

LAWYERS GOING BARE AND CLIENTS GOING BLIND

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Abstract

Many U.S. lawyers “go bare” and represent clients without maintaining malpractice insurance. Efforts to require these lawyers to carry lawyer professional liability (LPL) insurance have mostly foundered, due to bar opposition and concerns about the cost of insurance. As a compromise between protecting the public and protecting lawyers’ interests, many states now require lawyers to disclose whether they carry LPL insurance to clients, regulators, or both. This Article draws on survey data from Arizona, Connecticut and New Mexico lawyers that shed light on which lawyers go bare and the reasons why they do so. The Article then looks at states’ insurance disclosure requirements and assesses how well they achieve their primary purpose of public protection and their secondary aim of inducing uninsured lawyers to purchase LPL insurance. It also examines whether some of the bar’s arguments against disclosure requirements have proved meritorious. The Article then returns to the question, first considered forty years ago, of whether U.S. lawyers should be required to maintain LPL insurance. The evidence suggests that—like lawyers throughout much of the rest of the world—U.S. lawyers should be required to maintain LPL insurance. It explains why the current disclosure rules do not sufficiently alert clients to the risks posed by uninsured lawyers. The Article recommends measures to improve the current insurance disclosure rules, while recognizing the limitations of any disclosure scheme.

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INTRODUCTION

At a time when the U.S. bar's ability to self-regulate is eroding, the bar's continued strength can be seen in the fact that lawyers have maintained their freedom to go "bare" and can practice law without carrying malpractice insurance. A substantial number of lawyers—mostly solo and very small firm practitioners—do so.¹ The freedom of U.S. lawyers to go bare contrasts with the requirements throughout the rest of the common law world and many civil law countries, where legal professionals must carry insurance in order to practice law.² It also

1. See, e.g., Chuck Herring, *Pro: Disclosure Should Be Required*, 72 TEX. B.J. 822, 823 n.2 (2009) (reporting on a state bar survey indicating 63% of Texas solo practitioners were uninsured); V. Lowry Snow, *Professionally Insured...To Be or Not to Be*, UTAH B.J., Nov.–Dec. 2007, at 6, 6 (reporting on state bar survey indicating 62% of Utah's solo practitioners were uninsured); *Professional Liability Insurance Report*, CAL. LAW. (Feb. 2011), https://ww2.callawyer.com/Clstory.cfm?eid=913846&wteid=913846_Professional_Liability_Insurance_Report (estimating that 30,000 California lawyers were uninsured). The precise number of uninsured lawyers in most jurisdictions is not known. See *infra* text accompanying notes 30–34.

2. See, e.g., *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 s 211 (Austl.) (“An Australian legal practitioner must not engage in legal practice . . . unless the practitioner holds or is covered by an approved insurance policy for this jurisdiction and the policy covers that legal practice.”); *Legal Profession Act*, S.B.C. 1998, c 9, s 30(1) (Can.) (In British Columbia, “benchers must make rules requiring lawyers to maintain professional liability and trust protection insurance.”); Jennifer Ip & Nora Rock, *Mandatory Professional Indemnity Insurance & a Mandatory Insurer: A Global Perspective*, LAWPRO MAG., Fall 2011, at 10, 10, 12, <http://practicepro.ca/LawPROmag/Mandatory-Insurance-Global-Perspective.pdf> (noting that lawyers in Hong Kong, Malaysia, Scandanavia, and the United Kingdom are required to carry insurance).

distinguishes lawyers from other professionals such as physicians³ and dentists,⁴ and some other service providers,⁵ who in many states must carry liability insurance to maintain their licenses.

Relatively little is known about the backgrounds of uninsured lawyers or the reasons why they go bare. There is even less information about their malpractice experience. This is not surprising, because so much about the true incidence of legal malpractice is not known.⁶ Perhaps lawyers who go bare are more careful than their insured counterparts because they have no insurance. Conversely, perhaps they are less careful because they have few assets and are essentially judgment-proof. Regardless of how careful uninsured lawyers may attempt to be, however, they sometimes make mistakes. Some injured clients do not pursue claims against their uninsured lawyers because there is no chance of being compensated. Some malpractice judgments against uninsured lawyers go unpaid.⁷

3. See, e.g., COLO. REV. STAT. § 13-64-301(1)(a.5)(I) (2015); CONN. GEN. STAT. § 20-11b(a) (2015); KAN. STAT. ANN. § 40-3402(a) (2014); N.J. STAT. ANN. § 45:9-19.17(a) (West 2015); 42 R.I. GEN. LAWS § 42-14.1-2 (2016); 243 MASS. CODE REGS. 2.07(16) (2016). While most other states do not require doctors to carry malpractice insurance as a condition of licensure, there are other strong incentives to purchase insurance. For example, hospitals typically require doctors with admitting privileges to carry insurance. 1 RONALD E. LUNDEEN ET AL., HEALTH CARE LAW: A PRACTICAL GUIDE § 16.04(2)(d) (2d ed. 2014). Many health insurers also require physicians who participate in their plans to carry malpractice insurance. See, e.g., *Provider Requirements*, BLUE SHIELD CAL., <https://www.blueshieldca.com/provider/guidelines-resources/prospective-providers/join/providers-requirements.sp> (last visited Aug. 10, 2016).

4. See, e.g., COLO. REV. STAT. § 13-64-301(1)(a)(I) (2015); CONN. GEN. STAT. § 20-126d(a) (2015); KAN. STAT. ANN. § 65-1468 (2015); NEV. REV. STAT. § 428.095 (2015); 63 PA. STAT. AND CONS. STAT. ANN. § 122.2 (West 2016); 42 R.I. GEN. LAWS § 42-14.1-2 (2015).

5. Service providers required to carry liability insurance include, but are not limited to, massage therapists, pest inspectors, and real estate brokers. For examples of regulations regarding massage therapists, see ALA. CODE § 34-43-7 (2016); COLO. REV. STAT. § 12-35.5-116 (2015); IND. CODE § 25-21.8-4-2 (2016); S.D. CODIFIED LAWS § 36-35-21 (2015); WIS. STAT. § 460.05(1)(g) (2015). For examples of regulations regarding home and pest inspectors, see GA. CODE ANN. § 2-7-103(a) (2015); MD. CODE ANN., BUS. OCC. & PROF. § 16-4A-04 (LexisNexis 2016); OKLA. STAT. ANN. tit. 2 § 3-82 (West 2015); OR. REV. STAT. § 634.116 (2015). For examples of regulations regarding real estate brokers, see IDAHO CODE § 54-2013 (2015); LA. STAT. ANN. § 37:1466 (2015); 42 R.I. GEN. LAWS § 5-20.5-25(a) (2015).

6. See Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client Is Safe*, 47 FLA. L. REV. 1, 5, 9 (1995) (stating that “scholars will never be able to present a complete and accurate picture of legal malpractice”). Ramos also discusses some of the reasons the incidence of legal malpractice is unknown. *Id.* at 15–19.

7. See VA. STATE BAR ASS’N, REPORT OF STUDY UNDERTAKEN BY CLIENT PROTECTION SUBCOMMITTEE OF THE SPECIAL COMMITTEE ON LAWYERS MALPRACTICE INSURANCE 2005–2006, at 3 (2006); *infra* note 186.

The debate over whether lawyers should be required to carry lawyer professional liability (LPL) insurance arose in the late 1970s.⁸ At that time, legal malpractice claims increased, and it became harder—and more expensive—for lawyers to obtain LPL insurance.⁹ A few states, including California, Oregon, Washington, and Wisconsin, considered whether to require all lawyers to purchase malpractice insurance from state insurance funds as a way to lower insurance costs and protect the public from uninsured lawyers.¹⁰ Only Oregon adopted this approach—in 1977—requiring its lawyers in private practice to purchase insurance from its Professional Liability Fund.¹¹ Other states subsequently considered whether to require all lawyers in private practice to carry malpractice insurance.¹² Ultimately, those states decided against it due to bar opposition¹³ and the challenges of providing affordable coverage to all of its lawyers.¹⁴

8. See George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 308 (1998). These debates continued for many years thereafter. See, e.g., Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Legal Secret*, 47 VAND. L. REV. 1657, 1726–29 (1994); Jeffrey D. Watters, *What They Don't Know Can Hurt Them: Why Clients Should Know If Their Attorney Does Not Carry Malpractice Insurance*, 62 BAYLOR L. REV. 245, 247–50 (2010).

9. Cohen, *supra* note 8, at 307–08; Fredric L. Goldfein, *Legal Malpractice Insurance*, 61 TEMPLE L. REV. 1285, 1285–86, 1295 (1988); John J. Lynch, *The Insurance Panic for Lawyers*, A.B.A. J., July 1, 1986, at 42, 43.

10. Goldfein, *supra* note 9, at 1296; Jerome B. Schultz, *Ensured Insurance: Bars Look at Mandatory Coverage*, B. LEADER, Jan.–Feb. 1987, at 18, 18.

11. *About the PLF*, OR. ST. B. PROF. LIABILITY FUND, <https://www.osbplf.org/about-plf/overview.html> (last visited Aug. 10, 2016). Oregon requires all of its lawyers in private practice whose principal offices are in Oregon to purchase LPL insurance, including lawyers who only work on a pro bono basis, unless the lawyers are exclusively providing pro bono services for Oregon State Bar certified pro bono programs. OR. REV. STAT. § 752.035 (2015); *Professional Liability Fund Coverage*, OR. ST. B., <https://www.osbar.org/probono/PLFCoverage.html> (last visited Aug. 10, 2016).

12. These states included Arizona, Colorado, Delaware, and Nevada. Goldfein, *supra* note 9, at 1296. More recently, Pennsylvania and Virginia have considered the question. See Robert I. Johnston & Kathryn Lease Simpson, *O Brothers, O Sisters, Art Thou Insured? The Case for Mandatory Disclosure of Malpractice Insurance Coverage*, PA. LAW., May–June 2002, at 28, 28; Darrel Tillar Mason, *Mandatory Malpractice Insurance—It's Time to Call the Question*, VA. ST. B. (Aug. 4, 2008), <http://www.vsb.org/site/news/item/mandatory-malp-ins-080408>.

13. Opponents argued that some lawyers cannot afford LPL insurance, and would be unable to practice; that some lawyers who provide pro bono and low-cost legal services would have to raise their rates or discontinue practicing law; and that mandatory insurance would increase frivolous malpractice lawsuits. Goldfein, *supra* note 9, at 1296–97; Schultz, *supra* note 10, at 19 (presenting the arguments for and against mandatory coverage in chart form). They also claimed there was no evidence uninsured lawyers pose a substantial problem for the public. John Schlegelmilch, *Insufficient Evidence to Support Mandatory Malpractice Insurance Requirements*, NEV. LAW., June 2000, at 9, 9.

14. Some states that considered whether to require all lawyers to carry LPL insurance were concerned that without a state insurance fund, some lawyers would not be able to afford to purchase insurance from commercial carriers. See Johnston & Simpson, *supra* note 12, at 30; see

Since then, many states have concluded that requiring lawyers to disclose their LPL coverage—or lack thereof—to state regulators¹⁵ or clients is an appropriate compromise between protecting the public and protecting lawyers' interests.¹⁶ Theoretically, insurance disclosure provides clients with material information that enables them to make informed decisions about whether to hire lawyers who are uninsured.¹⁷ Proponents also hoped that many uninsured lawyers would obtain LPL coverage if they had to disclose their lack of insurance.¹⁸ Opponents of disclosure requirements argued that disclosure was unnecessary because there was no evidence that uninsured lawyers caused substantial harm to the public.¹⁹ They also claimed that disclosure would unnecessarily stigmatize uninsured lawyers,²⁰ increase malpractice lawsuits,²¹ and give

also James E. Towery, *Should Disclosure of Malpractice Insurance Be Mandatory? Pro*, GPSOLO MAG., Apr.–May 2003, at 36, 38. Yet they also concluded it was not possible to create a state insurance fund for lawyers, similar to the one in Oregon, in states without a unified and fairly homogenous bar. Johnston & Simpson, *supra* note 12, at 30.

15. This Article uses the term “state regulators” to refer to bar licensing authorities. Lawyer licensing is typically administered by the state court or by an integrated state bar.

16. See Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 FORDHAM URB. L.J. 177, 193–94 (2012); Farbod Solaimani, *Watching the Client's Back: A Defense of Mandatory Insurance Disclosure Laws*, 19 GEO. J. LEGAL ETHICS 963, 978 (2006).

17. See Fortney, *supra* note 16, at 196–98; Watters, *supra* note 8, at 247–49. Disclosure requirements can be viewed as another manifestation of the lawyer's duty to communicate with clients so that clients can make informed decisions concerning representation. See MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2015).

18. See COLO. SUP. CT. RULE 1.4 SUBCOMM., INTERIM REPORT 1–2 (2004); Watters, *supra* note 8, at 249–50; Carole J. Buckner, *Malpractice Insurance Disclosure Lurches Toward Approval*, ORANGE COUNTY LAW., Apr. 2008, at 50, 51 (2008); Mark Hansen, *Under Covered*, A.B.A. J., Nov. 2001, at 46, 47–48; Larry Rulison, *State Bar Mulls Disclosure of Coverage Status*, PHILA. BUS. J. (Feb. 7, 2005, 12:00 AM), <http://www.bizjournals.com/philadelphia/stories/2005/02/07/newscolumn4.html?page=all>.

19. See Devin S. Mills & Galina Petrova, *Modeling Optimal Mandates: A Case Study on the Controversy over Mandatory Professional Liability Coverage and Its Disclosure*, 22 GEO. J. LEGAL ETHICS 1029, 1034 (2009); Watters, *supra* note 8, at 251; Jason Mil, *New Rule Would Require Attorney Disclosures Regarding Malpractice Coverage*, LAW. J., Sept. 2005, at 7, 7 (2005); Towery, *supra* note 14, at 39; Memorandum from David J. Beck, Chair, State Bar of Tex. Bd. of Dirs., to State Bar of Tex. Bd. of Dirs. 4 (June 11, 2008), https://www.texasbar.com/pliflashdrive/material/3_TaskForce_Report_June08.pdf.

20. Edward C. Mendryzcki, *Should Disclosure of Malpractice Insurance Be Mandatory?: Con*, GPSOLO MAG., Apr.–May 2003, at 37, 41; Bill Miller, *Con: Disclosure Should Not Be Required*, 72 TEX. B.J. 824, 826 (2009); Rodney Snow, *Is Mandating Disclosure in Your Fee Letter That You Do Not Carry Malpractice Insurance a Sound Idea?*, UTAH B.J., Sept.–Oct. 2005, at 12, 13; Andrew Wolfson, *Kentucky Lawyers Need No Insurance*, COURIER-J., June 17, 2014, at A4; Memorandum from David J. Beck, *supra* note 19, at 4.

21. See, e.g., Miller, *supra* note 20, at 826; Insurance Disclosure Task Force – Final Report and Recommendations from James E. Towery, Chair, Ins. Disclosure Task Force et al., to Members of the Bd. of Governors, Cal. State Bar 19 (Sept. 14, 2007), <http://www.calbar.ca.gov/>

clients a false sense of security that any claims that might arise would be compensated.²²

In 1988, California became the first state to adopt an insurance disclosure rule when it required lawyers to disclose to clients in their written fee contracts whether they maintained LPL insurance.²³ After a few other states adopted disclosure requirements, the ABA, in 2004, adopted a Model Court Rule on Insurance Disclosure, which requires lawyers to disclose whether they carry LPL insurance on their annual registration forms and provides for courts to determine how to make this information available to the public.²⁴ Today, seven states require that uninsured lawyers disclose directly to clients that they do not carry LPL insurance (“direct disclosure”).²⁵ Seventeen other states require disclosure about LPL insurance coverage on attorney registration forms,²⁶ and ten of those states post the insurance information on state bar or judicial websites.²⁷ Failure to truthfully disclose insurance information may result in a disciplinary sanction.²⁸ Many states do not, however, require lawyers to make any disclosures to clients or regulators about LPL insurance, including some large states such as Florida, New York, and Texas.²⁹

portals/0/documents/publiccomment/2007/Insurance-Dis_BOG-Sept14.pdf [hereinafter Insurance Disclosure Report].

22. See Mendryzcki, *supra* note 20, at 40; Miller, *supra* note 20, at 825.

23. See Towery, *supra* note 14, at 38. California subsequently amended the disclosure requirement in the 1990s so only lack of insurance needed to be disclosed. *Id.* This requirement lapsed in 2000, but California adopted a new disclosure requirement in 2009. *Id.*; see CAL. RULES OF PROF'L CONDUCT r. 3-410 (2015).

24. MODEL CT. RULE ON INS. DISCLOSURE preface (AM. BAR ASS'N 2004) (stating that the “information . . . will be made available [to the public] by such means as designated by the highest court in the jurisdiction”).

25. These states are Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania, and South Dakota. AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., AM. BAR ASS'N, STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON INSURANCE DISCLOSURE (2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrid.authcheckdam.pdf [hereinafter STATE IMPLEMENTATION].

26. These states are Arizona, Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, North Dakota, Rhode Island, Virginia, Washington, and West Virginia. *Id.*

27. See *infra* Table 3.

28. See, e.g., MASS. SUP. JUD. CT. R. 4:02(2A)(c) (noting that false filing will subject a lawyer to disciplinary sanction); Columbus Bar Ass'n v. Roy, 34 N.E.3d 109–10 (Ohio 2015) (imposing public reprimand for failure to comply with direct disclosure requirement). In other states, failure to disclose the information to regulators may result in an administrative suspension. See, e.g., Wash. State Bar Ass'n, *Professional Liability Insurance Policies*, <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Annual-License-Renewal/License-Renewal-FAQs/Professional-Liability-Insurance> (last visited Aug. 10, 2016).

29. STATE IMPLEMENTATION, *supra* note 25.

Somewhat surprisingly, the number of uninsured lawyers who represent private clients is still not known, even in many states that require insurance disclosure. For example, four of the seven states that require direct disclosure to clients do not require disclosure of insurance information to state regulators.³⁰ Some state regulators that collect insurance information do not calculate the data they collect,³¹ will not share the information,³² or do not ask about LPL insurance in ways that enable them to calculate the number of uninsured lawyers who are representing private clients. For instance, Idaho requires its lawyers to disclose insurance information to state regulators, but it does not differentiate between lawyers in private practice and government lawyers or in-house counsel.³³ Other states include as “uninsured” lawyers who maintain “active” licenses but are not currently practicing law.³⁴ In the states that can calculate the number of uninsured lawyers who represent private clients, the percentage of lawyers in private practice who are uninsured ranges from 6% to 20%.³⁵

At a time when half the states impose some insurance disclosure requirement on lawyers, it is time to consider how well these requirements are working and to look more closely at the lawyers who go bare. In Part I, this Article draws on survey data that shed light on which lawyers go bare and the reasons why they do so. It uses information derived from a 2011 survey of uninsured New Mexico lawyers and more

30. See *infra* Table 2.

31. For example, Rhode Island requires licensed attorneys to indicate on their registration statements whether they maintain malpractice insurance, but the information is not included in a field that can be tracked or counted electronically. E-mail from Craig N. Berke, Assistant State Court Adm’r, R.I. Supreme Court, to author (May 13, 2015, 11:41 EDT) (on file with author).

32. E-mail from Marty Cole, Dir., Minn. Office of Lawyers Prof’l Responsibility, to author (Apr. 16, 2015, 16:36 EDT) (on file with author).

33. In Idaho, all lawyers who are active members of the Idaho State Bar must report whether they are “currently covered by professional liability insurance,” however, the disclosure form does not allow lawyers to indicate they are government lawyers or in-house counsel. See Idaho State Bar, Disclosure of Professional Liability Insurance, https://isb.idaho.gov/pdf/licensing/disc_prof_liability_ins.pdf.

34. Massachusetts asks lawyers whether they are covered by LPL insurance, not covered by LPL insurance, or not covered because they are government lawyers or employed by an organizational client and do not represent clients outside that capacity. MASS. SUP. JUD. CT. R. 4:02(2)(A); *Certification of Professional Liability Insurance*, MASS. BOARD B. OVERSEERS, <https://massbbo.org/insurance-prof-liability-form.pdf> (last visited Aug. 10, 2016). This does not reveal, however, how many of the uninsured lawyers were not practicing law at all but nevertheless retaining their “active” status.

By counting these lawyers as “uninsured”—and posting this information on websites—states make it easier for the public to check on any lawyer who might decide to provide legal services to private clients. But this approach makes it difficult to determine the number of uninsured lawyers who are currently posing a risk to private clients because they are representing clients while uninsured.

35. See *infra* Tables 2 and 3.

recent (and limited) surveys of insured and uninsured lawyers in Arizona and Connecticut. In Part II, this Article looks at states' insurance disclosure requirements. Drawing on information obtained from state regulators, it calculates the percentage of uninsured lawyers who represent private clients where that information is available. It also explores whether insurance disclosure requirements appear to have induced lawyers to purchase LPL insurance and considers whether two of the arguments against disclosure requirements—the concerns about stigma and frivolous malpractice lawsuits—have proved to be true. This Article then addresses, in Part III, the claim that lawyers who go bare do not cause substantial harm to the public. It draws on conversations with plaintiffs' malpractice lawyers about their experiences with uninsured lawyers, as well as other data. In Part IV, this Article returns to the larger question of what to do about uninsured lawyers. It considers whether, in light of the available evidence, courts and legislatures should permit lawyers to continue to go bare. It also explains why—if lawyers are allowed to go bare—the current disclosure rules are inadequate to protect the public. Although it seems unlikely that disclosure rules can ever be strengthened sufficiently to facilitate truly informed consent, this Article suggests some ways to make the disclosure rules somewhat more effective by changing the timing, method, and content of the disclosure. The Article concludes that the arguments for allowing lawyers to go bare do not outweigh the interests in public protection. It identifies some questions state courts and legislatures should be asking as they consider how best to protect the public from lawyers who go bare.

I. PORTRAITS OF THE UNINSURED LAWYERS

Uninsured lawyers are an understudied group. The only previously published study is a 2011 New Mexico State Bar survey of 503 uninsured lawyers, which yielded 202 responses, including 131 responses from uninsured lawyers in private practice.³⁶ The previous accounts of the survey results did not report exclusively on the responses of the uninsured lawyers who were representing private clients,³⁷ but the New Mexico Bar has since provided me with the data for analysis of the responses of uninsured private practitioners.³⁸ A small number of uninsured Arizona

36. Jack Brant, *Survey of Lawyers Who Do Not Have Legal Malpractice Insurance*, N.M. LAW., May 2012, at 3, 4. The survey defined "private practice" to include lawyers who engaged in pro bono representation. *Id.*

37. The previous report of the data analyzed the responses from all the lawyers who responded to the survey, including some lawyers who were insured or were not engaged in private practice. *Id.* at 4.

38. State Bar of N.M., *New Mexico Uninsured Lawyers Survey (2011)* (unpublished survey data) (on file with author) [hereinafter *New Mexico Survey*].

lawyers (48)³⁹ and uninsured Connecticut lawyers (28),⁴⁰ who were predominantly solo practitioners, also responded to surveys in 2015. The response rates by the Arizona and Connecticut uninsured lawyers were very low, and so those results cannot be viewed as representative.⁴¹ Nevertheless, taken together, the three surveys provide some insights into the circumstances and attitudes of uninsured lawyers⁴² and confirm some anecdotal information previously gathered about this group.⁴³

The surveys revealed that the time uninsured lawyers devote to law practice varies considerably. Some uninsured lawyers maintain “active” status but provide legal services on a very limited basis. For example, some of the New Mexico lawyers were essentially retired, or only represented family members occasionally, or were exclusively performing pro bono work.⁴⁴ Approximately 21% of the uninsured Arizona lawyers and 25% of the uninsured Connecticut lawyers practiced

39. Leslie C. Levin, Arizona Uninsured Lawyers Survey (2015) (unpublished survey data) (on file with author) [hereinafter Arizona Uninsured Lawyers Survey].

40. Leslie C. Levin, Connecticut Lawyers Survey (2015) (unpublished survey data) (on file with author) [hereinafter Connecticut Survey]. The Connecticut and Arizona surveys asked almost identical questions and solicited responses from attorneys working in one- to five-lawyer firms. Approximately 88% of the uninsured Arizona lawyers and 86% of the Connecticut uninsured lawyers who responded to the surveys worked alone.

41. I sent the Connecticut survey via e-mail to 1,764 lawyers in private practice who worked in firms of one to five lawyers. The names were obtained from the active attorneys listed on the Connecticut Judicial Branch website and from bar association membership lists that could be accessed on the internet. A total of 668 lawyers responded, yielding a response rate of 38%. This is considered a good response rate, but the number of uninsured lawyers who responded (28) was much lower than would be expected, even if the overall percentage of Connecticut uninsured lawyers in private practice were, conservatively estimated, 10%. At my request, the Arizona State Bar e-mailed separate surveys to 6,751 insured Arizona lawyers and 2,232 uninsured Arizona lawyers in private practice for whom the State Bar had e-mail addresses, and who appeared to work in firms of one to five lawyers. Arizona Uninsured Lawyers Survey, *supra* note 39; Leslie C. Levin, Arizona Insured Lawyers Survey (2015) (unpublished survey) (on file with author) [hereinafter Arizona Insured Lawyers Survey]. Thus, the responses from forty-eight uninsured lawyers reflect a very low response rate.

42. It should be noted that the three states utilize different approaches to the disclosure of insurance information: New Mexico requires direct disclosure to clients, Arizona posts insurance information on the state bar website, and Connecticut has no insurance disclosure requirement. See STATE IMPLEMENTATION, *supra* note 25.

43. See, e.g., VA. STATE BAR ASS'N, *supra* note 7, at 7 (providing an anecdotal description of reasons why lawyers are uninsured); Jill Sundby, *What Montana Lawyers Think About...Mandatory Malpractice Insurance: Your Answers to State Bar Survey*, MONT. LAW., Aug. 2001, at 24, 24 (reporting on individual comments from Montana lawyers in response to a state bar survey).

44. See Brant, *supra* note 36, at 4; New Mexico Survey, *supra* note 38. The New Mexico survey did not ask respondents to indicate how much time they performed legal work, so it was impossible to calculate the percentage of uninsured lawyers who performed legal work on a part-time basis.

law no more than fifteen hours per week.⁴⁵ Yet a majority of the uninsured Arizona lawyers (57%) and the uninsured Connecticut lawyers (54%) practiced law more than thirty hours per week.⁴⁶

In all three of these jurisdictions, annual LPL premiums for solo and small firm practitioners cost around \$3,000 per lawyer for minimum levels of coverage (\$100,000/\$300,000).⁴⁷ LPL insurance is a deductible business expense.⁴⁸ Nevertheless, uninsured New Mexico lawyers most frequently cited cost as the reason for not carrying malpractice insurance.⁴⁹ In the other two states, uninsured lawyers most frequently cited unaffordability as the reason: Among the uninsured Arizona and Connecticut lawyers, 65% and 58% responded, respectively, that one of the reasons they did not carry LPL insurance was because they could not afford it.⁵⁰ It is unclear, however, whether all of the uninsured lawyers knew the cost of LPL coverage. Among the uninsured New Mexico lawyers in private practice, 40.8% had never applied for insurance coverage,⁵¹ suggesting that they may have been unaware of the actual cost of insurance. Among the fifteen Arizona lawyers who had never been insured, seven had never communicated with an insurance agent, broker, or underwriter about the possibility of obtaining LPL insurance.⁵²

45. Arizona Uninsured Lawyers Survey, *supra* note 39; Connecticut Survey, *supra* note 40.

46. Arizona Uninsured Lawyers Survey, *supra* note 39; Connecticut Survey, *supra* note 40.

47. See Daymon Ely, *Survey Results: What About Them?*, N.M. LAW., May 2012, at 3, 3; E-mail from Insurance Executive No. 2 to author (July 16, 2015, 19:23 EDT) (on file with author) (stating that Arizona LPL insurance ranged from \$1,500–\$2,500 for mid-risk areas of practice and \$3,000–\$5,000 for high-risk areas); Telephone Interview with Insurance Executive No. 1 (Aug. 15, 2014) (stating that insurance ranged from \$2,500–\$4,000 in Connecticut).

48. DEP'T OF TREASURY, I.R.S. PUB. NO. 535: BUSINESS EXPENSES 18 (2016).

49. Brant, *supra* note 36, at 4.

50. Arizona Uninsured Lawyers Survey, *supra* note 39; Connecticut Survey, *supra* note 40. The New Mexico survey asked an open-ended question about why the lawyer was uninsured. Survey Regarding Insurance Coverage of New Mexico Attorneys 2 (on file with author). The Arizona and Connecticut surveys framed the question about why the lawyer was not currently insured in a way that allowed the lawyers to provide multiple responses, including “I cannot afford it.” They also allowed the respondents to indicate “other” and fill in a response.

51. For ease of reference to some of the New Mexico results, see Table 1. Due to the small numbers of responses to the Arizona and Connecticut surveys, the Article describes but does not set forth those results in tabular form.

52. Arizona Uninsured Lawyers Survey, *supra* note 39. This question was not asked in the Connecticut survey.

TABLE 1
SURVEY RESPONSES FROM NEW MEXICO UNINSURED LAWYERS⁵³

Question	Strongly Agree or Agree	Strongly Disagree or Disagree
I have never applied for insurance coverage	40.8% (51)	59.2% (74)
If I was required by the New Mexico Supreme Court to purchase insurance, I would do so	53% (61)	47% (54)
If I was required to purchase insurance, I would stop practicing law in New Mexico	58.6% (68)	41.4% (48)
If I am sued for malpractice, I can afford to retain separate counsel	57.5% (69)	42.5% (51)
I am not insured because my claims experience is not acceptable	4.4% (5)	95.6% (108)
My areas of practice do not expose me personally to any risk of liability	43.2% (54)	56.8% (71)
I have no problem telling a potential client that I am not insured	83.7% (103)	16.3% (20)
I believe clients assume that lawyers are insured	20.8% (25)	79.2% (95)
All lawyers should be insured, if they can afford the premium	32.8% (40)	67.2% (82)

Even though the cost of LPL insurance was an issue for many uninsured lawyers, the cost of insurance was not prohibitive for some of them. Among the uninsured New Mexico lawyers, 53% strongly agreed or agreed that if they were required by the New Mexico Supreme Court to purchase insurance they would do so, indicating they were able to pay for LPL insurance.⁵⁴ Among the 47% who strongly disagreed or disagreed that they would pay for LPL insurance if required to do so, the narrative responses indicated the issue for some lawyers was not the cost

53. Table 1 reflects the responses of uninsured lawyers who answered the question and work in private practice. The numbers in parentheses reflect the number of lawyers who answered the question in the manner indicated.

54. See *supra* Table 1. Somewhat inconsistently, 58.6% of the uninsured New Mexico lawyers strongly agreed or agreed that if they were required to purchase LPL insurance, they would stop practicing law in New Mexico. See *supra* Table 1. There were sixteen lawyers who responded that they both would purchase insurance if it were required and would cease practicing law in New Mexico if insurance were required. The narrative responses indicated some of them were genuinely unsure what they would do. For example, one such lawyer wrote, "I'm not sure[.] I know my premiums now will be sky high because I've not had coverage for a few years. I'd try probably, to comply, but more than likely I'd [do] something else." New Mexico Survey, *supra* note 38.

of insurance but philosophical opposition to an insurance requirement.⁵⁵ The comments of some of the other uninsured lawyers who said they would not pay for LPL insurance if it were required (and might instead, for example, retire) suggested the issue was not necessarily an inability to afford LPL insurance but rather, an economic calculation that they were making less from the practice of law than it would cost them to maintain their licenses. Further evidence that some of the fifty-four lawyers who indicated they would not purchase LPL insurance if so required might have been able to afford insurance could be found in the fact that the majority (31) of them strongly agreed or agreed that if they were sued for malpractice they could afford to retain separate counsel to defend them.⁵⁶

Nevertheless, the survey responses also revealed that some of the uninsured lawyers genuinely could not pay for LPL insurance. One New Mexico lawyer noted in narrative comments, “I provide the majority of my service pro bono or at reduced rates. I live below the poverty level. I have no medical/health or homeowners insurance either. If I could afford insurance, I’d buy those before I purchased legal malpractice insurance.”⁵⁷ Another New Mexico lawyer wrote, “I am struggling to survive. I earned enough net income to pay for food, shelter, clothing, gasoline, and utilities; I have had to decline recommended medical diagnostic tests for cancer because I do not have enough money to pay for those tests.”⁵⁸ An uninsured Connecticut lawyer, who had been on inactive status for some time and had recently resumed practice explained, “My income is very low (under \$25,000 for 2014) and there is little demand for my services.”⁵⁹

Responses to the questions on the Arizona and Connecticut surveys were consistent with reports that some uninsured lawyers may not have very profitable practices, making it difficult for some of these lawyers to pay for LPL insurance. More than half of the uninsured Arizona lawyers (52%) and three-quarters of the uninsured Connecticut lawyers maintained their offices in their homes, as compared to insured Arizona (22%) and Connecticut (11%) lawyers who maintained their offices at

55. See *supra* Table 1. For instance, one lawyer who strongly disagreed with the statement wrote, “I believe this would be unconstitutional and would not comply.” Another wrote, “Are you kidding me? Now you’re going to make us buy insurance like [O]bamacare? If I couldn’t afford it, then I either would practice illegally or quit.” New Mexico Survey, *supra* note 38.

56. New Mexico Survey, *supra* note 38.

57. *Id.* This type of response has been echoed in other jurisdictions. See, e.g., Sundby, *supra* note 43, at 24 (reporting on a response to a Montana survey stating, “I don’t make enough money. I can’t afford my own medical insurance, either”).

58. New Mexico Survey, *supra* note 38.

59. Connecticut Survey, *supra* note 40.

home.⁶⁰ The majority of uninsured Arizona (63%) and Connecticut (61%) lawyers had no support staff, and were significantly less likely than insured lawyers to have such staff.⁶¹ A small percentage of the uninsured Arizona lawyers (10.4%) and one of the uninsured Connecticut lawyers (3.6%) were recent law school graduates (2011 or later) who were working on their own and may have been unable to afford LPL insurance.⁶²

Difficulty obtaining LPL coverage due to poor claims experience did not appear to be a significant reason why most lawyers were uninsured. Only five uninsured New Mexico lawyers (3.8%) strongly agreed or agreed that they were not insured because their claims experience was unacceptable,⁶³ including two who indicated in narrative comments that they could not find a company to insure them or were having difficulty doing so.⁶⁴ None of the uninsured Arizona lawyers and only one uninsured Connecticut lawyer indicated they did not maintain insurance because they were unable to obtain coverage.⁶⁵

It appears that some uninsured lawyers do not carry LPL insurance because they believe the areas in which they practice do not put them at risk of malpractice claims. Over 43% of uninsured New Mexico lawyers indicated their areas of practice did not expose them personally to any risk of liability.⁶⁶ In some cases they were correct, because they worked as guardians ad litem⁶⁷ or for other reasons had personal immunity for their legal work. Approximately 10% of the uninsured New Mexico lawyers exclusively practiced criminal law, and a few of them indicated that they did not carry LPL insurance because criminal defense lawyers

60. Arizona Insured Lawyers Survey, *supra* note 41; Arizona Uninsured Lawyers Survey, *supra* note 39; Connecticut Survey, *supra* note 40. The fact that a lawyer maintains his office at home does not necessarily mean the practice is not profitable, but some lawyers work from home for this reason. The differences between insured and uninsured lawyers were statistically significant for the Connecticut lawyers ($p < .01$) but not for the Arizona lawyers, using Fisher's Exact Test, which is used in lieu of the chi-square test because small numbers are involved.

61. Arizona Uninsured Lawyers Survey, *supra* note 39; Connecticut Survey, *supra* note 40. In contrast, 31% of Arizona insured lawyers and 23% of Connecticut insured lawyers had no support staff. Significance at $p < .01$ was determined using Fisher's Exact Test.

62. Arizona Uninsured Lawyers Survey, *supra* note 39; Connecticut Survey, *supra* note 40.

63. *See supra* Table 1.

64. New Mexico Survey, *supra* note 38. Four of the five lawyers indicated that they had been declined insurance coverage by more than one insurance carrier.

65. Arizona Uninsured Lawyers Survey, *supra* note 39; Connecticut Survey, *supra* note 40. The Connecticut lawyer also indicated an inability to afford coverage, which suggests that the problem may not have been a true inability to obtain coverage, but rather that the lawyer could not afford it at the price quoted.

66. *See supra* Table 1.

67. Guardians ad litem are absolutely immune from liability for actions taken within the scope of their employment. *See Kimbrell v. Kimbrell*, 331 P.3d 915, 919 (N.M. 2014).

are rarely sued or found liable for malpractice.⁶⁸ In other cases, the uninsured lawyers' responses that their areas of practice did not expose them to personal liability were surprising, as some practiced in areas such as a family law, collections, and real property, which give rise to a greater number of malpractice claims than some other areas of law.⁶⁹

The narrative comments also indicated that a cohort of uninsured lawyers believe that their careful practices insulate them from malpractice liability and that they could responsibly handle a malpractice lawsuit if necessary. A New Mexico lawyer noted, "I have sufficient assets to hire an attorney and pay a claim. I have never had a claim filed and believe insurance creates lazy and negligent attorneys. I chose to walk the high wire without the net. I have been practicing law for over 30 years."⁷⁰ An Arizona lawyer explained:

I do not practice in high risk areas, am particular about clients I accept, am detailed and double-triple check everything to be able to refute any alleged malpractice (including having a written record of every conversation/financial transaction), employ asset protection vehicles, and believe that having insurance is a double-edged sword: if an illmotivated [sic] claimant knows there is insurance they're more likely to file a claim in the hope of getting some financial settlement without regard to merit, and insureds have no control over who is hired by insurance companies as defense counsel. Early in my solo practice career, I carried insurance because I didn't know what I didn't know, took on work for some clients that required it, and may have taken on clients that I wouldn't today. Now,

68. See New Mexico Survey, *supra* note 38. The perception that criminal defense attorneys are rarely involved in malpractice actions is accurate. To prevail in a malpractice case, a criminal defendant usually must demonstrate actual innocence. See Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 37–38. Nevertheless, criminal defense lawyers sometimes report claims for malpractice. AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS 2012–2015, at 11 (2016) [hereinafter PROFILE OF LEGAL MALPRACTICE CLAIMS]. They are also sometimes found liable for their actions. See Celeste King & Barrett Breitung, *Not Actual Protection: Actual Innocence Standard for Criminal Defense Attorneys in California Does Not Eliminate Actual Lawsuits and Actual Payments*, COMPLETE EQUITY MARKETS (Oct. 7, 2004), http://www.cemins.com/pdf/NACDL_Actual_Innocence.pdf.

69. See PROFILE OF LEGAL MALPRACTICE CLAIMS, *supra* note 68, at 11; Herbert M. Kritzer & Neil Vidmar, *When the Lawyer Screws Up: A Portrait of Legal Malpractice Claims and Their Resolution* 37–40, 49–50 (June 29, 2015) (unpublished manuscript) (on file with the Duke Law Scholarship Repository), http://scholarship.law.duke.edu/faculty_scholarship/3491; New Mexico Survey, *supra* note 38.

70. New Mexico Survey, *supra* note 38.

with the previous protective steps mentioned, many years of premium payments are better not spent or best placed into an investment vehicle.⁷¹

Like this lawyer, a few other Arizona survey respondents who viewed themselves as responsible professionals also believed that maintaining LPL insurance would make them a target for meritless claims. Another Arizona lawyer wrote:

It all comes down to personal and professional responsibility. In 28 years, I've followed all laws, rules, ethical/professional requirements. If I make a mistake, I'm going to admit it and correct it. But, [I] won't run my life or practice by insurance contract terms, clients who may want to pursue a claim because they know there's insurance regardless of merit, or other "fear." Nor do I want additional regulatory or financial requirements that serve no end. . . .⁷²

As the preceding quote indicates, some of the lawyers' responses revealed that at least part of the reason they did not carry LPL insurance was due to their attitudes towards insurance companies.⁷³ One New Mexico lawyer wrote in response to the question why the lawyer was uninsured, "Extreme mistrust/dislike of/for insurance industry."⁷⁴ Another lawyer observed, "I do not believe that I need it. It is an unnecessary extra expense. If insurance is in place the lawyers give up defense decisions to the insurance adjusters and lawyers which [is] unacceptable."⁷⁵ Yet another explained:

The cost is outrageous and the coverage appears to be a scam—or practically a scam. I struggled to pay for insurance for years, but the only time I contacted the provider, I was told they would not cover me because I had not given them notice of the claim back at the time of the incident that gave rise to the claim. I [was] not going to pay premiums and then have to fight that

71. Arizona Uninsured Lawyers Survey, *supra* note 39.

72. *Id.*

73. *See id.* The hostility toward insurance companies was especially notable in the responses of the New Mexico lawyers. This may have been because the New Mexico survey invited more narrative responses than the Arizona and Connecticut surveys or because uninsured lawyers in New Mexico are already subject to direct disclosure requirements and are concerned about further regulation. Indeed, more than two-thirds of the New Mexico uninsured lawyers strongly disagreed or disagreed that lawyers should be insured if they could afford it. *See supra* Table 1.

74. New Mexico Survey, *supra* note 38.

75. *Id.*

company for coverage I've paid for.⁷⁶

Finally, there was some suggestion that early practice experiences may affect the likelihood that lawyers will carry malpractice insurance later in their careers. The Arizona survey responses revealed that 61.7% of uninsured lawyers were covered by LPL insurance in their first jobs in private practice, while 89% of insured lawyers were covered by insurance in their first jobs in private practice.⁷⁷ Among the Connecticut lawyers, 75% of the uninsured lawyers were covered by insurance in their first jobs in private practice, while 97% of the insured lawyers were covered by insurance in their first jobs in private practice.⁷⁸ Some of the uninsured lawyers had never been covered by LPL insurance during their careers: Among the Arizona lawyers, fifteen out of forty-seven had never been covered by LPL insurance, including six who had been practicing more than fifteen years.⁷⁹ Among the Connecticut lawyers, five out of twenty-eight had never been covered by LPL insurance, including three lawyers who had been practicing more than fifteen years.⁸⁰ It may be that lawyers who are covered by malpractice insurance when they first enter private practice come to view insurance as a necessary part of doing business, while those who are not covered when they enter private practice are less likely to view insurance as essential.⁸¹ A larger study would be needed to determine whether and in what ways early practice experiences affect decisions to maintain malpractice insurance during a lawyer's career.

II. INSURANCE DISCLOSURE REQUIREMENTS AND THEIR IMPACT ON LAWYERS

Even though about half of the states have adopted insurance disclosure requirements, it appears that no one has systematically examined the situation in states that adopted such requirements, either with respect to the number of uninsured lawyers in those states or the impact of the

76. *Id.*

77. Arizona Uninsured Lawyers Survey, *supra* note 39; Arizona Insured Lawyers Survey, *supra* note 41.

78. Connecticut Survey, *supra* note 40.

79. Arizona Uninsured Lawyers Survey, *supra* note 39.

80. Connecticut Survey, *supra* note 40.

81. When I interviewed thirty insured Connecticut solo and small firm lawyers during the same time period, they almost all reported that they had maintained continuous LPL insurance coverage since they started in private practice. I did not directly ask whether their early experiences affected their decision to continue to carry insurance. There is some evidence, however, that lessons learned early in practice can significantly affect lawyers' decisions later in their careers. See Leslie C. Levin, *Immigration Lawyers and the Lying Client*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 87, 101–02 (Leslie C. Levin & Lynn Mather eds., 2012); Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 *HOUS. L. REV.* 309, 376–81 (2004) [hereinafter Levin, *Small Law Firm Practitioners*].

requirement on insurance purchasing by previously uninsured lawyers. Nor have there been efforts to evaluate whether two of the major concerns expressed by disclosure opponents—that disclosure rules would stigmatize uninsured lawyers and cause an increase in frivolous lawsuits—have proved to be true. Unfortunately, the evidence on all counts is limited. Nevertheless, this Section begins to address these questions.

A. *The Disclosure Requirements*

Twenty-four states require lawyers to make disclosures—to their clients, state regulators, or both—concerning LPL insurance.⁸² The disclosure requirements vary considerably. Direct disclosure requirements are the most onerous as they typically require uninsured lawyers to advise their clients that they do not maintain minimum amounts of LPL insurance or that they have ceased to maintain insurance during the representation.⁸³ As Table 2 reveals, however, direct disclosure requirements vary in the extent to which insurance information is revealed to the public and to state regulators who enforce direct disclosure rules.

82. *See supra* notes 25–26 and accompanying text. In addition, Maine asks a question on its registration form about whether lawyers carry LPL insurance but does not currently have a rule requiring insurance disclosure. *See* ME. BD. OF OVERSEERS OF THE BAR, NEW ATTORNEY REGISTRATION STATEMENT, http://www.mebaroverseers.org/attorney_services/registration/pdf/NewAdmitteeStatement.pdf.

83. The minimum amount is usually \$100,000 per occurrence. *See, e.g.*, PA. RULES OF PROF'L CONDUCT r. 1.4(c) (2016). California is the only direct disclosure state that does not specify a minimum amount of LPL insurance. CAL. RULES OF PROF'L CONDUCT r. 3-410 (2015).

TABLE 2
STATES REQUIRING DIRECT DISCLOSURE BY UNINSURED
LAWYERS TO CLIENTS

State	Form of Disclosure by Uninsured Lawyer to Client	Additionally Reported to Regulator	Posted on Official Website	Percent of Lawyers in Private Practice who are Uninsured ⁸⁴
Alaska	In writing to existing clients			Unknown
California ⁸⁵	In writing at time lawyer engaged			Unknown
New Hampshire	In writing at time lawyer engaged on separate form signed by client			Unknown
New Mexico	In writing at time lawyer engaged on separate form signed by client	X ⁸⁶		15.3% ⁸⁷
Ohio	In writing at time lawyer engaged on separate form signed by client			Unknown

84. I obtained the percentages in Tables 2 and 3 by contacting the officials in each state who have access to the insurance information. The figures generally reflect the percentage of lawyers engaged in private practice who are uninsured. The percentages are not completely comparable because the states do not frame the insurance question in precisely the same way. *See infra* notes 87, 90, 92, 105–06, 110, and 112–15. In addition, the New Mexico and South Dakota figures reflect the percentage of uninsured lawyers who actually engage in private practice in those states, while the Pennsylvania figure includes all uninsured private practitioners who are admitted to the Pennsylvania bar, regardless of whether they actually practice in Pennsylvania.

85. Disclosure is required only if it is reasonably foreseeable that the representation will exceed four hours of time. CAL. RULES OF PROF'L CONDUCT r. 3-410(A) (2015).

86. *In re* Mandatory Disclosure of Professional Liability Insurance Coverage, No. 05-8500 (N.M. July 29, 2005).

87. STATE BAR OF N. M., PROFESSIONAL LIABILITY INSURANCE REPORT (2015) (on file with author). This figure reflects the percentage of lawyers engaged in private practice in New Mexico who are uninsured. New Mexico asks lawyers whether they are “engaged in the private practice of law.” STATE BAR OF N.M., 2015 LICENSING STATEMENT (on file with author).

Pennsylvania	In writing to new and existing clients	X ⁸⁸	X ⁸⁹	6.9% ⁹⁰
South Dakota	Notice to client on letterhead and in every writing sent to client; also in advertising	X ⁹¹		6% ⁹²

For example, South Dakota lawyers who do not carry a minimum of \$100,000 of LPL insurance must disclose this fact to clients at the inception of the attorney-client relationship.⁹³ This information must appear on any firm letterhead sent to clients in the same size font as lawyers use for their names.⁹⁴ Lawyers must also disclose this information in every written communication with their clients and in any advertising.⁹⁵ Potential clients typically only obtain this information if they contact a lawyer directly, as this information is not posted on the state bar website or otherwise provided to the public.⁹⁶ New Mexico requires uninsured lawyers to provide clients with written notice on a separate document at the time of engagement that they do not carry LPL insurance of at least \$100,000 per occurrence and to obtain written acknowledgement by the client that the client has received

88. See CERTIFICATION OF PROFESSIONAL LIABILITY INSURANCE, DISCIPLINARY BD. SUP. CT. PA., <http://www.padisiplinaryboard.org/documents/InsuranceCertification-Fillable.pdf> (last visited Aug. 10, 2016).

89. See *Disciplinary Board of Pennsylvania Makes It Easy for the Public to Know If Lawyers Have Professional Liability Insurance*, DISCIPLINARY BD. SUP. CT. PA., <http://www.padisiplinaryboard.org/newsroom/rules/2010/0914.php> (last visited Aug. 10, 2016).

90. Letter from Suzanne E. Price, Pa. Attorney Registrar, to author (Apr. 21, 2015) (on file with author). This figure reflects lawyers who do not maintain LPL insurance “but do have private clients and/or a possible exposure to malpractice actions.” CERTIFICATION OF PROFESSIONAL LIABILITY INSURANCE, *supra* note 88. Lawyers are excluded if they “do not have private clients and have no possible exposure to malpractice actions (e.g., retired, full-time in-house counsel, prosecutor, full-time government counsel, etc.)” *Id.*

91. STATE IMPLEMENTATION, *supra* note 25.

92. E-mail from Nicole Ogan, Dir. of Commc’ns, S.D. Bar, to author (Apr. 16, 2015, 11:06 EDT) (on file with author). This figure reflects the percentage of lawyers engaged in private practice in South Dakota who are uninsured. See S.D. CODIFIED LAWS § 16-18-20.2 (2016) (containing Insurance Disclosure form). Lawyers are asked whether they are “engaged in the private practice of law in South Dakota” as a sole practitioner or in a firm. *Id.*

93. See S.D. RULES OF PROF’ S CONDUCT r. 1.4(c) (2016).

94. *Id.* r. 1.4 cmt. 8.

95. *Id.* rr. 1.4(d), 7.2(l).

96. E-mail from Nicole Ogan, Dir. of Commc’ns, S.D. Bar, to author (Apr. 10, 2015, 10:12 EDT) (on file with author). South Dakota does not have an official online lawyer directory.

this notice.⁹⁷ Like South Dakota, New Mexico does not otherwise provide insurance information to the public.⁹⁸ In contrast, Pennsylvania requires its uninsured lawyers to disclose this information to new clients in writing⁹⁹ and also posts lawyers' insurance information on the Pennsylvania Supreme Court's Disciplinary Board's website.¹⁰⁰ In the four other direct disclosure states, lawyers do not report insurance coverage information to regulators, making it difficult to ascertain the number of uninsured lawyers in those states.¹⁰¹

Of the seventeen other states that require insurance disclosure to regulators—but not direct disclosure to clients—ten states post lawyers' insurance information on websites.¹⁰² In some of the other states, the information can be obtained by the public through alternate methods, but not easily. In Delaware, Idaho, Kansas, North Dakota, and Rhode Island, the public must contact state authorities to request this information.¹⁰³ None of these jurisdictions clearly advertise to the public that this information is available or how to obtain it. In Hawaii and Michigan, state regulators collect the information but do not make it available to the public.¹⁰⁴ The states' approaches to disclosing insurance information to the public appear in Table 3.

97. N.M. RULES OF PROF'L CONDUCT r. 16-104(C) (2015).

98. *In re Mandatory Disclosure of Professional Liability Insurance Coverage*, No. 05-8500 (N.M. July 29, 2005).

99. PA. RULES OF PROF'L CONDUCT r. 1.4(c) (2016).

100. *Disciplinary Board of Pennsylvania Makes It Easy for the Public to Know If Lawyers Have Professional Liability Insurance*, *supra* note 89.

101. *See supra* Table 2. The failure to require lawyers to report this information to regulators also makes it difficult to check whether uninsured lawyers are making disclosures to clients. Three of these states do, however, require that attorneys maintain a record of disclosure to clients for several years after the termination of the representation. *See* ALASKA RULES OF PROF'L CONDUCT r. 1.4(c) (2016); OHIO RULES OF PROF'L CONDUCT r. 1.4(c)(1) (2015); N.H. RULES OF PROF'L CONDUCT r. 1.19(b) (2016).

102. *See* STATE IMPLEMENTATION, *supra* note 25; *see, e.g., A Brief Word About Professional Liability (Malpractice) Insurance*, COLO. SUP. CT., <https://www.coloradosupremecourt.com/PDF/Complaints/A%20word%20about%20professional%20liability.pdf> (last visited Aug. 10, 2016); *Attorney Records Search*, VA. ST. B., <http://www.vsb.org/attorney/attSearch.asp?S=M> (last visited Aug. 10, 2016).

103. E-mail from Laurie Guenther, Dir. of Admissions, N.D. State Bd. of Law Exam'rs, to author (May 7, 2015, 17:47 EDT) (on file with author); E-mail from Cathy Howard, Clerk, Del. Supreme Court, to author (Aug. 19, 2016, 14:06 EDT); E-mail from Debra Saunders, Clerk of R.I. Supreme Court, to author (May 11, 2015, 10:05 EDT) (on file with author); Telephone Interview with Stanton A. Hazlett, Disciplinary Adm'r, Kan. Office of the Disciplinary Adm'r (Apr. 28, 2015); Telephone Interview with Annette Strauser, Idaho State Bar, Licensing, MCLE & IT Adm'r (May 22, 2015).

104. *See* E-mail from Liberty Castillo, Accounting and Membership Specialist, Haw. State Bar Ass'n, to author (June 1, 2015, 14:00 EDT) (on file with author); E-mail from Joan Kreutzman, Member Records Specialist, State Bar of Mich., to author (June 30, 2015, 10:09 EDT) (on file with author).

TABLE 3
OTHER STATES REQUIRING INSURANCE DISCLOSURE
TO REGULATORS

State	Posted on Official Website	Information Only Available by Contacting Regulator	Information Unavailable to Public	Percent of Lawyers in Private Practice who are Uninsured
Arizona	X			19.6% ¹⁰⁵
Colorado	X			17% ¹⁰⁶
Delaware		X		Unknown
Hawaii			X	Unknown ¹⁰⁷
Idaho		X		Unknown
Illinois	X			15.7% ¹⁰⁸
Kansas		X		Unknown
Massachusetts	X			Unknown ¹⁰⁹

105. E-mail from Lisa Panahi, Sr. Ethics Counsel, Ariz. State Bar, to author (July 16, 2016, 19:18 EDT) (on file with author). Arizona lawyers are asked to indicate whether they are engaged in private practice and are instructed that “the categories of practice that do not require this [insurance compliance] notification [are] government lawyers, in-house counsel, judges, and legal services lawyers.”

Annual Member Fees Statement Instructions, ST. B. ARIZ., <http://www.azbar.org/membertools/annualfees/annualfeesinstructions> (last visited Aug. 10, 2016).

106. This figure was rounded to the nearest whole percentage point. E-mail from Elvia Mondragon, Clerk of Attorney Registration, Colo. Supreme Court, to James Coyle, Colo. Supreme Court Attorney Regulation Counsel (Apr. 15, 2015, 12:37 EDT) (on file with author). The Colorado registration form asks whether the lawyer is engaged in private practice but does not define the term. *New Attorney Registration Form*, COLO. SUP. CT., <https://www.colorado.supremecourt.com/PDF/registration/New%20Attorney%20Registration%20Form.pdf> (last visited Aug. 10, 2016).

107. Hawaii lawyers must report if they have insurance unless they are a government lawyer or in-house counsel and do not represent clients outside that capacity. HAW. SUP. CT. R. 17(d)(1)(C). More than 25.6% of Hawaii lawyers reported they were uninsured, but this includes lawyers who maintain “active” status but do not represent any clients. *See* HAW. STATE BAR ASS’N, 2016 BAR STATISTICS AND SUMMARIES 7, <http://hsba.org/images/hsba/HSBA/Annual%20Statistics%20Results/2016%20Bar%20Statistics%20and%20Summaries.pdf>.

108. E-mail from Jim Grogan, Deputy Administrator & Chief Counsel, Ill. Attorney Registration & Disciplinary Comm’n, to author (July 19, 2016, 13:39 EDT) (on file with author) [hereinafter Grogan I]. Lawyers in Illinois are required to indicate their “predominant” practice setting. The choices of setting include “academia,” “corporate/in-house,” “government/judicial,” “not-for-profit,” “private practice,” and “other.” E-mail from Jim Grogan, Deputy Administrator & Chief Counsel, Ill. Attorney Registration & Disciplinary Comm’n, to author (Sept. 8, 2016, 13:22 EDT) (on file with author).

109. As of July 2016, 10,325 “active” Massachusetts lawyers reported they were not insured and were not exempt (i.e., they were not working exclusively as government lawyers or for an organization), and 33,178 lawyers were insured, indicating almost 24% of active non-exempt Massachusetts lawyers were not insured. *See* E-mail from Constance Vecchione, Chief Bar

Michigan			X	20.86% ¹¹⁰
Minnesota	X			Unknown ¹¹¹
Nebraska	X			Unknown
Nevada	X			16.36% ¹¹²
North Dakota		X		Unknown
Rhode Island		X		Unknown
Virginia	X			10.17% ¹¹³
Washington	X			14.3% ¹¹⁴
West Virginia	X			13.5% ¹¹⁵

Counsel, Mass. Office of the Bar Counsel, to author (Aug. 16, 2016, 15:45 EDT) (on file with author). This figure includes some lawyers who maintain “active” status but do not represent clients.

110. E-mail from Clifford T. Flood, General Counsel, State Bar of Mich., to author (Sept. 8, 2016, 17:45 EDT) (on file with author). Michigan lawyers are required to provide one of four responses to the insurance question, including one that states “I do not maintain malpractice insurance, but I do have private clients and/or a possible exposure to malpractice actions.” E-mail from Clifford T. Flood, General Counsel, State Bar of Mich., to author (Aug 1, 2016, 17:50 EDT) (on file with author). There were 5,185 lawyers who responded affirmatively to that question, and another 18,629 who responded “I maintain, either individually or through my firm, malpractice insurance.” *Id.*; Malpractice Insurance Disclosure Statistics from the 2015–2016 State Bar Fiscal Year (on file with author).

111. Minnesota does not track lawyers by their type of practice. *See* E-mail from Linda Olson, Lawyer Registration Specialist, Minn. Supreme Court, to author (Apr. 21, 2015, 09:45 EDT) (on file with author). Nevertheless, a 2012 examination of registration data in Minnesota revealed 18% of lawyers who represented private clients did not carry LPL insurance. *See* Kritzer & Vidmar, *supra* note 69, at 4.

112. E-mail from Mary Jorgensen, Member Services Manager, State Bar of Nev., to author (Sept. 7, 2016, 12:28 EDT) (on file with author). In Nevada, lawyers are asked whether they are “engaged in the private practice of law” and maintain malpractice insurance. *Id.*

113. E-mail from Debra C. Isley, Admin. Assistant, Va. State Bar, to author (Apr. 23, 2015, 10:23 EDT) (on file with author). Virginia asks whether lawyers are “engaged in the private practice of law involving representation of clients drawn from the public.” VA. STATE BAR, PROFESSIONAL LIABILITY INSURANCE CERTIFICATION FORM (2008), www.vsb.org/docs/PL_certification.doc.

114. E-mail from Shelly Wick, Membership/Systems Mgr., Wash. St. Bar Ass’n, to author (May 11, 2015, 15:46 EDT) (on file with author). Washington excludes from its definition of private practice lawyers who do not practice law and lawyers who practice as a government lawyer or as a lawyer employed by an organizational client and do not represent clients outside that capacity. WASH. STATE BAR ASS’N, 2015 LICENSE RENEWAL FORM, at 2 (on file with author).

115. E-mail from Mike Mellace, Tech. & Commc’ns Specialist, W. Va. State Bar, to author (Apr. 14, 2015, 03:01 EDT) (on file with author). The percentage reflects all lawyers admitted in West Virginia who engage in private practice and are uninsured. The percentage of in-state uninsured lawyers is 14.7%. *Id.*

West Virginia’s form seeks insurance information from lawyers who are “engaged in the private practice of law and represent clients” and expressly excludes in-house and government lawyers who do not represent clients outside that capacity. W. VA. STATE BAR, NOTICE OF COMPLIANCE WITH STATE BAR BYLAWS ARTICLE III (A). FINANCIAL RESPONSIBILITY DISCLOSURE, (2013), <http://www.wvbar.org/wp-content/uploads/2012/04/13frd.pdf>.

Tables 2 and 3 also attempt to report the percentage of uninsured lawyers who engage in private practice in the states that require disclosure, but in many jurisdictions these statistics are “unknown” because the state does not compile the information, will not reveal it, or does not ask the question in a way that permits calculation of the percentage of uninsured lawyers in private practice. For the states where the percentages of uninsured lawyers are shown, the information is not entirely comparable because the questions state regulators ask differ. In some states, the questions do not define “private practice” or do so in different ways.¹¹⁶ Consequently, some lawyers may report that they are not engaged in private practice if they primarily work in another occupation (e.g., teaching, real estate) or practice context (e.g., government, in-house counsel) and only occasionally charge a private client for legal work. Some may report they are not engaged in private practice if they only provide legal services on a pro bono basis. As a result, some of the percentages in Tables 2 and 3 likely undercount the percentage of uninsured lawyers who occasionally represent private clients.¹¹⁷

B. *The Impact of Disclosure Rules on Insurance Purchasing*

Although proponents of insurance disclosure hoped that disclosure requirements would induce uninsured lawyers to purchase LPL insurance,¹¹⁸ it is difficult to assess whether disclosure requirements have had a significant effect on insurance purchasing. Claims that insurance disclosure requirements led to a marked decrease in uninsured lawyers appear overstated.¹¹⁹ Most state regulators did not gather insurance

116. See *supra* notes 87, 90, 92, 105–06, 110, 113–15.

117. The accuracy of the percentages in Tables 2 and 3 are, of course, also dependent on the truthfulness of the reporting by lawyers. The likelihood that the percentages are accurate may be higher in states such as South Dakota and West Virginia, which require lawyers to provide substantiating information about their insurance coverage, including the name of the insurer and the policy number. See S.D. CODIFIED LAWS § 16-18-20.2 (2015) (containing Insurance Disclosure form); W. VA. STATE BAR, *supra* note 115.

118. See *supra* note 18 and accompanying text.

119. See, e.g., Mil, *supra* note 19 (quoting the chair of the Pennsylvania Supreme Court Disciplinary Board who claimed some states requiring direct disclosure “saw reductions in the number of uninsured lawyers go from about 30% to 10%”). One commentator claimed that after Virginia instituted its disclosure requirement, it experienced a drop in its rate of uninsured lawyers from 60% to 10%. James C. Gallagher, *Should Lawyers Be Required to Disclose Whether They Have Malpractice Insurance?*, VT. B.J., Summer 2006, at 5, 6. In fact, a 1987 survey of Virginia lawyers, which was conducted only a few years before Virginia’s insurance disclosure requirement went into effect, indicated the percentage of uninsured lawyers in Virginia was 13.8%. See *infra* note 141 and accompanying text.

information from lawyers prior to instituting disclosure requirements.¹²⁰ Insurers apparently did not track changes in insurance purchasing in a systematic fashion during the relevant periods.¹²¹ Some insurers have anecdotally reported an increase in the purchasing of LPL coverage by uninsured lawyers around the time that states adopted direct disclosure requirements.¹²² Others have not observed such a trend.¹²³ One insurance company executive, whose company writes LPL insurance for solo and small firm lawyers in a number of states, noted that disclosure rules “likely only affect take-up rates in the one or two years following the rule passage, and even on that basis, [it is] hard to put a concrete number on the impact.”¹²⁴ Nevertheless, the relatively low percentage of uninsured lawyers in the states with the most rigorous disclosure requirements suggests that those requirements may help reduce the number of uninsured lawyers who continue to go bare.

120. See AM. BAR ASS’N STANDING COMM. ON CLIENT PROT., EXPERIENCE OF STATES WITH DISCLOSURE ON REGISTRATION STATEMENT, Table 2 (July 21, 2004) (on file with author). In 2007, a California Insurance Disclosure Task Force sought information from state bars and insurers about the impact of insurance disclosure requirements in jurisdictions that had adopted them. Insurance Disclosure Report, *supra* note 21, at 8–9. The Task Force asked, *inter alia*, whether jurisdictions had noted an increase in the assertion of legal malpractice claims or a decrease in the percentage of uninsured lawyers. *Id.* Those inquiries yielded little useful information because most jurisdictions did not collect relevant data or did not respond. See *id.* at 9–10.

121. The only exception is ALPS, a lawyers’ professional liability insurer, which reportedly analyzed the impact of the insurance disclosure requirement when South Dakota and Alaska first adopted their direct disclosure rules and did not note any decrease in the percentage of uninsured lawyers who were practicing law. See *id.* at 9. Otherwise, I have been unable to find any information published by insurance companies, and my informal communications with several insurance executives did not suggest any of them knew of efforts to track this information systematically.

122. See KIRK R. HALL, PROF’L LIAB. FUND, MINIMUM FINANCIAL RESPONSIBILITY FOR LAWYERS 7 (2000) (reporting that “[a]necdotally, the malpractice insurance carriers who write in South Dakota have indicated there was a significant increase in the number of new applications just before the 1999 effective date of [South Dakota’s] disclosure rule”); *Professional Liability Insurance Report*, *supra* note 1 (reporting a “noticeable spike in demand for coverage” in California since the disclosure requirement went into effect). In Pennsylvania, there was also reportedly an increase in purchasing by previously uninsured lawyers after the disclosure requirement went into effect. E-mail from Insurance Executive No. 3 to author (June 8, 2015, 12:37 EDT) (on file with author). Whether the uninsured lawyers who purchased insurance around the time the disclosure rules were instituted continued to maintain insurance thereafter is not known.

123. See *Professional Liability Insurance Report*, *supra* note 1 (reporting on law management expert who stated that after the change in the disclosure rule, many California attorneys were “just sitting it out”).

124. E-mail from Insurance Executive No. 4 to author (June 16, 2015, 12:04 EDT) (on file with author).

The biggest success story may be South Dakota, where 94% of lawyers who engage in private practice in the state carry LPL insurance.¹²⁵ This state also has the most demanding direct disclosure requirements. After South Dakota required uninsured lawyers to directly disclose their lack of insurance to clients in all written communications and advertising, the percentage of insured lawyers practicing in the state reportedly reached a high of 96%.¹²⁶ South Dakota reported anecdotally that some senior lawyers chose to retire fully rather than disclose to their few remaining clients that they did not maintain insurance.¹²⁷ The state did not, however, gather data concerning the percentage of uninsured lawyers before 1990, when it adopted the direct disclosure requirement, so it is not possible to determine whether the percentage of uninsured lawyers significantly decreased thereafter.¹²⁸

It may not be a coincidence, however, that Pennsylvania—which requires direct disclosure to clients *and* posts lawyers' LPL insurance information on a website—reports the next highest rate of insured lawyers in private practice (93.1%).¹²⁹ Like South Dakota, Pennsylvania did not systematically gather information about its uninsured lawyers before its disclosure requirement went into effect in 2010.¹³⁰ There is anecdotal evidence, however, that there was an increase in the number of uninsured lawyers who purchased LPL insurance around the time Pennsylvania's disclosure requirement went into effect.¹³¹ The relatively

125. See *supra* note 92 and accompanying text.

126. Insurance Disclosure Report, *supra* note 21, at 10.

127. *Id.*

128. The state bar at one point reported that it “suspects” that 80% of South Dakota lawyers were insured before direct disclosure was required. *Id.* Nevertheless, that figure may be incorrect. There was no survey of South Dakota lawyers before the disclosure requirement became effective, and the 80% figure appears to have been someone's best guess. Telephone Interview with Thomas Barnett, Exec. Dir., S.D. State Bar (May 4, 2015).

129. See *supra* note 90 and accompanying text. This figure includes lawyers engaged in private practice in Pennsylvania and lawyers admitted to the Pennsylvania bar who practice outside the state. It is possible that lawyers with multiple admissions are less likely to be solo practitioners and are more likely to carry insurance. Thus, if one looked only at the Pennsylvania lawyers who engage in private practice in the state, the percentage of insured lawyers might be somewhat lower. This appears to be the trend in the other states that track insurance coverage of lawyers practicing in and outside the state. See *supra* note 115 and accompanying text; *infra* note 146 and accompanying text.

130. Before the adoption of the disclosure rule, there were reports that as many as 20% of Pennsylvania lawyers did not carry malpractice insurance. Johnston & Simpson, *supra* note 12, at 28. This was based on an informal survey of some insurance carriers and not all carriers responded.

131. One insurance executive noted, “[W]e definitely experienced an increase in sales after the rule went into effect. The majority of new policies were sold to solo practitioners who placed the minimum coverage \$100/\$300. I would estimate a one-time increase of 10% in new policies within the year.” E-mail from Insurance Executive No. 3, *supra* note 122. There were also many

low percentage of uninsured lawyers—as compared to other states—suggests that the nature of the disclosure requirement in Pennsylvania encouraged a number of uninsured lawyers to purchase LPL insurance or to retire from practice. It is impossible, however, to state this with certainty or to quantify the effect.

At the same time, in New Mexico, direct disclosure requirements do not appear to have encouraged a significant number of uninsured lawyers to purchase LPL insurance. In 2005, New Mexico adopted a requirement that lawyers disclose insurance information to the state bar but did not make this information available to the public.¹³² That year, 19.7% of New Mexico lawyers in private practice reported they were uninsured.¹³³ That percentage rose to 20.3% in 2006 and declined to around 17% in 2007, 2008, and 2009.¹³⁴ In 2009, the New Mexico Supreme Court promulgated a direct disclosure rule,¹³⁵ but did not require that this information be posted on an official website. In 2010, 17.4% of New Mexico lawyers were uninsured—the same as before the direct disclosure requirement was adopted.¹³⁶ The next year, the percentage declined to 15.5%¹³⁷ but subsequently fluctuated from a high of 19.1%¹³⁸ to a low of 15.3% in 2015.¹³⁹

There is also little evidence that uninsured lawyers are motivated to purchase LPL insurance simply because state regulators post their lack of insurance coverage on an official website. Virginia reports the lowest

inquiries from uninsured lawyers who decided not to purchase LPL insurance when they learned the new Pennsylvania rule did not require lawyers to carry insurance. *Id.*

132. *In re Mandatory Disclosure of Professional Liability Insurance Coverage*, No. 05-8500 (N.M. July 29, 2005).

133. *Q & A: Mandatory Disclosure to Clients of an Attorney's Lack of Professional Liability Insurance*, N.M. B. BULL., Mar. 2, 2009, at 7, 7.

134. *Id.*; STATE BAR OF N.M., PROFESSIONAL LIABILITY INSURANCE BY SIZE OF FIRM (2005–2007) (Apr. 7, 2008) (on file with author). The actual percentage of uninsured lawyers may have been somewhat higher because some lawyers were reporting they were “self-insured” or were not providing adequate information to confirm the respondent carried LPL insurance coverage. *Q & A, supra* note 133, at 7.

135. Brant, *supra* note 36, at 3.

136. STATE BAR OF N.M., PROFESSIONAL LIABILITY INSURANCE (2010) (on file with author).

137. STATE BAR OF N.M., PROFESSIONAL LIABILITY INSURANCE (2011) (on file with author).

138. STATE BAR OF N.M., PROFESSIONAL LIABILITY INSURANCE (2013) (on file with author).

139. STATE BAR OF N.M., PROFESSIONAL LIABILITY INSURANCE REPORT (2015) (on file with author). It is difficult to account for the fluctuations. Roughly 500–600 lawyers were reportedly uninsured in any year and the statistics only included bar members who had paid their dues by the report date. During the two years when the uninsured lawyers were reportedly in the 15.3–15.5% range, the statistics were extracted in March rather than in May. *Id.*; STATE BAR OF N.M., *supra* note 137. It is conceivable that lawyers without insurance were slower in submitting their registration forms and were not as likely to be counted in the years when the statistics in the 15% range were reported.

percentage of uninsured lawyers among these states¹⁴⁰ and illustrates the challenges of determining the impact—if any—of disclosure requirements on uninsured lawyers' decisions to purchase insurance. In 1987, before Virginia instituted any disclosure requirement, a large survey of Virginia lawyers indicated 13.8% of active members in private practice did not carry malpractice insurance.¹⁴¹ Virginia's insurance disclosure requirement went into effect in 1990, and by 2001 11% of all Virginia lawyers in private practice reported that they did not carry malpractice insurance.¹⁴² At that time, the information could only be obtained by calling the Virginia State Bar's membership department.¹⁴³ In July 2005, when Virginia made insurance information available on the state bar's website,¹⁴⁴ 10.85% of Virginia lawyers in private practice reported that they were uninsured.¹⁴⁵ In 2006, 10.85% of its members were still uninsured.¹⁴⁶ There was an additional small decrease in the percentage of uninsured lawyers—to 10.17%—by 2015.¹⁴⁷ Whether Virginia's decrease in uninsured lawyers since 1987 is due to the insurance disclosure requirement or to other factors that incentivize lawyers to carry insurance is not clear. For example, starting in 1997, Virginia required its lawyers to be bonded or carry malpractice insurance in order to perform real estate closings.¹⁴⁸ This requirement—rather than the insurance disclosure rule—may have induced more Virginia lawyers to carry malpractice insurance since the time the disclosure requirements went into effect.

140. See *supra* Table 3.

141. VA. STATE BAR, REPORT OF THE SPECIAL COMMITTEE TO STUDY LAWYER PROFESSIONAL FINANCIAL RESPONSIBILITY 12 (1988); see William R. Rakes, *Lawyer Financial Responsibility and the Public Interest*, VA. LAW., June 1988, at 26, 28. This survey was sent to all Virginia lawyers with their bar dues statement and yielded responses from 14,873 lawyers, or a 77% response rate. See VA. STATE BAR, REPORT OF THE SPECIAL COMM., *supra*.

142. Memorandum from Darrel Tillar Mason, Chair, Special Comm. on Lawyer Malpractice Ins., to the Exec. Comm. & Bar Council of the Va. State Bar 2–3 (Oct. 2, 2007), <http://www.vsb.org/docs/mmi-en6-080408.pdf>. The Virginia State Bar has statistical data going back only to 2001. E-mail from Debra C. Isley, *supra* note 113. The 1987 bar dues survey asked lawyers if they were working in “private practice.” It did not specify, as the question on the Virginia registration form now states, that this includes lawyers who are representing clients drawn from the public. VA. STATE BAR, REPORT OF THE SPECIAL COMM., *supra* note 141, at A-1.

143. Memorandum from Darrel Tillar Mason, *supra* note 142, at 3.

144. *Id.*

145. VA. STATE BAR ASS'N, *supra* note 7, at 3.

146. Memorandum from Darrel Tillar Mason, *supra* note 142, at 2. The percentage of uninsured lawyers who actually practiced in Virginia was 11.8%. *Id.*

147. E-mail from Debra C. Isley, *supra* note 113.

148. *Unauthorized Practice of Law (UPL) Guidelines for Real Estate Settlement Agents*, VA. ST. B., <http://www.vsb.org/site/regulation/upl-guidelines-for-real-estate-settlement-agents> (last updated Mar. 13, 2012).

C. *The Adverse Impact of Disclosure Requirements on Lawyers?*

While it is not clear that disclosure requirements have caused a large number of uninsured lawyers to purchase insurance, twenty-five years of experience with these requirements suggests that they have also not produced the harms that opponents feared. For example, there is no evidence to support opponents' arguments that frivolous malpractice claims against lawyers would increase because of disclosure requirements.¹⁴⁹ In fact, the states that have looked at this issue after implementing disclosure requirements have not reported any increase in malpractice claims.¹⁵⁰ To be fair, it is exceedingly difficult to test this assertion because many factors affect claims rates.¹⁵¹ It is telling, however, that insurance companies, which price premiums by location¹⁵² and have a strong interest in identifying all possible factors that affect claims rates so that they can price insurance properly, have not concluded that lawyers in states requiring insurance disclosure should pay higher premiums.¹⁵³

The argument that uninsured lawyers would be unfairly stigmatized by disclosure rules¹⁵⁴ also appears overstated. One indication that even direct insurance disclosure does not adversely affect most uninsured lawyers can be seen in the fact that most uninsured New Mexico lawyers (83.7%) reported they have no trouble advising potential clients they are not insured.¹⁵⁵ Among uninsured Arizona lawyers, whose insurance information is disclosed on the Arizona State Bar website, only 13%

149. Mendryzcki, *supra* note 20, at 41; *see* Mason, *supra* note 12. There is a somewhat distinct argument that the total number of malpractice claims may increase if all lawyers are insured. *See infra* notes 238–42 and accompanying text.

150. *See* Insurance Disclosure Report, *supra* note 21, at 9–10.

151. One insurance company executive, when asked whether his company had seen an increase in insurance claims after two states' direct disclosure rules were implemented responded,

The short answer is no, but truth be told, there really is no way to know. Frequency rates vary over time in individual states for all kinds of reasons and understand that claims can take even years to come to light. In light of this, I have no idea how one might try to justify pinning a change in frequency rates to a jurisdiction passing an insurance disclosure notice requirement.

E-mail from Insurance Executive No. 5 to author (Apr. 27, 2015, 12:43 EDT) (on file with author).

152. *See* RONALD E. MALLIN, LEGAL MALPRACTICE: THE LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE INSURANCE § 14:10 (2016).

153. When I interviewed several insurers for a different study and asked them about the factors affecting premium pricing for solo and small firms, none of them suggested insurance disclosure rules were relevant to pricing.

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

155. These lawyers either strongly agreed or agreed that "I have no problem telling a potential client that I am not insured." *See supra* Table 1.

believed that even direct disclosure of this information to potential clients would result in clients not retaining them.¹⁵⁶ While the Arizona lawyers do not actually know what would happen if they directly disclosed their lack of insurance to clients, their responses suggest that these lawyers have not experienced significant problems with obtaining or retaining clients, even though the state bar website discloses their lack of insurance coverage.¹⁵⁷

III. DO LAWYERS WHO GO BARE CAUSE HARM?

As previously noted, one of the arguments against LPL insurance requirements—and against insurance disclosure requirements—is that there is insufficient evidence that uninsured lawyers present a substantial problem for the public.¹⁵⁸ In truth, it is exceedingly difficult to determine how much legal malpractice occurs, even among insured lawyers.¹⁵⁹ It is impossible to know how much harm uninsured lawyers actually cause. There is little evidence these lawyers are more likely to commit malpractice than insured lawyers, but there is also no evidence they are less likely to commit malpractice.¹⁶⁰

It is not clear how many lawyers receive a malpractice claim annually, but it appears to be less than 6% of insured lawyers.¹⁶¹ At least one insurer

156. Arizona Uninsured Lawyers Survey, *supra* note 39. Forty-six uninsured lawyers answered this question. Of the remaining group, twenty-one (46%) indicated that they did not think disclosure would result in the client not retaining them and nineteen (41%) said that they did not know.

157. Another indication uninsured Arizona lawyers do not view the disclosure rule as seriously affecting their business can be seen in the fact that almost 20% of Arizona lawyers in private practice continue to be uninsured, even though the cost of insurance is usually less than \$3,000 per year. *See supra* notes 47, 105, and accompanying text. If these lawyers believed they were losing significant business because of Arizona's disclosure rule, more would presumably rectify the situation by purchasing LPL insurance.

158. *See supra* note 19 and accompanying text.

159. *See Kritzer & Vidmar, supra* note 69, at 15.

160. There is some evidence, however, that uninsured lawyers are more likely than insured lawyers to be sanctioned for violating professional rules. Virginia found that of 109 private practitioners who were subject to discipline sanctions in 2005–2006, forty-two lawyers (38.5%) were uninsured. Memorandum from Darrel Tillar Mason, *supra* note 142, at 2. During this time, 10.85% of Virginia private practitioners were uninsured. *See supra* note 145 and accompanying text. As noted, however, solo and small firm lawyers are more likely to be uninsured than other lawyers. They are also more likely to be disciplined. Levin, *Small Law Firm Practitioners, supra* note 81, at 312–13. Thus, the Virginia results would need to be analyzed controlling for practice setting to know what to make of this data.

161. A few sources assert that on average the claims rate is 5–6% annually for all lawyers. *See, e.g., Frequently Asked Questions (FAQs)—Lawyers Professional Liability*, HERBERT L. JAMISON & CO., L.L.C., http://www.jamisongroup.com/program_services/faq.aspx (last visited Aug. 10, 2016) (reporting that “[a]pproximately 6% of all attorneys in the U.S. are likely to face an allegation of professional liability in any given year”); *Malpractice Insurance—Why*

of predominantly solo and small firm lawyers reports that almost half of the company's insureds have experienced a malpractice claim at some point in their careers.¹⁶² Insurance companies include in their definition of "claims" matters that lawyers report as *possible* claims so if an actual dispute arises, the matter will be covered under a "claims made" policy.¹⁶³ Unfortunately, there is no way to assess whether uninsured lawyers experience a comparable number of problems because they do not report this information.

There is some evidence, however, concerning the rates of *threats* of malpractice actions against insured and uninsured lawyers. In the Connecticut survey, the same percentage of insured and uninsured respondents (33%) reported that they or a lawyer in their current firm had been threatened with a malpractice action.¹⁶⁴ Roughly the same percentage of insured Arizona lawyers (36%) reported that they or a lawyer in their firm had been threatened with a malpractice action,¹⁶⁵ but only 22% of the uninsured Arizona lawyers reported receiving threats.¹⁶⁶

Buy?, B. PLAN, <http://www.thebarplan.com/products/product-malpractice-insurance/malpractice-insurance-why-buy/> (last visited Aug. 10, 2016) (reporting that nationally 5–6% of lawyers are confronted with a malpractice claim annually). It seems likely that the estimates are referring to insured lawyers, as there is no way to calculate the claims against uninsured lawyers. For insured lawyers, the annual claims rates vary by insurer, location, and firm size. *See, e.g.*, Kritzer & Vidmar, *supra* note 69, at 16–17 (reporting lower claims rates for larger firms); Telephone Interview with Insurance Executive No. 6 (Aug. 7, 2014) (reporting that his company experienced an annual claims rate of 7.5%); David D. Hudgins, *Committee on Lawyer Malpractice Insurance*, VA. ST. B. (July 1, 2014), http://www.vsb.org/site/about/lmic_1314 (reporting that ALPS had a claims frequency of 3.27% in Virginia in 2013); *Malpractice Insurance—Why Buy?*, *supra* (stating that in Missouri, 3–4% of insured attorneys receive a claim in any given year). In Oregon, where all lawyers are insured—including high-risk insureds—the annual claims rate in 2015 was 11.37%. *See* E-mail from Carol Bernick, Chief Exec. Officer, OSB Prof'l Liab. Fund, to author (Aug. 19, 2016, 14:56 EDT) (on file with author).

162. *Malpractice Insurance—Why Buy?*, *supra* note 161.

163. A claims made policy covers claims reported to the underwriter, in writing, during the policy period or any applicable extended reporting period. *See* AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., EXTENDED REPORTING ("TAIL") COVERAGE 1 (2013), http://www.americanbar.org/content/dam/aba/administrative/lawyers_professional_liability/lis_1pl_tail_coverage_faq_glossary.authcheckdam.pdf.

164. Connecticut Survey, *supra* note 40. As previously noted, only a small number of uninsured Connecticut lawyers responded to the survey. Nine of them indicated that they or a lawyer in their firm had been threatened with a malpractice action, while eighteen reported no threats. Among the insured Connecticut lawyers, 209 reported such threats and 415 reported no threats.

165. Arizona Insured Lawyers Survey, *supra* note 41.

166. Arizona Uninsured Lawyers Survey, *supra* note 39. Ten uninsured Arizona lawyers said they or another lawyer in their firm had been threatened with a malpractice action and thirty-five reported that there had not been threats. Among the insured Arizona lawyers, 104 lawyers or their firms had received threats of a malpractice action and 188 had not. Arizona Insured Lawyers Survey, *supra* note 41.

It is not clear whether the uninsured Arizona lawyers actually received fewer threats of malpractice actions than the insured lawyers. Insured lawyers may be more sensitive to client communications that imply such threats, because they must report possible claims to their insurers in order to preserve coverage. Insured attorneys may also be more likely to remember such threats because they communicated with insurers about them. Nevertheless, these survey responses indicate that at a minimum, between 22–33% of uninsured lawyers were threatened, or someone in their firm was threatened, with at least one malpractice action. Of course, some threatened lawsuits will never result in actual lawsuits,¹⁶⁷ but these statistics reveal that a number of uninsured lawyers do receive threats from clients or third parties.

It is exceedingly difficult to quantify the damage these uninsured lawyers cause as a result of malpractice. It is not even known how much LPL insurers pay annually in indemnity payments to resolve malpractice claims against insured solo and small firm lawyers. Claims-level data are not easily obtainable and are only reported by insurers to insurance regulators in Florida and Missouri.¹⁶⁸ Professors Herbert Kritzer and Neil Vidmar analyzed Missouri claims data and found that from approximately 1988 to 2013, the median indemnity payment for claims against solo lawyers was \$24,351 and for claims against two- to five-lawyer firms was \$33,651.¹⁶⁹ Using their calculations, it appears that, on average, insurers made \$3.85 million in indemnity payments annually to resolve claims against Missouri solo and small firm lawyers.¹⁷⁰ Missouri lawyers comprise only about 1.5% of all solo and small firm practitioners in the United States.¹⁷¹ If the levels of indemnity payments are comparable in all of the states, this suggests that—very roughly—LPL insurers pay more than \$260 million annually in indemnity payments for claims against solo and small firm practitioners. Insured lawyers may pay

167. Nevertheless, a threatened lawsuit is more likely to suggest a serious problem than a mere “claim” that is reported to an insurer. See Mark Bassingthwaighe, *General Lawyers’ Professional (LPL) FAQs*, ALPS CORP. 3 (2014), <http://www.alpsnet.com/media/773992/general-lpl-faqs.pdf> (noting that insurers ask insureds to report potential claims even if the client is unaware that there is a problem).

168. Kritzer & Vidmar, *supra* note 69, at 12–13. Missouri requires all insurers writing policies in the state to report claims-level data, while Florida only requires claims to be reported if the insurer paid more than \$5,000 in indemnity payments or expenses. *Id.*

169. *Id.* at 24. Indemnity payments for claims against solo lawyers averaged \$52,964 per claim paid and averaged \$108,257 for claims against two- to five-lawyer firms. *Id.*

170. This is a crude calculation. To derive the estimate, the total indemnity payments by Missouri insurers from 1988–2013 was divided by the number of years over which the claims were paid.

171. In 2005, there were 429,216 solo and small firm practitioners (two to five lawyers) in the United States. See CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005*, at 10 (2012). There were 6,317 in Missouri. *Id.* at 141.

additional money to satisfy their deductibles.¹⁷² Assuming that 25% of all solo and small firm lawyers who represent private clients are uninsured nationwide,¹⁷³ it appears that tens of millions more dollars would be paid annually to compensate the clients of uninsured lawyers for legal malpractice if their lawyers were insured.¹⁷⁴

Unfortunately, a major challenge that clients confront when they discover their uninsured lawyers mishandled their legal matters is finding another competent lawyer who will represent them in a malpractice lawsuit.¹⁷⁵ Many clients of uninsured lawyers cannot afford to hire a malpractice lawyer on an hourly basis and cannot find a lawyer who will represent them on a contingent fee basis because the likelihood of obtaining a sizable recovery from an uninsured lawyer is low.¹⁷⁶ Some plaintiffs' legal malpractice lawyers effectively discourage potential clients from even contacting them if their lawyer is uninsured.¹⁷⁷

172. Some policies only require lawyers to pay the deductible if an indemnity payment is made. *See, e.g.*, The Bar Plan, *Policy Features & Additional Coverages*, <https://www.thebarplan.com/products/product-malpractice-insurance/policy-features/> (last visited Aug. 10, 2016). In such cases, for example, if a malpractice claim is settled for \$10,000 and the firm has a \$5,000 deductible, the insurer will contribute \$5,000 as an indemnity payment and the remainder will be paid by the insured.

173. This probably understates the actual percentage of uninsured solo and small firm lawyers. In Illinois, 41% of all solo lawyers are uninsured. Grogan I, *supra* note 108. The percentage appears to be higher in some jurisdictions. *See supra* note 1.

174. Of course, in some cases uninsured lawyers pay out-of-pocket to settle malpractice disputes. But for the lawyers who cannot afford to purchase insurance, it seems unlikely that if they make a payment, it will fully compensate the client for the loss.

175. The number of plaintiffs' legal malpractice lawyers who devote a substantial amount of their practice to such work is relatively small. *See* Herbert M. Kritzer & Neil Vidmar, *Handling Legal Malpractice Claims: Plaintiffs' Lawyers, Defense Lawyers, and Insurers* 11–13 (June 13, 2015) (unpublished manuscript) (on file with author). There are, in addition, a number of lawyers who occasionally handle plaintiffs' legal malpractice actions, but they may not always be competent to do so. *Id.* at 20, 23–24.

176. *See* ROBERT D. WELDEN, AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., REPORT OF THE MODEL COURT RULE ON INSURANCE DISCLOSURE 4 (2004), http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/malprac_disc_report.authcheckdam.pdf (noting that a threshold issue for plaintiffs' lawyers when evaluating whether to bring a claim is whether the lawyer is insured); Kritzer & Vidmar, *supra* note 175, at 16 (reporting that plaintiffs' malpractice lawyers are very reluctant to pursue malpractice claims against uninsured lawyers); Letter from Kenneth Kirwin, Chair, Rules of Prof'l Conduct Comm. of Minn. State Bar Ass'n, to John Holtaway, ABA Client Prot. Counsel (Feb. 27, 2004), <https://www.mnbar.org/docs/default-source/judiciary-committee/comments-on-proposed-aba-model-rule-on-financial-responsibility-%28feb-04%29-and-oneil's-letter-re-malpractice-coverage.pdf> (describing a letter from an attorney who handles lawyer malpractice cases stating he will not take cases against uninsured lawyers).

177. For example, one lawyer warns potential clients on his website that even if the individual can prove each element of legal malpractice:

Nevertheless, all six of the plaintiffs' legal malpractice lawyers contacted in connection with this Article¹⁷⁸ reported that they periodically encounter potential clients whose lawyers turn out to be uninsured.¹⁷⁹ Some plaintiffs' lawyers will "absolutely never" take such cases, at least on a contingent fee basis.¹⁸⁰ If plaintiffs' malpractice lawyers discover that a lawyer is uninsured during the representation, some drop the case if there are no substantial assets.¹⁸¹ One such lawyer, who encounters two to three cases a year in which he learns after the lawsuit commences that the lawyer is uninsured, noted, "It has gotten to the place where I tell clients up front that if it turns out their lawyer is uninsured, I will have to send the case elsewhere or drop the claim. It does not make sense to chase lawyers for their condos and BMWs. They will file for bankruptcy."¹⁸²

Another potential problem to understand before bringing a legal malpractice case is the fact that many attorneys lack professional liability insurance. These are often the same attorneys who make themselves "judgment proof" by putting their assets in a spouse's name or making other perfectly legal maneuvers. Most verdicts are meaningless without financial recovery, so the availability of insurance or other means of recovery should be considered as early as possible.

Legal Malpractice, LAW OFF. DANIEL L. ABRAMS, <http://www.lawyerquality.com/legal-malpractice/> (last visited Aug. 10, 2016).

178. I spoke with the lawyers in 2015. The lawyers practiced in California, Florida, and the New York City metropolitan area, and they all devoted a substantial amount of time to plaintiffs' malpractice work. I obtained their names through a combination of recommendations by other attorneys and internet searches.

179. Some had practices that were mostly devoted to suing large law firms for high-dollar amounts, so this was not a common event. One of the other lawyers estimated that about 5% of potential clients who contacted him were calling about uninsured lawyers. Telephone Interview with Plaintiffs' Attorney No. 4 (May 4, 2015). Another estimated that it occurred in one out of five matters, but conceded that the estimate could be high. Telephone Interview with Plaintiffs' Attorney No. 3 (Apr. 30, 2015).

180. Telephone Interview with Plaintiffs' Attorney No. 6 (May 8, 2015); see Miller, *supra* note 20, at 825 (reporting on an attorney who will "almost never take a case, regardless of the wrongdoing" if the lawyer is uninsured); Dan Abendschein, *State Bar Considers Insurance Disclosure*, WHITTIER DAILY NEWS (July 15, 2007, 12:01 AM), <http://www.whittierdailynews.com/general-news/20070715/state-bar-considers-insurance-disclosure> (quoting lawyer who explained that "I have had to decline cases where the attorney doesn't have insurance, because the client is not going to get any money out of it").

181. Telephone Interview with Plaintiffs' Attorney No. 5 (May 6, 2015); see Steve Lash, *MD Court Asked to Reopen 19-Year-Old Lead-Paint Poisoning Case*, DAILY REC. (May 4, 2011), <http://thedailyrecord.com/2011/05/04/court-asked-to-reopen-19-year-old-lead-paint-poisoning-case/> (reporting on a case in which the plaintiff's lawyer filed a legal malpractice claim, but "realized [the] case would be fruitless because [the defendant lawyer] had no insurance" and lacked significant assets to satisfy meaningful judgment).

182. Telephone Interview with Plaintiffs' Attorney No. 5, *supra* note 181. The report of another plaintiffs' malpractice lawyer, who had only recovered damages once against an uninsured lawyer in seventeen years of practice, echoed the difficulty of recovering from

For this reason, among others, malpractice cases against uninsured lawyers are rarely pursued to judgment.¹⁸³ In Virginia, which requires its lawyers to report unsatisfied malpractice judgments against them, ten Virginia lawyers reported that they had unsatisfied judgments in 2015, and six of those lawyers were uninsured.¹⁸⁴ Some uninsured lawyers have more than one unsatisfied malpractice judgment against them.¹⁸⁵ Unsatisfied malpractice judgments against uninsured lawyers presumably occur in every state, but it is hard to find published cases.¹⁸⁶

uninsured lawyers. See Phillip Bantz, *Survey Says... Not Much*, S.C. LAW. WKLY., Feb. 25, 2015. Some uninsured lawyers will go to great lengths to avoid paying malpractice judgments. See, e.g., *In re Dorfman*, 917 N.Y.S.2d 126, 127–28 (App. Div. 2011).

183. Instead, some plaintiffs' lawyers who discover the defendant is uninsured may try to settle the case on a heavily discounted basis. For example, a Connecticut lawyer who did not regularly handle legal malpractice actions but had commenced a malpractice case against a lawyer who proved to be uninsured, described settling a "good" case worth "a couple hundred thousand dollars" for "pennies on the dollars." Telephone Interview with Attorney No. 7 (Apr. 20, 2015).

184. E-mail from Debra C. Isley, Admin. Assistant, Va. State Bar, to author (Apr. 23, 2015, 11:15 EDT) (on file with author). West Virginia is the only other state that requires lawyers to report this information, but it does not maintain the information in a form that can be easily accessed. E-mail from Anita Casey, Exec. Dir., W. Va. State Bar, to author (Apr. 25, 2015, 12:38 EDT) (on file with author).

185. See, e.g., *In re Jobi*, 896 N.Y.S.2d 328, 329 (App. Div. 2010).

186. *But see*, e.g., *Patton v. Stillman*, No. RIC382810 (Cal. App. Dep't Super. Ct. Sept. 26, 2002) (describing a malpractice judgment entered on default judgment in amount of \$206,184 against uninsured California lawyer); *Bell v. Law Offices of Howard A. Lawrence*, No. NNHCV116025442S, 2013 WL 1943849, at *2 (Conn. Super. Ct. April 19, 2013) (describing a malpractice judgment against uninsured Connecticut lawyer in amount of \$537,000 which he could not pay); *Bland v. Hammond*, 935 A.2d 457, 467 (Md. Ct. Spec. App. 2007) (reporting on a client who was unable to recover over \$25,000 in damages against an uninsured Maryland lawyer who committed malpractice); see also Thomas G. Bousquet, *It's Time for Mandatory Malpractice Insurance*, TEX. LAW., Dec. 6, 1993, at 11 (describing two malpractice judgments, of \$260,000 and \$310,000, in which default judgments entered against uninsured Texas lawyers went unrecovered); P.J. D'Annunzio, *Attorney Fights \$245K Default Judgment in Legal Mal Case*, LEGAL MONITOR WORLDWIDE, Oct. 11, 2014 (reporting on a default judgment of \$245,000 against an uninsured Pennsylvania lawyer in which the plaintiff's lawyer looking for other assets); Robert Elder, *Limited Help for Lawyers' Victims*, AUSTIN AMERICAN STATESMEN, June 23, 2008, at A1 (describing a client who had an uncollectible \$10 million judgment against an uninsured lawyer); Molly Selvin, *Lawyers Split on Insurance Proposal: If the Disclosure of Malpractice Coverage Was Mandatory, Costs May Rise, But Plaintiffs May Select Better*, L.A. TIMES, July 2, 2007, <http://articles.latimes.com/2007/jul/02/business/fi-legal2> (describing a client who was only able to recover a "tiny fraction" of a \$450,000 judgment against an uninsured California lawyer); Caryn Tamber, *Longtime Rockville Lawyer Loses License*, DAILY REC., May 12, 2010 (reporting on a client who won a \$700,000 judgment against an uninsured Maryland lawyer on which she could not collect); Andrew Wolfson, *Lawyer's Lack of Insurance Costs Okolona Woman*, COURIER-J. (June 16, 2014, 6:47 PM), <http://www.courier-journal.com/story/news/local/2014/06/16/lawyers-lack-insurance-costs-okolona-woman/10638183/> (describing a Kentucky plaintiff who collected only \$4,000 on a \$120,000 legal malpractice judgment because the lawyer was uninsured); Andrew Wolfson, *Legal Malpractice Award Still Unpaid After 18 Years*,

It appears, however, that some of these judgments are substantial.¹⁸⁷ One plaintiffs' malpractice lawyer reported that he had four or five legal malpractice cases against uninsured lawyers that resulted in uncollectible judgments, including one for \$1 million.¹⁸⁸

Further indication that clients are often unable to recover for malpractice from their uninsured lawyers can be seen in claims submitted to state client protection funds. These funds typically provide some compensation for lawyer dishonesty (usually defalcations) and often state on their websites that they are not available to compensate for lawyer negligence or malpractice.¹⁸⁹ Nevertheless, the Virginia Client Protection Fund denies 25% of the petitions filed because the behavior complained

COURIER-J. (June 16, 2016, 6:48 PM) [hereinafter Wolfson, *Legal Malpractice Award Still Unpaid*], <http://www.courier-journal.com/story/news/local/2014/06/16/legal-malpractice-award-still-unpaid-years/10639615/> (reporting on plaintiff who was unable to collect \$590,000 malpractice judgment against uninsured lawyer).

In some cases, the opinions do not expressly state the lawyer was uninsured, but the failure to defend the action or to pay the judgment suggests there was no insurance. *See, e.g., In re Kelly*, 182 B.R. 255, 257 (9th Cir. 1995) (describing a lawyer who declared bankruptcy sometime after a \$351,000 malpractice judgment was entered against him); *Kuruwa v. Meyers*, 823 F. Supp. 2d 253, 261 (S.D.N.Y. 2011), *aff'd*, 512 Fed. Appx. 45 (2d Cir. 2013) (describing a case in which a default judgment of more than \$140,000 was entered against a defendant in a legal malpractice case); *In re Slosberg*, 225 B.R. 9, 12 (Bankr. D. Me. 1998) (describing a lawyer who defended himself and failed to pay a \$27,000 malpractice judgment); *Okoye v. Abbott*, No. C058642, 2009 Cal. App. LEXIS 4730, at *1 (June 9, 2009) (reporting on an unsatisfied malpractice judgment of \$350,000 entered on default judgment); *Comm. on Prof'l Ethics v. Jackson*, 391 N.W.2d 699, 701 (Iowa 1986) (reporting on a lawyer who failed to defend against a malpractice action or pay the \$40,000 judgment); *In re Stewart*, 934 N.Y.S.2d 133, 134 (App. Div. 2011) (sanctioning a lawyer who had an unsatisfied \$50,000 malpractice judgment against him obtained by default judgment); *Columbus Bar Ass'n v. Roseman*, No. 5085, slip op. at 6 (Ohio July 26, 2016) (reporting on lawyer who must resolve a \$135,000 malpractice judgment against him before seeking reinstatement); *In re Lawler*, Conn. Statewide Grievance Comm., 96-0344 (reporting on a judgment-proof lawyer who refused to pay client a more than \$14,000 malpractice judgment); *Jankura v. Piombino*, Conn. Statewide Grievance Comm., 14-0065 (Nov. 7, 2014) (sanctioning an attorney for, among other things, failing to pay judgment for negligence against him); *French v. Evans*, Conn. Statewide Grievance Comm., 08-0250 (June 5, 2009) (noting the lawyer's failure to pay all but \$1,500 of a \$42,000 malpractice judgment entered against him).

187. *See, e.g., Norm Pattis, Malpractice Insurance Shouldn't Be Mandated*, CONN. L. TRIB., May 24, 2013, <http://www.ctlawtribune.com/id=1202601597368/Opinion-Malpractice-Insurance-Shouldnt-Be-Mandated?mcode=0&curindex=0> (describing uninsured lawyer with \$550,000 malpractice judgment against him and no reachable assets).

188. Telephone Interview with Plaintiffs' Attorney No. 4, *supra* note 179.

189. *See, e.g., Client Protection Fund*, ST. B. ARIZ., <http://www.azbar.org/LegalHelpandEducation/ConsumerBrochures/ClientProtectionFund> (last visited Aug. 10, 2016) (stating that claims for negligence, incompetence or malpractice are not reimbursable); *Frequently Asked Questions*, CLIENT PROTECTION FUND B. MD., <http://mdcourts.gov/cpf/faq.html> (last visited Aug. 10, 2016) (stating that "[t]he Fund does not handle malpractice claims").

of constitutes malpractice and not dishonesty.¹⁹⁰ Of course, this does not reveal whether the clients' claims would have been successful. It does suggest, however, that there are a sizable number of claims based on lawyer malpractice for which clients feel they have no other recourse, even in a state where almost 90% of lawyers in private practice carry LPL insurance.¹⁹¹

Thus, there is evidence that clients of uninsured lawyers are being harmed by their lawyer's malpractice, clients are not always compensated for the harm, and sometimes clients suffer substantial harm. The question, then, is *how substantial* should that harm be before taking steps to protect the public from these lawyers? The dollar values of the claims may not always be high,¹⁹² but the harm may be significant to the injured client. Clients will likely feel doubly aggrieved when the uninsured lawyer shelters assets in a family member's name¹⁹³ or seeks bankruptcy protection after-the-fact.¹⁹⁴ While the percentage of cases in which uninsured lawyers commit malpractice may not be large, the percentage of lawyers who steal from their clients is even smaller—yet there are fairly elaborate mechanisms in place to protect clients from such lawyers

190. VA. STATE BAR ASS'N, *supra* note 7, at 8; *see also* E-mail from Alecia Ruswinckel, Prof'l Standards Assistant Counsel, State Bar of Mich., to author (June 22, 2015, 13:51 EDT) (on file with author) (reporting that 6.4% of closed files that Michigan Client Protection Fund maintains were closed or denied because they were based on lawyer negligence or malpractice).

191. *See supra* text accompanying note 113.

192. Most claims paid by insurers to claimants are in the \$1 to \$10,000 range. PROFILE OF LEGAL MALPRACTICE CLAIMS, *supra* note 68, at 21. It is not unreasonable to assume that most claims against uninsured lawyers would be of equal value.

193. *See, e.g.,* Okoye v. Abbott, No. C058642, 2009 Cal. App. LEXIS 4730, at *2–3 (June 9, 2009) (describing a lawyer who transferred assets to his wife's name and family trust to avoid paying a malpractice judgment). Lawyers are sometimes advised to transfer their assets so that they are not reachable in the event of a malpractice claim. *See, e.g.,* Amy K. Kanyuk, *Asset Protection Planning for New Hampshire Attorneys*, N.H. B. NEWS, May 20, 2005, <http://www.mckan.com/assets/uploads/pdf/Asset-Protection-Planning-05-20-05.pdf>.

194. For example, after New York attorney Michael Bressler had a \$900,000 judgment entered against him, he sought bankruptcy protection. *See In re Bressler*, No. 06-11897, 2008 Bankr. LEXIS 754, at *3, *4 (S.D.N.Y. Mar. 10, 2008); Dareh Gregorian, *'Deceitful' Lawyer Socked for 900G*, N.Y. POST (Aug. 17, 2004, 4:00 AM), <http://nypost.com/2004/08/17/deceitful-lawyer-socked-for-900g/>; *see also In re Kelly*, 182 B.R. 255 (9th Cir. 1995) (describing a lawyer who declared bankruptcy sometime after a \$351,000 malpractice judgment entered against him); *In re Slosberg*, 225 B.R. 9 (D. Me. 1998) (describing a lawyer who sought bankruptcy protection after a \$27,000 malpractice judgment entered against him). In some cases, lawyers declare bankruptcy to head off a judgment. One plaintiffs' malpractice lawyer described a case in which the defendant declared bankruptcy eight days before the trial in a case brought by an elderly couple in which \$1 million was at issue. Telephone Interview with Plaintiffs' Attorney No. 5, *supra* note 181.

and to reimburse them for their losses.¹⁹⁵ These protections are no doubt due, in part, to the publicity associated with lawyer defalcations¹⁹⁶ and the negative views of the profession that result from these events. The harm caused by uninsured lawyers who are not sued—or fail to pay malpractice judgments—is much less likely to garner as much public attention.¹⁹⁷ Nevertheless, the impact of their malpractice can be devastating, especially in cases where physical injuries were sustained or a client's liberty is at stake.¹⁹⁸

IV. SHOULD LAWYERS BE PERMITTED TO GO BARE WHILE CLIENTS GO BLIND?

The question of whether lawyers should be allowed to go bare has been much debated.¹⁹⁹ So has the question of what *else* should be required of uninsured lawyers if they are permitted to go bare. This Section returns to those questions with the benefit of some data about uninsured lawyers. It first considers what the evidence suggests about whether lawyers

195. A review of the discipline histories of 6,200 lawyers admitted to the Connecticut bar from 1989–1992 revealed that the bar imposed discipline for violations of rules concerning safekeeping of client property in only 49 cases. LESLIE C. LEVIN ET AL., LSAC GRANT REPORT SERIES: A STUDY OF THE RELATIONSHIP BETWEEN BAR ADMISSIONS DATA AND SUBSEQUENT LAWYER DISCIPLINE 14 (2013), [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/gr-13-01.pdf](http://www.lsac.org/docs/default-source/research-(lsac-resources)/gr-13-01.pdf). Not all of the discipline involved theft. Nevertheless, even if all 49 decisions involved 49 separate lawyers, the rate of discipline for any kind of violation concerning safekeeping of property among the Connecticut lawyers over a 20-year period was less than 0.8%. Notwithstanding the low incidence of lawyer theft, many states conduct random audits of client trust accounts and all states have client protection funds to provide clients with some redress when lawyers steal, even though lawyer theft is a very rare event. See AM. BAR ASS'N, DIRECTORY OF LAWYERS' FUNDS FOR CLIENT PROTECTION (2010), http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/cp_dir_fund.authcheckdam.pdf.

196. See, e.g., Jennifer Emily, *Disbarred Lawyer Faces up to Life in Prison for Stealing from Dallas Area Clients*, DALL. MORNING NEWS (Oct. 22, 2013, 10:43 PM), <http://www.dallasnews.com/news/crime/headlines/20131022-clients-testify-lawyer-never-paid-them-lawsuit-settlements.ece>; Jerry Sandusky's Lawyer Charged with Stealing Money from Clients, FOXSPORTS.COM (Feb. 20, 2015, 4:26 PM), <http://www.foxsports.com/college-football/story/jerry-sandusky-lawyer-charged-with-stealing-money-from-clients-022015>; Amanda Marazzo, *Crystal Lake Lawyer Gets Nine Years for Stealing from Clients*, CHI. TRIB. (Nov. 13, 2014, 10:18 AM), <http://www.chicagotribune.com/suburbs/ct-lawyer-theft-met-20141112-story.html>.

197. When lawyers steal from clients, they are often criminally prosecuted and publicly disciplined, which is all a matter of public record. Indeed, the legal press routinely publishes disciplinary sanctions, which helps bring them to the attention of the mainstream media. In contrast, there is often no way to learn about uninsured lawyers who are not sued, as this information is not a matter of public record.

198. See, e.g., *Bell v. Law Offices of Howard A. Lawrence*, No. NNHCV116025442S, 2013 WL 1943849, at *2 (Conn. Super. Ct. Apr. 19, 2013); Selvin, *supra* note 186; Tamber, *supra* note 186; Wolfson, *supra* note 20; Wolfson, *Legal Malpractice Award Still Unpaid*, *supra* note 186.

199. See HALL, *supra* note 122, at 2–3; Schlegelmilch, *supra* note 13; Memorandum from Darrel Tillar Mason, *supra* note 142; see also *supra* note 8 and accompanying text.

should be required to maintain LPL insurance. It then considers how well the compromise—insurance disclosure requirements—is working to inform clients of the risks they undertake when they hire an uninsured lawyer.

A. *Mandatory Insurance Redux*

The argument for mandatory insurance is primarily based on public protection: Clients should be able to obtain redress if their lawyers' negligence causes them harm.²⁰⁰ In many cases, the clients of solo and small firm lawyers can only obtain meaningful redress through malpractice claims.²⁰¹ While the clients of larger firm lawyers, who are repeat players in the legal system, can often negotiate effectively with those firms for compensation if their lawyers make mistakes, the clients of solo and small firm lawyers—often individuals who are one-shot players in the legal system—lack this leverage.²⁰² Their recourse is usually limited to lawyer discipline complaints or malpractice claims.²⁰³ Lawyer discipline authorities can sanction lawyers for neglect, but they almost never monetarily compensate clients for the harm their lawyers cause.²⁰⁴ Thus, if the clients of solo and small firm lawyers cannot pursue these lawyers through malpractice claims, they are left with no meaningful remedy. For the reasons discussed above, this avenue is mostly unavailable to clients whose lawyers are uninsured.²⁰⁵

There are reasons to be especially concerned about the risks that uninsured lawyers pose. While there is no hard evidence that uninsured lawyers are more likely to commit malpractice than insured lawyers, there is reason to suspect that this may be the case.²⁰⁶ The process of applying for LPL insurance forces insured lawyers to review annually the adequacy of their office systems and procedures.²⁰⁷ This is less likely to

200. See, e.g., Bousquet, *supra* note 186, at 11; Schultz, *supra* note 10, at 19; Memorandum from Darrel Tillar Mason, *supra* note 142, at 3.

201. Bousquet, *supra* note 186, at 11.

202. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 828–29 (1992).

203. *Id.* at 829–30.

204. Moreover, in some cases of incompetence or neglect, disciplinary authorities will not become involved at all. See Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 18–19 (2007).

205. See *supra* notes 175–76, 180–82 and accompanying text.

206. See *supra* note 160 and accompanying text.

207. For instance, insured lawyers must provide insurers with information about their risk management practices—including calendaring and conflicts checking systems—when they apply for insurance and typically again at the time of renewal. See Leslie C. Levin, *Regulators at the Margins: The Impact of Malpractice Insurers on Solo and Small Firm Lawyers*, 49 CONN. L. REV. 553, 570, 574 (2016).

systematically occur if lawyers are uninsured. Moreover, lawyers who do not carry insurance because they cannot afford it are less likely to be able to afford to pay for office staff to help them avoid mistakes.²⁰⁸ They are also less likely to be able to afford to belong to voluntary bar associations, which are important sources of information about best professional practices and changes in the law.²⁰⁹

Uninsured lawyers also threaten to undermine the public's trust in lawyers. This loss of trust occurs at the individual client level, when clients discover that they have no meaningful recourse against their uninsured lawyers. Public trust in lawyers is also undermined when the news media report stories about clients who cannot recover for the harm caused by their uninsured lawyers.²¹⁰ These concerns have given rise to arguments that if the bar does not self-regulate responsibly and require lawyers to carry LPL insurance, legislatures may impose the requirement on them.²¹¹ Once confidence is lost in the bar's ability to regulate itself in ways that are consistent with the public interest, state legislatures may increasingly become involved in lawyer regulation.²¹²

208. Of the forty-eight uninsured Arizona survey respondents, thirty (63%) had no support staff. Arizona Uninsured Lawyers Survey, *supra* note 39. In contrast, among the 303 insured Arizona lawyer respondents, only 31% had no support staff. Arizona Insured Lawyers Survey, *supra* note 41. Likewise, seventeen out of the twenty-eight uninsured Connecticut lawyers (61%) had no support staff as compared to 23% of insured lawyers (148 out of 656) who had no support staff. Connecticut Survey, *supra* note 40.

209. See Leslie C. Levin, *Specialty Bars as a Site of Professionalism: The Immigration Bar Example*, 8 U. ST. THOMAS L.J. 194, 196–97, 202 (2011).

210. See, e.g., Elder, *supra* note 186, at A01 (describing a client who had a large malpractice judgment against an uninsured lawyer); Selvin, *supra* note 186 (describing a client who was only able to recover a “tiny fraction” of a \$450,000 judgment against an uninsured lawyer); Wolfson, *supra* note 20, at A1 (describing an uninsured lawyer who filed for bankruptcy protection to avoid paying a malpractice judgment to disabled clients); Christina M. Wright, *Judge: Anderson Attorney Must Pay Former Client \$270,000*, HERALD BULL. (Aug. 28, 2010), http://www.heraldbulletin.com/news/local_news/judge-anderson-attorney-must-pay-former-client/article_9ad68fe5-5ea91-50ed-938a-19e3f4e7cf47.html (noting that it was unknown how long it would take a legal malpractice plaintiff to obtain the \$277,000 awarded in a malpractice case against an uninsured lawyer).

211. A similar argument was made in Texas, when it appeared that the legislature was considering mandating insurance disclosure for lawyers. In response, the Texas Supreme Court asked the bar to take up the question to head off legislative action. See Bruce A. Campbell, *A Viewpoint on Disclosure of Malpractice Insurance by Texas Lawyers*, CAMPBELL & ASSOCS. L. FIRM, P.C. (July 2010), <http://www.cllegal.com/wp-content/uploads/2012/10/A-Viewpoint-on-Disclosure-of-Malpractice-Insurance-by-Texas-Lawyers.pdf>. At the time, there were predictions that if the Texas Supreme Court did not adopt a disclosure rule, the legislative initiative would resurface. See Herring, *supra* note 1, at 822. While the Texas Supreme Court did not ultimately adopt a disclosure rule, at some point the legislature may revisit this question. See Campbell, *supra*.

212. See Herring, *supra* note 1, at 822. Of course, the legal profession's ability to self-regulate has already eroded in some jurisdictions. See, e.g., William T. Gallagher, *Ideologies of*

The most common argument against requiring lawyers to maintain LPL insurance is the cost of the insurance, which is said to be prohibitively expensive for some lawyers.²¹³ This argument requires careful scrutiny. The average cost of minimum levels of LPL insurance (\$100,000/\$300,000) for individual lawyers is \$3,000 or less annually in much of the United States,²¹⁴ although it runs higher in a few states.²¹⁵ Opponents of an insurance requirement argue, however, that some lawyers—including new lawyers and lawyers who practice part-time—cannot afford to pay for LPL insurance.²¹⁶ This claim may be overstated. In some states, part-time lawyers (working fewer than 25 hours per week) can obtain LPL insurance for \$600 per year or less.²¹⁷ For many new lawyers, it is possible to purchase policies for amounts as low as \$500 the first year and at reduced rates for a few years thereafter.²¹⁸

Nevertheless, it may be truly impossible for some lawyers who represent private clients to pay for LPL insurance.²¹⁹ It is difficult to obtain an accurate estimate of the percentage of uninsured lawyers who fall into that category. The New Mexico survey responses suggest, however, that the percentage of uninsured lawyers who truly cannot

Professionalism and the Politics of Self-Regulation in the California State Bar, 22 PEPP. L. REV. 485, 490–91, 556–60 (1995).

213. See Glenn Fischer, *Professional Liability Insurance Coverage—Viable Form of Self-Regulation or Simply Another Business Decision?*, LPL ADVISORY, Fall 2002, at 1, 2; see also Mason, *supra* note 12. Alternatively, opponents argue that the cost of insurance would be passed on in the form of higher fees charged to clients. See Watters, *supra* note 8, at 252.

214. See Ely, *supra* note 47, at 3. See also Todd C. Scott, *Attorney Malpractice Insurance: Who's Got Your Back?*, GPSOLO, Jan./Feb. 2014, at 38, 41 (stating that the annual premium can average from \$1,500 to \$3,000 for experienced attorneys); Gary Gosselin, *Going Bare: Not Carrying Malpractice Insurance Could Leave You and Your Firm Exposed*, INGHAM CTY. LEGAL NEWS (Oct. 12, 2013), <http://www.legalnews.com/ingham/1381823> (premium for solo Michigan lawyer averages from \$2,000 to \$3,500). Premiums are higher in all states for lawyers who practice in certain areas such as securities and intellectual property. Scott, *supra*.

215. In California, the annual cost of \$100,000/\$300,000 coverage for lawyers working in low-risk practice areas (e.g., criminal, family, immigration) averages about \$1,500, and for lawyers working in mid-range risk practices (e.g., slip-and-fall personal injury, residential real estate), the average cost is about \$3,500. The annual cost is about \$7,500 for lawyers in high-risk practices (e.g., class actions, securities or intellectual property). The premiums are even higher in Los Angeles. Telephone Interview with Insurance Executive No. 2 (July 6, 2015).

216. Mendryzcki, *supra* note 20, at 41; Memorandum from Darrel Tillar Mason, *supra* note 142.

217. E-mail from Insurance Executive No. 1 to author (May 20, 2015, 14:29 EDT) (on file with author). In Texas, part-time lawyers with minimal practices can pay as little as \$450 for LPL insurance. TEXASBARCLE, BASIC CONSIDERATIONS REGARDING LAWYER PROFESSIONAL LIABILITY INSURANCE (2005), <http://www.texasbarcle.com/CLE/site/LawOfficeMgmtPracticeMaterials/tlie.pdf>.

218. *Strong Start Program*, LIMIC, http://www.lmic.com/policies_offered/strong_start_program (last visited Aug. 10, 2016); TEXASBARCLE, *supra* note 217; Scott, *supra* note 214.

219. See *supra* notes 57–59 and accompanying text.

afford annual LPL premiums may be less than 20%.²²⁰ If these lawyers commit malpractice, their low incomes and lack of assets may also render them unable to fully compensate clients for the harm they cause.

Furthermore, uninsured lawyers who currently cannot afford LPL insurance will most likely not be able to pay for insurance even if their state establishes a mandatory professional liability insurance fund like the one in Oregon. The cost of insurance in Oregon is \$3,500 per lawyer,²²¹ which is higher than the average cost in the commercial market in many states.²²² Some have argued, however, that without a state fund, a law requiring lawyers to maintain LPL insurance would result in commercial insurance companies deciding who practices law.²²³ This claim has rhetorical resonance but is less persuasive when carefully considered. Any insurance requirement would only apply to lawyers who represent private clients and would not prevent lawyers from working in other practice settings (e.g., in-house, government), associating with a firm that provides insurance, or working in lower risk practice areas so they can afford the cost of insurance. Lawyers in every state also have a number of insurance companies from which they can purchase LPL insurance.²²⁴ Only five uninsured lawyers who responded to the New Mexico survey

220. See New Mexico Survey, *supra* note 38. As previously noted, 53% of the uninsured New Mexico lawyers (61) indicated that they would purchase LPL insurance if the New Mexico Supreme Court required them to do so. See *supra* Table 1. Of the fifty-four uninsured lawyers who indicated they would not pay for insurance if required to do so, only twenty of the lawyers (17.4% of all uninsured respondents) also indicated they could not afford to hire representation to defend them if sued in a malpractice action, suggesting they truly may have difficulty paying for insurance. Three other lawyers who indicated they would not pay for insurance did not answer the question about their ability to pay for representation.

221. In Oregon, all lawyers who have been in practice more than three years—including lawyers who practice part-time—must pay the same premium of \$3,500 for \$300,000/\$300,000 coverage. Coverage, OR. ST. B. PROF. LIABILITY FUND, <https://www.osbplf.org/coverage/overview.html> (last visited Aug. 10, 2016).

222. See *supra* note 214 and accompanying text. It is possible, however, that the insurance premiums for high-risk lawyers (either because of their claims history or their areas of practice) would be lower if they could purchase insurance from a state professional liability provider than if they had to obtain insurance in the commercial market.

223. See, e.g., Fischer, *supra* note 213, at 1; Hansen, *supra* note 18, at 49; Mason, *supra* note 12.

224. For example, Missouri has eighteen companies that are admitted to write LPL insurance in the state. 2015 MO. DEP'T OF INS. ET AL., MISSOURI PROPERTY & CASUALTY SUPPLEMENT REPORT 183 (2016), <http://insurance.mo.gov/reports/suppdata/documents/2015PropertyCasualtySupplementReport.pdf>. Even a state with relatively few lawyers, such as Montana, has fifteen companies admitted to write LPL insurance in that state. *Professional Liability Insurance Directory: Montana*, A.B.A. STANDING COMMITTEE ON PROF'L LIABILITY, <http://apps.americanbar.org/legalservices/lpl/directory/states/mt.html> (last visited Aug. 10, 2016). Not all of the insurance companies write policies for solo and small firms, but in every jurisdiction, there are more than a few companies that do so.

indicated that they had difficulty obtaining insurance due to their claims experience.²²⁵ It was not clear that most of these lawyers had exhausted the alternatives for finding coverage. If lawyers cannot obtain or afford LPL insurance, it is not the insurer that “decides” who practices law. Rather, it is the lawyer’s choice of practice setting, financial circumstances, practice areas, and other risk factors that are determinative.

Another argument against mandatory insurance that merits consideration is that requiring all lawyers to purchase LPL insurance will adversely affect the provision of legal services to people of limited means.²²⁶ There is some evidence supporting this argument. The responses from some of the uninsured New Mexico lawyers indicated that they would cease doing pro bono work (because they were not otherwise practicing), would do less pro bono work (presumably because they would need to earn more money), or would have to raise their legal fees if they were required to maintain LPL insurance.²²⁷ Only 23 of 131 uninsured lawyers in private practice (17.6%) indicated that they performed some pro bono work.²²⁸ Nevertheless, sixteen of these uninsured lawyers (12.2%) indicated in narrative comments that they performed all or most of their legal work on a pro bono basis.²²⁹ In many cases, they were retired, semiretired, or working full-time in a job unrelated to law practice. Thirteen of the sixteen lawyers strongly agreed or agreed that they would stop practicing law in New Mexico if they were required to purchase LPL insurance.²³⁰ Some of the other uninsured lawyers who mentioned they performed some pro bono work indicated that an insurance requirement would cause them to close their practices or reduce the amount of pro bono work that they perform.²³¹ It was sometimes unclear from the responses, however, what the lawyers meant by “pro bono” work. For solo and small firm lawyers, pro bono may encompass not only free legal work but also discounted work (“low bono”) and “carrying” clients who can no longer pay.²³² Although a majority of the uninsured lawyers who indicated they performed “pro

225. See *supra* notes 63–64 and accompanying text.

226. See, e.g., Mason, *supra* note 12.

227. New Mexico Survey, *supra* note 38.

228. *Id.* The New Mexico survey did not systematically inquire about pro bono work. It is possible that some additional uninsured lawyers performed pro bono work but did not mention it because they did not view it as relevant to the questions about LPL insurance.

229. *Id.*

230. *Id.*

231. *Id.*

232. Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*, 37 HOFSTRA L. REV. 699, 718–24 (2009).

bono” work appeared to be assisting clients of limited means,²³³ a few of the lawyers may have been providing free legal services to clients who could otherwise afford to pay.

Most of these uninsured New Mexico lawyers did not indicate how many hours they devoted to pro bono work, and for some lawyers the time may not have been substantial.²³⁴ Nevertheless, any significant diminution in pro bono or low bono work for people of limited means is a concern when so many people cannot afford to pay for legal services. One alternative for lawyers who wish to perform pro bono work, however, is to work in state bar pro bono programs or state legal services programs that provide LPL coverage for their volunteer lawyers.²³⁵ If lawyers in private practice were required to maintain LPL insurance, an exception could be created—as it was in Oregon—for lawyers who represent clients exclusively through these pro bono programs.²³⁶ It is probably not possible, however, to create an exception to an insurance requirement for lawyers who provide pro bono or low bono services in other ways.²³⁷ Nor would it be desirable to leave pro bono clients without recourse if their lawyers commit malpractice. Thus, if LPL insurance is required, some lawyers may perform less pro bono or low bono work in order to pay for insurance. Some otherwise retired lawyers may become “inactive” and cease to perform pro bono work. The question is *how much* pro bono work for people of limited means would actually be lost if uninsured lawyers were required to carry LPL insurance or confine their pro bono efforts to bar programs that provide insurance coverage? It is also important to consider whether states could implement measures to offset the loss of pro bono services that might result from an insurance requirement.

233. One lawyer wrote:

I usually only take cases where clients have been rejected by other attorneys and they cannot get help. I do not call all of my work pro bono because they sometimes generate a fee or my client pays me a small amount of money. [R]ecently once [sic] client brought me a sack of onions and a sack of chile.

New Mexico Survey, *supra* note 38.

234. At least a few of the lawyers did, however, devote substantial time to pro bono or low bono work. One lawyer wrote, “80% of the cases I do are pro bono. I am the only practicing private (full time) attorney in [name omitted] County. If I don’t help these people no one will.” *Id.* Another lawyer indicated that 200 hours was devoted to pro bono. *Id.* A few others referred to working on one to three pro bono matters. *Id.*

235. In fact, three of the uninsured New Mexico lawyers were performing pro bono through such programs. *Id.*

236. See *Professional Liability Fund Coverage*, *supra* note 11.

237. The California Supreme Court has held that an attorney’s obligation to pro bono clients is no less than it is to other clients. *Siegel v. State Bar of California*, 751 P.2d 463, 466 (Cal. 1988). In addition, there is no support under lawyers’ professional rules for the proposition that lawyers owe lesser duties to pro bono clients than to paying clients.

A further argument against an insurance requirement—that malpractice claims will increase if all lawyers who represent private clients are required to carry LPL insurance—is less compelling, and the evidence is equivocal. While the highest annual claims rate I could find for a commercial insurer was 7.5%,²³⁸ the Oregon Professional Liability Fund (PLF), which insures all Oregon private practitioners, experienced a claims rate of 11.37%.²³⁹ This rate may be due, in part, to the fact that the Oregon PLF insures all Oregon private practitioners whose principal office is in Oregon, including higher risk lawyers many commercial insurers may decline to cover. Oregon lawyers may also be more willing to report all possible claims to the PLF because reported claims will not affect the lawyers' premiums.²⁴⁰ The possibility cannot be discounted, however, that the higher claims rate against Oregon lawyers is due, in part, to the fact that clients—and plaintiffs' malpractice lawyers—are aware that all Oregon lawyers in private practice maintain LPL insurance, and that if a plaintiff proves malpractice, as much as a \$300,000 recovery is possible.²⁴¹

The comments of plaintiffs' malpractice attorneys also reveal that if uninsured lawyers are required to maintain insurance, this will increase the chances they will be sued if they engage in malpractice.²⁴² It would be a perverse outcome, however, to allow these lawyers to reduce their chances of being sued by declining to purchase insurance that would compensate clients if the lawyers commit malpractice. The failure to purchase insurance is especially concerning when some uninsured lawyers use their legal knowledge to shelter their assets.²⁴³ Failure to carry insurance may further lead to clients suing lawyers who have less involvement with the matter than the uninsured lawyer who most directly

238. In other words, 7.5% of the LPL policyholders reported claims in a year. Telephone Interview with Insurance Executive No. 6, *supra* note 161.

239. E-mail from Carol Bernick, *supra* note 161. This rate is comparable to the claims rates in three provinces in Canada that also require that lawyers carry LPL insurance. See Herbert Kritzer, *Lawyers Professional Liability: Comparative Perspectives*, 24 INT'L J. LEGAL PROFESSION (forthcoming 2017), <http://www.tandfonline.com/doi/full/10.1080/09695958.2016.1223673> (reporting that claims rates in Alberta, Ontario, and British Columbia in 2014 ranged from 10.3–12.3%).

240. See E-mail from Carol Bernick, Chief Exec. Officer, OSB Prof'l Liab. Fund, to author (July 30, 2015, 14:07 EDT) (on file with author).

241. See *supra* note 221 and accompanying text.

242. See *supra* notes 176, 180 and accompanying text. It is also conceivable that maintaining insurance will increase the chances they will be sued even if no malpractice occurs, but in that case they are protected by insurance.

243. See *supra* note 193 and accompanying text; see also Bantz, *supra* note 182 (“People are consciously deciding these days to not carry malpractice insurance You start searching public records to find out what’s in their names and you see that they don’t have any property, that they’ve put stuff in a partnership or in their wife’s name and they’re basically judgment-proof.”).

caused the harm.²⁴⁴ These uninsured lawyers are free riders who benefit from the fact that most private practitioners carry LPL insurance and form the public's belief that lawyers carry insurance.²⁴⁵

B. *The Limits of Insurance Disclosure Requirements*

Alternatively, if lawyers are not required to maintain LPL insurance, and clients must bear the risk that they cannot recover for the negligence of their uninsured lawyers, what—if anything—should be communicated to these clients before they retain an uninsured lawyer? Not surprisingly, there is evidence the public believes insurance information should be disclosed.²⁴⁶ Some members of the public believe that if they knew a lawyer was uninsured, it would affect their decision to retain the lawyer.²⁴⁷ Seventeen states currently mandate direct disclosure or provide for disclosure of insurance information to the public via websites.²⁴⁸ Yet even those states fail to provide effective disclosure to clients concerning lawyers who are uninsured.

As previously noted, in the seven jurisdictions that require direct disclosure to clients, lawyers must advise their clients in writing that they are uninsured.²⁴⁹ It is not known whether clients actually read this information, especially in jurisdictions that do not require the information to be communicated in a separate document or do not require a written acknowledgement by the client.²⁵⁰ Even if clients read the disclosure, it

244. Fortney, *supra* note 16, at 200; Bousquet, *supra* note 186.

245. See VA. STATE BAR ASS'N, *supra* note 7, at 7; WELDEN, *supra* note 176, at 3 n.2; Nancy McCarthy, *Bar Board Will Tackle Disclosure Again*, CAL. B.J., Nov. 2007, <http://archive.calbar.ca.gov/Archive.aspx?articleId=89185&categoryId=89063&month=11&year=2007>. Further evidence that the public assumes lawyers are insured can be found in the survey of uninsured New Mexico lawyers. These lawyers are required to directly advise clients that they do not carry insurance. Almost 80% of these lawyers strongly disagreed or disagreed with the statement that clients assume that lawyers are insured. See *supra* Table 1.

246. Memorandum from David J. Beck, *supra* note 19, at 3 (stating that 70% of surveyed members of the public believed the law should require lawyers to inform potential clients whether they carry LPL insurance).

247. A small Texas study of the public indicated almost half of the respondents (48.6%) believed that if the lawyer informed the individual she did not carry professional liability insurance, the information would affect whether the individual would hire the lawyer. TEX. STATE BAR, PLI DISCLOSURE SURVEY OF THE PUBLIC 5 (2009), <https://www.texasbar.com/pliflashdrive/material/PublicSurvey.pdf>. Another 15% did not know whether it would affect them or did not respond. *Id.* It is not clear whether all the respondents understood what function professional liability insurance performs.

248. See *supra* Table 2 and Table 3.

249. See *supra* Table 2.

250. Alaska only requires its lawyers to “inform an existing client in writing if the lawyer does not have malpractice insurance.” ALASKA RULES OF PROF'L CONDUCT r. 1.4(c) (2016). In contrast, Ohio lawyers must provide this information on a separate form and clients must sign a

is often ambiguous, and it is unlikely clients will fully understand the implications of lawyers being uninsured.²⁵¹ Clients may assume lawyers have other assets if they need to sue.²⁵² Clients may also discount the information because they are unaware of the incidence of malpractice. Moreover, clients may believe there will not be a problem with the representation if someone they trust recommended the lawyer to them.²⁵³

The timing of direct disclosure is also problematic, because it comes at a time when it may be difficult for clients to objectively process the information they receive. Direct disclosure is not typically required until the client engages the lawyer.²⁵⁴ Yet at this point, the client has already committed time to the relationship and made a decision to proceed with the representation. Social norms and power imbalances may make it difficult for a client to change course once the client has orally indicated that she will hire the lawyer.

Cognitive biases may also make it difficult for a client to change course once a decision to retain a lawyer is made. When someone has formed a belief, it is very difficult to erase.²⁵⁵ Once people reach a conclusion, they pay more attention to information confirming the

written acknowledgement that they have been advised their lawyers are uninsured. OHIO RULES OF PROF'L CONDUCT r. 1.4(c) (2015).

251. For example, the Ohio Rules of Professional Conduct provide that the notice to the client shall state: "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) (2015). This notice does not clearly convey that the lawyer carries no LPL insurance whatsoever or that the lawyer may be unable to satisfy a malpractice judgment as a result.

252. See, e.g., LEO J. SHAPIRO & ASSOCS., PUBLIC PERCEPTION OF LAWYERS: CONSUMER RESEARCH FINDINGS 18 (2002), http://www.americanbar.org/content/dam/aba/migrated/market_research/PublicDocuments/public_perception_of_lawyers_2002.authcheckdam.pdf (noting that the public believes that law careers are lucrative); David O'Boyle & Michael Smith, *Survey Reveals Public Perceptions of Lawyers and Legal Profession*, WASH. LAW. (Apr. 2015), <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/april-2015-legal-beat.cfm> (reporting that nearly half of respondents think lawyers are rich).

253. Clients of solo and small firm lawyers often find their lawyers through recommendations or word of mouth. See CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* 139-40 (1996); Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers: Dealing With the Possible But Not Certain*, 60 DEPAUL L. REV. 337, 366 (2011).

254. The exception may be South Dakota, as lawyers there must include this information in advertising. See *supra* Table 2. It is not known whether many uninsured South Dakota lawyers advertise.

255. See Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 880 (1975); Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 122 (1994).

correctness of their decisions than to negative information.²⁵⁶ This phenomenon is called confirmation bias: Individuals seek out and pay attention to information that supports their tentative decisions and downplay evidence that does not.²⁵⁷ In addition, the overconfidence bias, which causes people to be more confident in their judgments than is warranted by existing facts,²⁵⁸ may cause clients to believe they are making good decisions when they decide to retain a lawyer. These biases may make it difficult for clients to revisit the decision to hire a lawyer if they do not learn, until after they orally agree to retain the lawyer, that the lawyer is uninsured.

States that disclose a lawyer's lack of insurance coverage on websites enable clients to obtain this information before they contact a lawyer, but it is likely that many clients never consult these sources.²⁵⁹ Many solo and small firm lawyers report that new clients come to them through word of mouth.²⁶⁰ If lawyers are personally recommended, these clients may not perform extensive online research before hiring the lawyers. Even if clients perform an internet search, it seems unlikely they would consider checking whether lawyers carry LPL insurance, as the public generally believes that lawyers in private practice are required to maintain insurance.²⁶¹ Members of the public are also unlikely to know they can check a state court or state bar website to learn whether a lawyer maintains LPL insurance. This information typically does not appear when a lawyer's name is input into an internet search engine.²⁶² Insurance information is not available on commercial websites, such as Avvo,²⁶³ that the public is more likely to find in a general internet search. Consequently, the current insurance disclosure rules do not enable the

256. See MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* 82 (5th ed. 2002); SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 234 (1993).

257. See BAZERMAN, *supra* note 256, at 34–35; Ross et al., *supra* note 255, at 889–90.

258. See Dale Griffin & Amos Tversky, *The Weighing of Evidence and Determinants of Confidence*, 24 *COGNITIVE PSYCHOL.* 411, 411 (1992).

259. *But see* Memorandum from Darrel Tillar Mason, *supra* note 142, at 3 (reporting that from 2005–2007, the number of hits on the Virginia State Bar internet attorney record site ranged from about 1,500–2,300 per month). It is not clear, however, whether the searches were to obtain insurance information or discipline information, which is reported separately. It is also unclear whether the searches were performed by potential clients, lawyers, or others.

260. See *supra* note 253.

261. See *supra* note 245 and accompanying text.

262. The official lawyer directories often require confirmation that the information is being sought by an individual and not being mined for commercial purposes. Currently only the California State Bar's website seems to provide lawyer registration information that the public can access through a general internet search. ST. B. CAL., <http://www.calbar.ca.gov/> (last visited Aug. 10, 2016). The California Bar does not, however, post lawyers' insurance information on its website.

263. AVVO, <https://www.avvo.com/> (last visited Aug. 10, 2016).

public to readily identify uninsured lawyers or to engage in truly informed decision-making with respect to the risks of hiring an uninsured lawyer.

The better approach would be to design disclosure requirements so they provide meaningful information to the public before the client makes the decision to retain a lawyer. This would start with direct disclosure to clients of the sort required in South Dakota, where insurance information is not only provided to clients at the time of engagement, but is also provided in advertising, on letterhead, and in all written communications to clients.²⁶⁴ Direct disclosure rules should additionally require this information to appear on lawyers' websites and in any written communications with potential clients, so people can consider this information before they have psychologically committed to the relationship. The disclosure rule should also require—as it does in New Hampshire, New Mexico, and Ohio—that notice that the lawyer is not insured must be provided to the client in a separate document and that the client sign an acknowledgement stating this information has been received.²⁶⁵ Written disclosures should not only state that the lawyer does not carry LPL insurance but should also briefly explain in plain language the potential consequences of a lawyer being uninsured.²⁶⁶

In order to enable members of the public to find insurance information even before contacting a prospective lawyer, state regulators should make the information readily available through a simple internet search. They should also educate the public about the possible consequences of hiring a lawyer who is uninsured. Currently, most official websites do not explain the relevance of insurance coverage.²⁶⁷ This information should be available in official lawyer directories and in other sections of state

264. See *supra* notes 93–95 and accompanying text.

265. See *supra* Table 2.

266. For a discussion of some techniques for disclosing information to consumers in ways they are likely to understand, see Lauren E. Willis, *The Consumer Financial Protection Bureau and the Quest for Comprehension*, in *FINANCIAL REFORM: PREVENTING THE NEXT CRISIS* (Michael S. Barr ed., forthcoming 2016); Vanessa G. Perry & Pamela M. Blumenthal, *Understanding the Fine Print: The Need for Effective Testing of Mandatory Mortgage Loan Disclosures*, 31 J. PUB. POL'Y & MARKETING 305, 307 (2012).

267. For example, the Arizona State Bar discloses on its website in its “Find a Lawyer” section whether individual lawyers maintain LPL insurance, but it simply states that active Arizona lawyers are required to report whether they carry LPL insurance without explaining the significance of not carrying insurance. See *Find a Lawyer*, ST. B. ARIZ., <http://www.azbar.org/lawyers/> (last visited Aug. 10, 2016). The Arizona State Bar also has a section on its website for the public entitled, “What Should I Find Out About a Lawyer,” that suggests clients find out about lawyers' locations, practice areas, and disciplinary histories, but makes no reference to malpractice coverage. *Quick and Easy Tips for Legal Help*, ST. B. ARIZ., <http://www.azbar.org/WorkingWithLawyers/Topics/QuickAndEasyTipsForLegalHelp> (last visited Aug. 10, 2016).

bar and judicial websites that inform the public about the factors they should consider when hiring a lawyer.²⁶⁸ The public should also be informed that if the lawyer commits malpractice and the client obtains a judgment, it may not be possible to recover damages from an uninsured lawyer. In addition, the public should be advised of the limitations of LPL insurance, including that insurance does not cover all misconduct.²⁶⁹ Without these measures, the disclosure requirements will not effectively communicate to clients the information they need to make an informed decision before hiring an uninsured lawyer.

CONCLUSION

There are still many unanswered questions about uninsured lawyers, but the picture that emerges from the data helps clarify who these lawyers are and the harm some of them cause to their clients. The research confirms there are two broad categories of uninsured lawyers. The first are lawyers who can afford insurance but choose not to purchase it. They make this decision for philosophical reasons, because they believe they can afford to pay any judgment against them, because they shelter their assets from judgments, or because they are essentially retired and are only occasionally performing legal work, often on a pro bono basis. From a public protection perspective, it is hard to justify not requiring these lawyers to purchase LPL insurance or, alternatively, to demonstrate they have sufficient assets available to pay a malpractice judgment. While the possible loss of pro bono work by near-retired lawyers is a legitimate concern, these lawyers can provide pro bono services through bar-organized pro bono programs that insure participating lawyers. Bar associations might also be able to work with their preferred carriers to offer low-cost insurance for individuals who limit their practice to occasional pro bono work for people of limited means.

In the second category are lawyers who barely earn a living and truly cannot afford LPL insurance. These same lawyers may also be unable to

268. The Virginia State Bar suggests that the public ask whether lawyers have reported that they have malpractice insurance. *Selecting and Working with a Lawyer*, VA. ST. B. (Nov. 3, 2015), <http://www.vsb.org/site/publications/selecting-and-working-with-a-lawyer/>. Unfortunately, this does not effectively communicate to most clients the potential implications of a lawyer not carrying insurance.

269. This information addresses a common objection to insurance disclosure raised by disclosure opponents, which is that clients may be misled or lulled into a false sense of security if they are told there is insurance. See Watters, *supra* note 8, at 253–54. I did not find evidence that clients have been misled in states with disclosure rules, but the public should be advised of the limitations of LPL insurance, including that LPL insurance does not cover intentional acts such as defalcations and may be insufficient to fully cover a claim. The public should also be advised that even if the lawyer maintains minimum levels of LPL insurance, the limits may be inadequate to fully cover a claim.

hire support staff that would help them avoid mistakes. Some of them are good lawyers representing people of limited means. Every lawyer makes mistakes, however, and sometimes those mistakes rise to the level of malpractice. In such cases, these lawyers are unlikely to have the means to compensate their clients for the harm they cause. Again, from a public protection perspective, it is difficult to justify requiring clients to bear the risk of loss.

The issue of what to do about uninsured lawyers should not be left in the hands of the organized bar to decide.²⁷⁰ Instead, the highest state courts—with input from the bar and the public—should carefully examine the conditions in their jurisdictions to determine how to better deal with lawyers who go bare. This process should begin by determining the number of uninsured lawyers in the state who represent private clients, on either a paid or pro bono basis. As previously noted, many jurisdictions cannot answer this basic question because they do not collect the data or do not collect it in ways that yield useful information. In some states, the number of uninsured lawyers may already be relatively low because of other requirements that incentivize lawyers to maintain LPL insurance, such as a requirement that lawyers maintain insurance to operate as an LLC or LLP.²⁷¹ In other states, the percentage of uninsured lawyers may be high for reasons such as the cost of LPL insurance or the ease with which lawyers can shield their assets from malpractice judgments.²⁷² In either case, states should also determine the number of uninsured lawyers who truly cannot afford LPL insurance and the impact that an insurance requirement would have on the provision of pro bono or low bono legal services by these lawyers.²⁷³ Courts must then weigh this information against the interest in protecting the public from uninsured lawyers.

270. In some states, such as Texas, the courts have largely deferred to the recommendations of the bar on this issue. *See, e.g.*, Fortney, *supra* note 16, at 203–09.

271. *See, e.g.*, DEL. SUP. CT. R. 67; N.J. SUP. CT. R. 1:21-1B. Likewise, in states where real estate closings are primarily handled by lawyers, banks or title companies impose insurance requirements that cause many solo and small firm lawyers to carry LPL insurance.

272. For instance, Florida has a very generous homestead provision in its constitution which prevents creditors from forcing the sale of a lawyer's home to satisfy a malpractice judgment. *See* FLA. CONST. art. X, § 4. Florida law also provides that assets held jointly as a tenancy by the entirety by a married couple cannot be obtained to satisfy a judgment against only one of the spouses. *Winters v. Parks*, 91 So. 2d 649, 652 (Fla. 1956). This affects the willingness of malpractice lawyers to pursue claims against uninsured Florida lawyers, except on an hourly basis. Telephone Interview with Plaintiffs' Attorney No. 6, *supra* note 180. It may also affect lawyers' decisions to purchase LPL insurance in Florida.

273. Oregon has not reported a problem with losing a significant number of lawyers from practice who might otherwise perform pro bono work, but this has not been investigated systematically.

If LPL insurance is not required, it is important to develop more effective insurance disclosure regimes. Under the current rules, the timing, method, and content of disclosure are inadequate to provide a meaningful opportunity for clients to consider the risks they run by hiring an uninsured lawyer.²⁷⁴ In addition, it is not known whether uninsured lawyers in states with disclosure rules are truthfully disclosing this information, either to clients or to regulators.²⁷⁵ It would not be surprising if a substantial number of uninsured lawyers are not directly disclosing to clients, as states do not appear to be performing random audits or systematically enforcing the rules.²⁷⁶ It is important to learn more about the public's experience with insurance disclosure to formulate disclosure requirements in ways that provide meaningful information to the public.

Finally, it must be acknowledged that neither insurance requirements nor insurance disclosure will fully protect clients. Even if lawyers maintain LPL insurance, insurers will not provide coverage for criminal or intentional acts.²⁷⁷ Insurers may decline to cover other claims for a variety of reasons, including the failure by the lawyer to timely notify the insurer of a claim. Even where coverage is available, clients' claims may greatly exceed the insurance limits.²⁷⁸ Thus, mandatory insurance coverage is not a perfect solution. Enhanced disclosure requirements are an even less satisfying response, as it is unclear that even with more information, most individuals will fully understand the implications of hiring an uninsured lawyer. Nevertheless, either approach would be an improvement over the current regulatory regimes and would afford the public better protection from lawyers who go bare.

274. See *supra* notes 251, 254–59, 262 and accompanying text.

275. In at least a few cases, they are not. See, e.g., *Cincinnati Bar Ass'n v. Leahr*, 873 N.E.2d 288, 289 (Ohio 2007); *Cuyahoga Cty. Bar Ass'n v. Frenden*, 871 N.E.2d 570, 572 (Ohio 2007).

276. One disciplinary counsel I spoke with informally advised me he has not enforced his state's direct disclosure rule, even though he knew of cases in which lawyers were not disclosing insurance information. Instead, he described a process of allowing lawyers to cure their approach to insurance disclosure.

277. 5 RONALD E. MALLEN & ALLISON MARTIN RHODES, *LEGAL MALPRACTICE* 38:52 (2015 ed.).

278. In most cases, however, insurance claims are settled within the \$100,000 limit of the most basic LPL policy. See *PROFILE OF LEGAL MALPRACTICE CLAIMS*, *supra* note 68, at 22 (reporting that more than 89% of all claims are resolved for \$0–\$100,000, including defense costs).

