. Trump Castle Hotel & Casino, 626 A.2d 425, 429 (N.J. 1993) (limiting the application of a New Jersey statute proscribing frivolous lawsuits so that it imposed attorneys’ fees on a party but not the party’s lawyers).
281. N.J. CONST. art IV, § 1. The legislature is not, however, considered a professional legislature, in part because legislators only receive salaries of $49,000 per year. See *Comparison of State Legislative Salaries*, supra note 160.
282. For example, it has passed legislation governing lawyers’ fees and retainer agreements in family law cases. See N.J. STAT. ANN. §§ 5:3-5 (West 2018).
284. *See* supra note 94 and accompanying text.
286. N.J. STATE BAR ASS’N, Bylaws art. VI, § 2.
289. *Id.* at 786.
290. *See* N.J. RULES OF PROF’L CONDUCT R. 3.3(a)(5) (1984). This rule had no counterpart in the *Model Rules* and is triggered even without an earlier affirmative misrepresentation by the attorney or the client.
295. *See* id. at 14. Lawyers working in those entities could limit their vicarious liability, but the LLPs and LLCs were required to maintain at least $100,000 per occurrence for each attorney employed by the firm, up to $5 million. See David S. Neufeld, *Shelter from the Storm: A Review of Business Entities Available to New Jersey Professionals*, N.J. L.J., Mar. 2, 1998.
297. *See* N.J. Assemb. 617, 211th Leg.
300. *Id.* at 3, app. A.


304. REPORT OF THE SUPREME COURT AD HOC COMM. ON ATTORNEY MALPRACTICE INSURANCE, supra note 56, at 3–4, 167–68.

305. Id. at 7, 132.

306. Id. at 8. It further claimed that mandatory insurance may economically preclude some lawyers from practicing law. Id. at 136.

307. Id. at 132–34.

308. See Telephone Interview with Ad Hoc Committee Member (June 20, 2019) (on file with author). Insurers may have been concerned that if there were an insurance requirement, they would be pressured to write coverage for all lawyers in the state, regardless of claims experience.

309. REPORT OF THE SUPREME COURT AD HOC COMM. ON ATTORNEY MALPRACTICE INSURANCE, supra note 56, at 7–10, 144–45.


314. Id. at 1.

315. See S.B. 821, 218th Leg., Reg. Sess. (N.J. 2018). In May 2015, Scutari had also introduced a bill requiring all New Jersey lawyers in private practice to be covered by LPL insurance, which was carried over in 2016, but no action was taken. S.B. 2897, 216th Leg., Reg. Sess. (N.J. 2015).


319. See Bar Report—Capitol Report, N.J. L.J. (Mar. 25, 2019). USI Senior Vice President Mike Mooney, who made a presentation and arguments in favor of the bill before the legislature, also acted as a “resource associate member” of the Ad Hoc Committee and provided information to that Committee about LPL insurance costs in New Jersey. REPORT OF THE SUPREME COURT AD HOC COMM. ON ATTORNEY MALPRACTICE INSURANCE, supra note 56, at app. FF.


323. Id.

324. Id.


326. See Telephone Interview with Ad Hoc Committee Member, supra note 308.

327. CAL JILLSON, TEXAS POLITICS: GOVERNING THE LONE STAR STATE 7 (3d ed. 2011).

328. SUPREME COURT OF TEX., TEX. JUD. BRANCH, http://www.txcourts.gov/supreme/ [https://perma.cc/KM8N-V84L] (last visited May 26, 2020). Justices are elected to six-year terms. Id. The Texas Supreme Court is the court of last resort for civil cases. Id. The Texas Court of Criminal Appeals is the court of last resort for criminal cases.


334. The legislature meets for a maximum of 140 days that year, unless the governor calls a special session. Frequently Asked Questions, TEX. HOUSE OF REPRESENTATIVES, https://house.texas.gov/resources/frequently-asked-questions/ [https://perma.cc/23H8-S423] (last visited May 26, 2020). Legislators earn $7200 annually, plus a per diem. Comparison of State Legislative Salaries, supra note 160. Because it only meets biannually, it is often “so hard pressed in the closing days and hours of the session that critical business is left undone.” JILLSON, supra note 327, at 93–94.

335. TEX. GOV’T CODE ANN. §§ 325.001–325.015 (West 2019).


338. See supra note 95 and accompanying text.


340. TEX. STATE BAR RULES art. IV, §§ 1, 3.


345. Id. The survey response rate is not known.


347. Memorandum from David J. Beck, Chair, Task Force on Insurance Disclosure, to State Bar of Texas Bd. of Dirs. 1 (June 11, 2008) (on file with author). The sole non-lawyer member was an Exxon employee and not a consumer advocate.

348. Id. at 3; PLI Disclosure-Attorney Survey Findings-February 2008 (on file with author). The response rate for the email survey was 6.6%. Memorandum from David J. Beck, supra note 347, at 3 n.2. One State Bar section reportedly campaigned to get its members to oppose disclosure before the polling was complete. See GRIEVANCE OVERSIGHT COMM., 2009 REPORT TO THE SUPREME COURT OF TEX. 3 (2009).


350. E-mail from Texas Task Force Member to Leslie C. Levin (Apr. 17, 2018: 21:41 EDT) (on file with author).
351. Memorandum from David J. Beck, supra note 347, at 7. Recognizing, however, that the Texas Supreme Court might eventually decide to require some form of disclosure, the Task Force voted 6-4 to recommend that any required insurance disclosure be available only on the Texas State Bar’s website and not through direct disclosure to the client. Id.

352. Robbins, supra note 349.


354. GRIEVANCE OVERSIGHT COMM., supra note 348, at 2.

355. Id. at 2, 6–7.


357. See H.B. 2825, 81st Leg. Sess. (Tex. 2009). The bill died in the House committee. See Campbell & Chadwick, Talk, Talk, Talk: Background Discussions About the Proposed Requirement of Disclosure of Lawyer E&O Insurance (Oct. 30, 2009), http://bruceacampbell.com/category/liability-insurance/ [https://perma.cc/ZAP3-E6PV]. That bill apparently did not move forward because the Supreme Court was still studying the issue, but it raised concerns among some lawyers that if a disclosure rule was not adopted, the legislature might become more involved in lawyer regulation. See Chuck Herring, Pro: Disclosure Should be Required, 72 TEX. B.J. 822, 822 (Nov. 2009); Robbins, State Bar Board Recommends Against Insurance Disclosure, TEX. LAW., Feb. 1, 2010.

358. See Fortney, supra note 64, at 204; Robbins, supra note 356.


360. See id.; Fortney, supra note 64, at 206.


366. Id.


368. Id. at 2.

369. See id. The 2009 survey asked respondents to list the factors that influenced their decision to hire a lawyer but did not provide a menu of options from which to select. STATE BAR OF TEX., supra note 361.


372. Id.

373. Indeed, Charles Herring offered such evidence when he first requested that the Supreme Court look at the issue. See Herring, supra note 344 (noting that “when a lawyer shows that he has no malpractice insurance, I almost never take a case, regardless of the wrongdoing”); see also Bousquet, supra note 43, at 11 (describing instances of large default judgments against uninsured lawyers); Elder, supra note 26, at A1 (describing client who had an uncollectable $10 million judgment against an uninsured lawyer).

375. Any disclosure requirement could impose on lawyers an obligation to notify clients if they become uninsured during the representation and indeed, some states already impose this requirement. See, e.g., PA. RULES OF PROF’L CONDUCT R. 1.4 (c) (2019); S.D. RULES OF PROF’L CONDUCT R. 1.4 (c) (2019).
376. For example, the Supreme Court declined the invitation to weigh in on the subject of mandatory pro bono. One justice noted that the Court’s primary role was adjudicating disputes, and that it preferred to leave difficult issues, such as access to justice, to the legislature. State Bar v. Gomez, 891 S.W. 2d 243, 247–48 (Tex. 1994) (Gonzales, J., concurring).
377. See Rick Casey, The Coddled Lawyers of Our Fair State, HOUSTON CHRON., Apr. 20, 2010 (describing two Texas Supreme Court decisions making it more difficult for plaintiffs to recover in certain types of malpractice cases).
381. See supra notes 214, 255, 301, and 344 and accompanying text. The Nevada and Washington Supreme Courts previously initiated efforts to look at insurance disclosure, but only after the ABA asked them to adopt its Model Court Disclosure Rule. The Texas and New Jersey Supreme Courts seemingly ignored that request and did not act until lawyers in those states raised the issue.
382. See Telephone Interview with Michelle Points, supra note 136 and accompanying text.
383. See supra text accompanying note 186. It is unclear who initiated the move to mandatory insurance in the 1970s in Oregon, but it seems to have come from within the OSB.
384. In California, the Supreme Court may not have acted because the legislature was attempting to address the issue.
385. See, e.g., Joel Stashenko, Lippman Announces Pro Bono Requirement for Bar Admission, LAW.COM (May 2, 2012) (describing New York Chief Judge’s initiative to require all bar applicants to provide fifty hours of pro bono representation).
386. There were occasional attempts by individual lawyer-legislators to raise the need for insurance requirements in Texas and New Jersey, but they failed to garner support. See supra notes 296, 315, 357 and accompanying text. In fact, all of the legislators in California (Willie Brown, Lloyd Connelly, and Hannah-Beth Jackson), New Jersey (Jon Bramnick and Nicholas Scutari), and Texas (Elliott Naishtat) who introduced legislation concerning mandatory LPL insurance were lawyers.
387. See Resolution Process, supra note 125 and accompanying text (discussing the Idaho resolution process); TEX. GOV’T CODE §§ 81.0877, 81.0878 (West 2018) (requiring a membership vote for proposed disciplinary rule changes).
388. See supra note 207 and accompanying text.
389. Courts may be more willing to disregard lawyer opposition when regulatory proposals affect the courts’ work, as was the case with Washington’s licensing of LLLTs and New Jersey’s rules requiring greater candor to the court. See supra note 193 and accompanying text.
391. See supra note 219 and accompanying text: Telephone interview with Michelle Points, supra note 136; Petition of the State Bar of Nevada, ADKT 534, supra note 9, at 7.
392. See Order Denying Petition for Amendment to Supreme Court Rule 79, ADKT 534, supra note 30. The State Bar website does not advise the public that this information is available.
393. Morgan & Watson, supra note 83, at 43.
394. Only Virginia (traditionalistic) and West Virginia (traditionalistic/individualistic) are exceptions. See ABA STANDING COMM. ON CLIENT PROTECTION, STATE IMPLEMENTATION OF ABA MODEL COURT RULE, supra note 61, at 5–6.
395. In 2019—fifteen years after the ABA adopted its Model Court Disclosure Rule—the New Jersey Supreme Court indicated it would require disclosure by insured lawyers as to whether they carry insurance, but seemingly is not requiring disclosure by uninsured lawyers. See Notice to the Bar—Ad Hoc Committee on Attorney Malpractice Insurance, supra note 322 and accompanying text. That requirement has yet to be implemented.
396. Nor do the case studies suggest that a state legislature with statutory responsibilities to review the State Bar’s activities will promote significant public-regarding regulation. In recent years, the Texas legislature has not focused attention on the issue of uninsured lawyers or other public protection measures commonly found in other states. See, e.g., STANDING COMM. ON CLIENT PROTECTION, AM. BAR ASS’N REPORT: STATE BY STATE ADOPTION OF ABA CLIENT PROTECTION PROGRAMS (2015), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_by_state_cp_programs.pdf [https://perma.cc/W5H3-YMR7] (reflecting that Texas has not adopted most ABA-recommended client protection programs). It is possible that a state with a full-time legislature, more frequent legislative reviews of the State Bar, and a less traditionalistic political culture might adopt more public-regarding lawyer regulation.


399. For example, the ABA Commission on Ethics 20/20, which drafted revisions in the Model Rules, was composed entirely of lawyers and judges. See ABA Comm’n on Ethics 20/20, About Us, AM. BAR ASS’N, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/aba-commission-on-ethics-20-20/about_us/ [https://perma.cc/LM3Q-URKS] (last visited May 26, 2020).


401. See supra note 340 and accompanying text.

402. See supra note 340 and accompanying text.

403. Order Scheduling Public Hearing and Requesting Public Comment, ADKT 534, supra note 268.

404. The impact of public opinion and public engagement on political decisionmakers is highly contingent on context. For a discussion of some of the research on this issue, see Anne Rasmussen et al., With a Little Help from the People? The Role of Public Opinion in Advocacy Success, 51 COMP. POL. STUD. 139, 140–47 (2018).

405. See also Fred C. Zacharias, The Myth of Self-Regulation, 93 MINN. L. REV. 1147, 1174–75 (2009); Fred C. Zacharias & Bruce A. Green, Rationalizing Judicial Regulation of Lawyers, 70 OHIO ST. L.J. 73, 94 (2009).

406. Such laws might include measures to protect client trust accounts (e.g., random audits), to license non-lawyer legal services providers, or to require lawyer disclosure of confidential information to protect the public.

407. See supra note 2 and accompanying text. Arizona and California license document preparers. See ARIZ. CODE JUD. ADMIN. §§ 7-201, 7-208 (2019); CAL. BUS. & PROF. CODE § 6400 (West 2019).

408. See 22 NYCRR § 1240.2(j) (2019); N.J. RULES OF PROF’L CONDUCT R. 5.1(a), 5.3 (2019).

409. Media attention in Nevada and New Jersey may have contributed to the Supreme Courts’ decisions in those states to study the LPL insurance issue. It did not, however, seem to play a role in persuading the courts to adopt an insurance requirement or strong disclosure rules.