

The Malpractice Insurance Dilemma A Talk with Professor Leslie Levin

- Overview of issue of lack of mandatory lawyer professional liability (LPL) insurance among states
 - Lack of uniformity among states
 - Only 2 states require lawyers carry: Idaho and Oregon.
 - Nearly half of the states require disclosure to different entities in varying forms
 - Other states do not have any LPL insurance requirements
 - Many solos and small firms not insured
- Claims typically covered by LPL insurance
 - Missed deadlines
 - Conflicts of interest
 - Communication issues with clients
 - Fee disputes
- Not typically covered
 - Fraud
 - Criminal acts
- Debate over mandatory lawyer malpractice insurance
 - Debate first rose in late 1970s when LPL insurance claims increased and became more expensive. Many states considered whether to mandate LPL insurance. Only Oregon adopted this approach in 1977.
 - Opponents
 - No significant harm to public
 - Cost prohibitive
 - Would raise rates impacting pro bono or low bono work
 - Would enable insurance companies to dictate who practices law
 - Would increase malpractice claims
 - Why does LPL insurance matter
 - Public harm
 - Client difficulty in paying on hourly basis or finding lawyer on contingent basis
 - Malpractice cases against uninsured rarely pursued to judgment
 - Lawyers not willing to work on claim against uninsured lawyers
 - Provides access to remedies for clients who are harmed
 - Impact on perception of legal profession. May undermine public's trust in lawyers at the individual client level.
 - Creates incentives and disincentives for lawyer conduct in dealings with clients
 - States restrict practice of law to licensed lawyers; special privilege requires responsibility to be accountable
 - May improve risk management

- Mandatory system may improve accessibility and affordability
- Evaluating mandatory LPL insurance systems
 - Oregon
 - Oregon maintains a Professional Liability Fund to spread risk while keeping costs down.¹ Lawyer pay the same assessment, and basic coverage includes \$50,000 for defense and \$300,000 per claim inclusive of defense and indemnity costs.
 - Purpose is to protect clients and the public and control costs
 - Idaho
 - In 2016, the Idaho State Bar approved a resolution to require lawyers to submit proof of LPL insurance. The rule changes were adopted by the Idaho Supreme Court in 2018.
 - Idaho Bar Commission Rule 302(a)(5) requires that a lawyer who represents private clients certify that they maintain insurance coverage of \$100,000 per claim and \$300,000 annual aggregate.²
- Insurance disclosure requirements
 - ABA Model Court Rule on Insurance Disclosure requires disclosure of LPL insurance on annual registration statements.³
 - ABA Standing Committee on Client Protection lists various states' requirements for LPL insurance disclosure to state governing authorities and/or clients.⁴
 - Varied disclosure requirements of states
 - "Direct disclosure" states: lawyers must disclosure to clients that they do not carry LPL insurance.
 - E.g. California requires lawyers to disclose to clients in writing at time of engagement if they do not have LPL insurance.⁵

¹ Oregon State Bar Professional Liability Fund (PLF): <https://www.osbar.org/plf/plf.html>.

² Strauser, A, *2018 Malpractice Coverage Requirement – General Information*, Idaho State Bar (Aug 29, 2017, Updated May 14, 2019), <https://isb.idaho.gov/blog/author/astrouser/>.

³ ABA Model Court Rule on Insurance Disclosure (adopted Aug. 10, 2004), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_court_rule_on_insurance_disclosure.pdf.

⁴ ABA Model Court Rule on Insurance Disclosure resource: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrd.pdf.

⁵ California Rules of Professional Conduct Rule 1.4.2 Disclosure of Professional Liability Insurance, http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.4.2-Exec_Summary-Redline.pdf.

- E.g. South Dakota requires the lawyer to disclose a lack of LPL insurance on letterhead using specific language⁶ and on any advertisements⁷.
 - Require on attorneys' registration forms: lawyers must report on registration forms whether they carry LPL insurance. Among those, 10 require information posted on state bar or judicial websites.
 - E.g. Illinois requires lawyers to disclose on their annual registration statement.⁸
 - No disclosure requirements to clients or regulators
 - E.g. Connecticut, New York, and Texas do not have disclosure rules.
 - What has been the impact of disclosure requirements to induce uninsured lawyers to purchase LPL insurance
 - Some correlation with direct disclosure requirements and higher rates of LPL insurance
 - Little evidence that requirement to post on state bar or judicial websites correlates with higher rates
 - Measures to improve disclosure rules overall
 - Provide meaningful information to clients
 - Provide information on lawyer websites and communications
 - Have clients sign acknowledgements (e.g. NH, NM, and OH requirements)
 - State regulators share information
- Insurers "regulating" lawyer conduct
 - Through process of applying for and renewing LPL insurance
 - Underwriters require copies of engagement letters and may ask for certain changes to be made.
 - May periodically review conflicts check systems.
 - May provide guidance, consultations, and audits of risk management systems.
 - Premiums for specialty areas and policy exclusions
- Should LPL insurance be required?
 - Lawyer attitudes about malpractice claims and insurance
 - Lawyers may hear and read more about discipline than malpractice
 - Are more concerned about discipline than malpractice
 - Belief that they're not likely to be sued for malpractice

⁶ South Dakota Model Rules of Professional Conduct Rule 1.4(c), https://sdlegislature.gov/Statutes/Codified_Laws/2044876.

⁷ South Dakota Model Rules of Professional Conduct Rule 7.2(l), https://sdlegislature.gov/Statutes/Codified_Laws/2044876.

⁸ Ill. Sup. Ct. R. 756 (e), http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VII/artVII.htm#Rule756.

- Where does reform movement need to come from
 - State bars – in both OR and ID, the state bars proposed changes to require LPL insurance.
 - Courts – rarely do courts propose such action, in part because malpractice insurance claims or the issue uninsured lawyers rarely make it to the courts.
 - Individual lawyers – bar leadership, bar organizations, and lawyers who advocate for changes affects whether the issue is debated at state bars and whether the measures pass.

Additional Resources

- Leslie Levin, *When Lawyers Screw Up*, 32 Geo. J. Legal Ethics 109 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3352852.
- Leslie Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735144.