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The Emperor's New Clothes: Cloaking Client Protection under the New Model Court Rule on Insurance Disclosure The Fourth Annual Symposium on Legal Malpractice and Professional Responsibility: Comment.

Nicole D. Mignone

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COMMENTS

THE EMPEROR'S NEW CLOTHES?: CLOAKING CLIENT PROTECTION UNDER THE NEW MODEL COURT RULE ON INSURANCE DISCLOSURE

NICOLE D. MIGNONE

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I. INTRODUCTION

"[T]he best augury of a man's success in his profession is that he thinks it the finest in the world."[1] The success of a profession should similarly reflect in a positive perception by the public it serves. For the legal profession, its tarnished public image[2] demands a polishing if the public views attorney honesty and ethics slightly above those of car salesmen and advertisers.[3] Unfortunately, this negative publicity lacks novelty,[4] as evidenced by the dramatic rise in legal malpractice claims over the past forty years.[5] Increasing malpractice claims barely forecast a more successful image in the legal professional climate.

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1. GEORGE ELIOT, Daniel Deronda 657 (Penguin Books 1995) (1876).

2. *See* John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 66-68 (1999) (characterizing increased public criticism of lawyers as overshadowing the positive public deeds and leadership of others in the legal profession). *See generally* Deborah L. Rhode, *Ethics in Practice, in* ETHICS IN PRACTICE 13, 13-14 (Deborah L. Rhode ed., 2000) (describing ethical and moral dilemmas currently confronting the legal profession).

3. *See* David W. Moore, *Nurses Top List in Honesty and Ethics Poll*, THE GALLUP ORG., (Dec. 7, 2004), *at* http://www.gallup.com/poll/content/login.aspx?ci=14236 (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (ranking the legal profession's Honesty and Ethical Standard as 18% in its annual survey). Comparatively, advertising practitioners ranked at 10% and car salesmen ranked at 9%. *Id.*

4. *See* Gary A. Hengstler & R. William Ide, III, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, 79 A.B.A. J. 60, 64 (1993) (reporting on the 1992 ABA survey of lawyers prioritizing improvement of the public's increasing negative perception of lawyers). Ironically, the people with the most attorney interaction and contact had the most negative perceptions, compared to those who did not. *Id.* at 62. *Compare* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1239 (1991) (attributing the contemporary "crisis" of public dissatisfaction with lawyers to the greater quantity of lawyers, media portrayal of legal ineptitude, and the profession's disdain of itself), *with* Joseph T. McLaughlin et al., *Overview: Ethical Problems, Disqualification, and Lawyers' Potential Liability for Malpractice and Fraud*, C641 A.L.I.-A.B.A. 1, 8 (1991) (associating increased malpractice claims with third parties as well as the high-risk practice areas of the 1970s and 1980s). *But see* Susan Korenvaes Robin, Comment, *Attorney Malpractice and Preventative Lawyering: Are Attorneys Safer in Large Firms?*, 40 U. MIAMI L. REV. 1101, 1105 (1986) (ascribing malpractice claim increases to the public's perceptions that insurance pays the claim without injury to the attorney). The media remains blameworthy for propagating the idea that lawyers make mistakes rendering large settlements. *Id.*

5. *Compare* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1681 (1994) (proposing that malpractice claims have risen since the 1970s due to increases in both the public's and jurors' hostility toward lawyers and the chances that a jury rather than a judge will decide issues of credibility and liability), *with* Nicole A. Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO. J. LEGAL ETHICS 637, 641 (1995) (including heightened public awareness and increased medical malpractice case publicity as factors contributing to rising malpractice claims).

Although the legal profession harbors a taboo regarding legal malpractice conversations,[6] since at least the 1796 case of *Stephens v. White*,[7] clients have been filing various types of legal malpractice grievances against their attorneys.[8] A punishing grievance filed against an attorney, however, does not compensate a client legitimately harmed by an attorney's negligence or incompetence.[9] Many client-protection programs aimed to reimburse clients for intentional crimes or harm by attorneys do not cover negligence.[10] Sometimes clients prefer to sue for compensation rather than just file a complaint.[11] Although malpractice suits offer a viable remedy for the majority of claims concerning either personal injury or real estate,[12] they pale in significance if the negligent attorney does not carry malpractice insurance.[13]

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6. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1663 (1994) (divulging insurance company and lawyer reluctance to reveal or discuss malpractice issues).

7. 2 Va. 203 (2 Wash.) (1796).

8. *See* Stephens v. White, 2 Va. 203 (2 Wash.) (1796) (considering the standard of care for an attorney who negligently failed to file a declaration). In *Stephens*, the Virginia Supreme Court established the standard of care for which an attorney owes a dutiful obligation to his client and for which he could be held liable for gross negligence. *Id.* at 212. The court's further notation of the client's duty to assert his damages demonstrates an important requirement beyond the mere filing of a grievance or an injury worthy of compensation by the attorney. *Id.*

9. *See* David Z. Webster, *Mandatory Malpractice Insurance: Has the Time Come to Require Coverage? Yes: It's Essential to Public Trust*, 79 A.B.A. J. 44, 44 (1993) (advancing that malpractice insurance harms uncompensated clients and influences negative perceptions about lawyers); *cf.* Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 838 (1978) (arguing that many clients remain uncompensated because they would rather not sue an uninsured attorney).

10. *See Court Should Require Disclosure, Plan for Coverage*, LEGAL INTELLIGENCER, Mar. 15, 2004, at 5 (comparing Pennsylvania's Client Security Fund to other states' funds). Most states have a fund to protect clients from intentional misconduct of attorneys, like theft, but not negligence. *Id.* For example, the Texas Client Security Fund provides for "[a]ny client who has lost money, property or other things of value because of an attorney's dishonest conduct . . . ." STATE BAR OF TEX., THE CLIENT SEC. FUND OF THE STATE BAR OF TEX. (2004), *available at* http://www.texasbar.com/template.cfm?section=pamphlets (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*).

11. *See* Susan Korenvaes Robin, Comment, *Attorney Malpractice and Preventative Lawyering: Are Attorneys Safer in Large Firms?*, 40 U. MIAMI L. REV. 1101, 1105 (1986) (quoting a malpractice insurance defense specialist who contends the rise in malpractice claims reflects society's views that only filing suit solves problems).

12. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1660 (1994) (citing an ABA study that revealed most malpractice claims relate to personal injury and real estate).

13. *See* Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 838 (1978) (criticizing the lack of insurance that indirectly forces clients to forego a legitimate malpractice suit).

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Traditionally, the legal profession prides itself on its ability to self-regulate and prefers to "take care of its own" in the disciplinary realm.[14] To further these self-regulation principles, the American Bar Association (ABA) assesses the needs of both the legal profession and the public and recommends disciplinary rules to the courts and respective state bar associations.[15] Recently, the ABA House of Delegates narrowly approved the *Model Court Rule on Insurance Disclosure* (Model Insurance Rule) proposed by the ABA's Standing Committee on Client Protection (Client Protection Committee) at its August 2004 annual meeting.[16] The Model Insurance Rule requires attorneys engaged in the private practice of law to report to the highest court in the state whether they plan to maintain liability insurance.[17] Then, that court must determine how the public should access this reported information.[18] Actually, the approved Model Insurance Rule weaves previous proposals attempting to protect the public from negligent attorneys while also offering a viable avenue of recourse and compensation for any harm suffered.

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14. *Contra* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 591 n.449 (1985) (questioning the efficacy of the current legal disciplinary system). Apparently, most bar disciplinary agencies do not deal with attorney negligence and "the difficulties of proving malpractice have been frequently noted." *Id.*

15. *See Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1582 (1994) (assessing the ABA's role to protect the public and the profession).

16. *See Malpractice: ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 LAW. MANUAL ON PROF. CONDUCT 411 (2004) (publicizing ABA House of Delegates' narrow vote of 213-202). The following groups offered the Model Insurance Rule: "[ABA] Standing Committee on Client Protection, Section of Family Law, ABA Standing Committee on Professional Discipline, National Organization of Bar Counsel, [and] the state bars of New Mexico, Virginia and Washington." *Id.* The ABA Tort Trial and Insurance Practice Section (TTIPS) and the Standing Committee on Lawyer Professional Liability opposed this rule because of the rule's potential ambiguity. *Id.*

17. *See* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 8 (2004), *available at* http://www.ethicsandlawyering.com/Issues/files/ABAHODReport.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (outlining the reporting requirements in Section B of the adopted Model Rule on Insurance Disclosure). The Model Insurance Rule language is reprinted in Appendix A of this Comment.

18. *See* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 8 (2004), *available at* http://www.ethicsandlawyering.com/Issues/files/ABAHODReport.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (delegating the publication task to each state's highest court as defined by the adopted Model Insurance Rule, Section B). The Model Insurance Rule is reprinted in Appendix A of this Comment.

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The Model Insurance Rule, however, provides protection equivalent to the "emperor's new clothes"[19] for both the attorney and the client because it provides little, if any, of its purported benefits and protection. Even worse, a false sense of security enshrouds the client, who believes he is protected against any negligence of his attorney. Similarly, a mistaken belief of full coverage from client suits cloaks the attorney carrying malpractice insurance. In reality, the Model Insurance Rule lacks the capacity to completely protect either client or attorney, but it does stitch a reassuring pattern toward client protection. The challenging issue then becomes the balance between protecting both the client and attorney.[20]

Unlike Hans Christian Andersen's fairy tale, good intentions do underlie the Model Insurance Rule's creation. This Comment exposes the elements creating the illusory cloak that protects the client and his attorney, as well as potential unintended consequences. Part II highlights the evolution of the current Model Insurance Rule and reveals how competing arguments actually encourage client protection. Part III explores the illusion of client protection through the attorney-client relationship, malpractice insurance, and the self-regulation of the legal profession, all of which influence disclosure to clients. This section also unveils potential unintended consequences of the Model Insurance Rule and considers whether the rule would benefit the Texas legal market. Finally, Part IV considers whether the Model Insurance Rule could more effectively accomplish its client protection goals with alternative recommendations.

II. BACKGROUND

The Model Insurance Rule represents myriad proposals evolved from the ABA's four-year struggle to formulate a rule fairly addressing the concerns of the legal profession while also responding to the public's need for more protection.[21] The genesis of the current push to protect

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19. *See generally* HANS CHRISTIAN ANDERSEN, THE EMPEROR'S NEW CLOTHES (North-South Books, Inc. 2000) (referencing the children's fairy tale of two invidious "tailors" who con a gullible and materialistic emperor into believing their magical invisible "cloth" actually covers him).

20. *See* Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 840 (1978) (commenting, almost prophetically in the late 1970s, that the real issue balances between an ethical duty to protect the public from bad lawyers and a need to offer attorneys a means of insurance protection at a price that does not put them out of business).

21. *See Malpractice: ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 LAW. MANUAL ON PROF. CONDUCT 411 (2004) (summarizing ABA Standing Committee on Client Protection chairman Robert D. Welden's statement that the rule was "the most lawyer-friendly version" from the committee in over four years of work on it).

clients with malpractice insurance may be attributed to initial efforts through state lawyer referral services.[22] Starting in August 1989, the ABA House of Delegates adopted *Minimum Quality Standards*, providing client protection for lawyer referral services and requiring participating lawyers to maintain malpractice insurance coverage.[23] Then, in August 1992, the ABA House of Delegates adopted Rule 4 of the *Model Supreme Court Rules Governing Lawyer Referral and Information Services*, which requires a participating referral lawyer to maintain errors and omissions insurance or provide proof of financial responsibility in an amount at least equal to the minimum established by the committee overseeing the service.[24] In the following year, the *Model Rule for the Licensing of Legal Consultants* established requirements for foreign lawyers to maintain professional liability insurance if practicing as a United States legal consultant.[25] Despite these small efforts aimed at protecting some classes of clients, these patchwork rules still did not adequately protect the majority of the public that hired attorneys.

A. *The Evolving History of the Model Court Rule on Insurance Disclosure*

The ABA's first efforts to address a broader category of attorneys utilized the channels established for disciplinary or self-regulatory procedures. For instance, by July 2002, the Client Protection Committee proposed an amendment to Rule 1.4 of the Model Rules of Professional Conduct,[26] which would have required lawyers to disclose directly to their clients whether they maintained professional liability insurance.[27]

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22. *Cf.* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 4 (2004), *available at* http://www.ethicsandlawyering.com/Issues/files/ABAHODReport.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (beginning the ABA history backing the Model Insurance Rule at the referral services measures).

23. *See id.* at 3 (sketching the role of the 1989 *Minimum Quality Standards* for lawyer referral services into the history of the current Model Court Rule).

24. *See id.* at 5 (fortifying the lawyer referral services rules with a requirement for errors and omissions insurance or proof of financial responsibility). The creators of Rule 4 intended to provide redress for the client and immunity for the lawyer referral service in cases of negligent legal service. *Id.*

25. *See id.* at 6 (providing malpractice insurance requirements in 1993 for practicing foreign legal consultants in the United States).

26. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2005). Although the rule addresses generic client-attorney communications, part (b) states that an attorney "shall explain a matter to the extent reasonably necessary . . . [for] the client to make informed decisions regarding the representation." *Id.*

27. *See* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 3 (2004), *available at* http://www.ethicsandlawyering.com/Issues/files/ABAHODReport.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*)

The amendment would have included two provisions requiring written disclosure to clients if the attorney did not have insurance, or if the attorney's insurance terminated.[28] However, when this Committee requested input from state and local bar associations, the proposal received tepid support.[29]

By December 2003, the same Client Protection Committee introduced a different version, the *Model Rule on Financial Responsibility*, which would have required private practice lawyers to disclose on their annual registration forms whether they had at least $100,000 per claim and $300,000 per year in the aggregate liability insurance coverage and whether any legal malpractice judgments were pending against either them or the law firm in which they worked.[30] Again, the Committee solicited opinions; although this time the majority favored disclosing at

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(abstracting the Model Insurance Rule's history in the ABA's August 2004 report to its House of Delegates).

28. Glenn Fischer, *Professional Liability Insurance Coverage—Viable Form of Self-Regulation or Simply Another Business Decision?*, LPL ADVISORY (ABA Standing Comm. on Lawyers' Prof'l Liab., Chicago, Ill.), Fall 2002, at 1-2, *available at* http://www.abanet.org/legalservices/lpl/advisory/advfl02.pdf (last visited Mar. 12, 2005) (enumerating the ABA 2003 midyear meeting amendment proposal that would have added two new provisions to Rule 1.4 of the Model Rules of Professional Conduct, Communication). The provisions would have additionally provided:

> (c) A lawyer shall inform new and existing clients, in writing, if the lawyer does not have malpractice insurance. A lawyer shall inform the client, in writing, any time the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for five years from the conclusion of the client's representation. (d) The requirements in (c) do not apply to full-time members of the judiciary or full-time, in-house counsel or government lawyers when representing the entity by whom they are employed.

Id.

29. *See* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 4 (2004), *available at* http://www.ethicsandlawyering.com/Issues/files/ABAHODReport.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (explaining the reasons for the various versions of the Model Insurance Rule); *see also* James Podgers, *Time-Out Call: Sponsor Holds Off on Proposal Regarding Malpractice Insurance Disclosures*, 89 A.B.A. J. 66, 66 (2003) (reporting that lack of support forced the ABA Standing Committee on Client Protection to refrain from submitting an amendment to Rule 1.4 of the Model Rules of Professional Conduct at the 2003 ABA midyear meeting). The unsupportive ABA committees included the Ethics, Discipline, Delivery of Legal Services, and Professional Liability Committees. *Id.* This original amendment to Rule 1.4 of the Model Rules required attorneys to inform clients in writing of the lack or lapse of malpractice insurance. *Id.* The proposal would have excused judges, in-house counsel, and government lawyers. *Id.*

30. *See* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 4 (2004), *available at* http://www.ethicsandlawyering.com/Issues/files/ABAHODReport.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (recounting the rejected proposal for a Model Rule of Financial Responsibility).

least some form of financial responsibility, concerns arose about potential repercussions from the public's perception of disclosed pending malpractice judgments.[31] Finally, the Committee drafted the precursor to the Model Insurance Rule, which, as adopted, neither requires the disclosure of coverage amounts nor exists as a rule of professional conduct.[32] After solicited input and despite heated debate, the ABA House of Delegates narrowly adopted the current Model Insurance Rule in August 2004.[33]

B. *The Current Rule*

The adopted Model Insurance Rule specifically mandates that an attorney engaged in the private practice of law report to the state's highest court whether the attorney currently has and plans to maintain professional liability insurance.[34] Notably, the rule applies only to private practice lawyers and exempts government attorneys and in-house counsel.[35] Significantly, the adopted rule contains modified language requiring the attorney not only to report his current liability insurance coverage, but also his intention to maintain it.[36] The ABA delegation added the intent-to-maintain requirement in response to concerns about the misleading nature of a declaration of current insurance coverage.[37] The language misleads because insurance, relevant only at the time the claim is made,

31. *See id.* (expressing the majority response to the proposed Model Rule of Financial Responsibility).

32. *See id.* at 4-5 (qualifying that the Model Insurance Rule's requirements establish neither rules of conduct nor insurance coverage minimums).

33. *See* James Podgers, *A Close Vote on Insurance Disclosure: ABA House Oks Model Rule Requiring Malpractice Coverage to Be Reported*, 32 A.B.A. J. E-REP. 3, 3 (2004) (reporting how the 540-member ABA House of Delegates heavily debated, but then passed the Model Insurance Rule by a close vote of 213 to 202).

34. *See* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 8 (2004), *available at* http://www.ethicsandlawyering.com/Issues/files/ABAHODReport.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (affirming the language of the adopted Model Insurance Rule). The Model Insurance Rule is reprinted in Appendix A of this Comment.

35. *Id.* at 9; *accord Malpractice: ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 LAW. MANUAL ON PROF. CONDUCT 411 (2004) (clarifying the rule's exemption of full-time government lawyers and in-house counsel for organizational clients).

36. *See Malpractice: ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 LAW. MANUAL ON PROF. CONDUCT 411 (2004) (reporting on the modified language also requiring the attorney to report if he intends to maintain liability insurance during the time the lawyer engages in the private practice of law).

37. *See* Jane Pribek, *ABA Wants Lawyers to Disclose Insurance Coverage*, WIS. L.J., Aug. 18, 2004, 2004 WLNR 59055030 (responding to attorneys' concerns that having insurance and having coverage at the time of the claim could mislead the client into thinking he had claims security).

may not exist years after the day the attorney discloses he has insurance.[38] The modified language further establishes an affirmative duty to inform the highest state court when the insurance policy covering the lawyer's conduct either lapses or terminates.[39]

Unfortunately, the Model Insurance Rule's labyrinthine history causes attorneys and others to erroneously intermingle previously proposed versions of the rule, thereby creating misconceptions about the present one. A misconception that the new rule requires an attorney to have specific amounts or levels of malpractice coverage distorts the actual requirement that an attorney only disclose whether coverage exists.[40] Another misconception interprets the Model Insurance Rule as a disciplinary rule, when in fact an attorney would not receive reprimand or sanction.[41] Instead, the licensing state may impose an administrative penalty, such as a license suspension, until the attorney complies with the state's specific requirements.[42] If an attorney lies or provides false information on the disclosure form, that conduct would violate the Model Rules of Professional Conduct and subject the attorney to the appropriate disciplinary action.[43]

Many states already have implemented some version of the Model Insurance Rule. For example, seven states require attorneys to disclose on the annual registration form whether they have professional liability in-

38. *See id.* (responding to attorneys' concerns that having insurance and having coverage at the time of the claim could mislead the client into thinking he had claims security).

39. *See* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 3-4 (2004), *available at* http://www.ethicsandlawyering.com/Issues/files/ABAHODReport.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (noting that attorneys are required to report to the highest court if their insurance policy either terminates or lapses).

40. *See Malpractice: ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 LAW. MANUAL ON PROF. CONDUCT 411 (2004) (reiterating that the ABA recommends, but the Model Insurance Rule does not require, minimum levels of insurance coverage).

41. *See id.* (emphasizing that the Model Insurance Rule is not a disciplinary rule); *see also* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 2 (2004), *available at* http://www.ethicsandlawyering.com/Issues/files/ABAHODReport.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (affirming that the Model Insurance Rule does not provide for a disciplinary offense).

42. *See* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 2 (2004), *available at* http://www.ethicsandlawyering.com/Issues/files/ABAHODReport.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (warning that the failure or refusal to provide insurance information could result in an administrative suspension from the practice of law until the lawyer complies).

43. *See Malpractice: ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 LAW. MANUAL ON PROF. CONDUCT 411 (2004) (qualifying that an attorney who supplies false information to the highest court will violate Section 8.4(c) of the Model Rules of Professional Conduct).

surance, and this requirement resembles the recently adopted Model Insurance Rule.[44] Additionally, four states statutorily require attorneys to maintain liability insurance.[45] Only Oregon has mandated malpractice insurance as a prerequisite to practice law in that state since 1978.[46] The

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44. *See, e.g.*, DEL. SUPREME COURT, ANNUAL REGISTRATION STATEMENT, *available at* http://courts.state.de.us/courts/supreme%20court/?2005registration.pdf (last visited Mar.12, 2005) (on file with the *St. Mary's Law Journal*) (requiring Delaware attorneys annually to disclose malpractice insurance coverage by checking "yes" or "no"); ILL. SUP. CT. R. 756 (establishing the disclosure requirement for Illinois attorneys); Mich. Sup. Ct. Admin. Order No. 2003-5 (Aug. 6, 2003) (declaring that the Michigan Supreme Court requires lawyers to include with their annual dues disclosure of whether they do or do not maintain, either privately or through the firm, malpractice insurance); NEB. STATE BAR ASS'N art. III, § 2(f) (2003) (requiring disclosure from Nebraska attorneys); N.C. STATE BAR R. § .0204 (2003) (establishing the North Carolina "Admission to Practice Rule .0204"); VA. SUP. CT. R. ch. 6, §§ 4-18 (making an attorney's malpractice insurance disclosure publicly accessible in Virginia). Additionally, Kansas requires disclosure on the annual registration form, but this is not part of any court rule. *See* E-mail from Carol Green, Clerk, Kansas Supreme Court, to Nicole D. Mignone, Student, St. Mary's University School of Law (Oct. 12, 2004, 11:44:00 CST) (on file with the *St. Mary's Law Journal*) (confirming the current attorney registration requirements in Kansas). "The Supreme Court reviews and approves the content whenever changes are made. There is no current plan to change our procedure. The Kansas Bar Association was involved in discussion with the Court before that requirement was imposed." *Id.*

45. ALASKA RULES OF PROF'L CONDUCT R. 1.4(c) (1999); N.H. RULES OF PROF'L CONDUCT R. 1.17 (2003); OHIO CODE OF PROF'L RESPONSIBILITY DR 1-104(A) (2003); S.D. RULES OF PROF'L CONDUCT R. 1.4(c) (2003); *see also New Hampshire Ethics Rule Requires Lawyers to Reveal Low Limits of Malpractice Coverage*, 71 U.S.L.W. (BNA) No. 29, at 2487 (Feb. 4, 2003) (elaborating on the March 2003 New Hampshire ethics requirement of private practice lawyers). The New Hampshire rule requires attorneys to reveal if they have less than $300,000 in aggregate coverage for multiple occurrences and to keep a separate disclosure form, signed by the client, for five years after representation has ended. *Id.* Also required is a mandatory notice form and an acknowledgement form signed by client. *Id.* New Hampshire held a public hearing and the supreme court held a public comment period prior to adopting the rule. Lisa Segal, *Lawyers Required to Disclose Lack of Malpractice Insurance*, N.H. B. NEWS, Jan. 3, 2003, at 12. New Hampshire Supreme Court Justice David A. Brock echoed proponents's views of similar measures when stating that a disclosure rule helps clients make more informed decisions. *Id.*

46. OR. REV. STAT. § 9.080(2)(a) (2003); *see also* Hass v. Or. State Bar, 883 F.2d 1453, 1455 (9th Cir. 1989) (referencing the 1977 Oregon Board of Governors' resolution mandating professional liability insurance). Although the aggregate limits could not be less than $100,000 at that time, the limits later increased to $300,000. *Hass*, 883 F.2d at 1455. This resolution also established a fund through which an attorney obtains the malpractice coverage; failure to pay into the fund results in suspension from bar membership. *Id.* at 1456. The statute authorizes the Oregon State Bar "to do whatever is necessary and convenient to implement" a mandatory insurance requirement for all Oregon lawyers engaged in the private practice of law. OR. REV. STAT. § 9.080(2)(a) (2003). The provision also authorizes the establishment of a professional liability fund. *Id.* *See generally* Robert J. Derocher, *State by State, Mandatory Malpractice Disclosure Gathers Steam*, A.B.A. B. LEADER, Mar.-Apr. 2004, *available at* http://www.abanet.org/barserv/bl2804.html (last visited Mar. 12,

states already requiring attorneys to maintain and disclose insurance announce positive results from the requirement.[47] Although other states have considered various versions of similar rules prior to the adoption of the Model Insurance Rule, a lack of support prevented any further consideration.[48] Interestingly, prior to 2000, the California Business and Finance Code required insurance disclosure directly to clients,[49] but these sunsetted statutory provisions have not been resurrected.[50]

2005) (on file with the *St. Mary's Law Journal*) (reporting that Oregon responded with mandatory malpractice insurance requirements after insurance premium costs rose in the late 1970s).

47. *See* Jane Pribek, *ABA Wants Lawyers to Disclose Insurance Coverage*, WIS. L.J., Aug. 18, 2004, 2004 WLNR 59055030 (discussing the absence of problems with Ohio's rule and quoting an Ohio ABA delegate who rejects a rule that would make the profession look bad); *see also Malpractice: ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 LAW. MANUAL ON PROF. CONDUCT 411 (2004) (quoting a 2004 New Hampshire ABA meeting delegate's proclamation that a new disclosure rule in his state revealed that half the New Hampshire attorneys did not carry professional liability insurance).

48. *See, e.g.*, Greg Bluestein, *State Bar Board Nixes Plan to Require Insurance Disclosure*, FULTON COUNTY DAILY REP., Nov. 9, 2004, at 1 (reporting how Georgia's State Bar Board of Governors "took two votes and a recount" to defeat the recently proposed insurance disclosure rule); Jill Sundby, *What Montana Lawyers Think About Mandatory Malpractice Insurance*, MONT. LAW., Aug. 2001, at 24 (listing several contrasting responses from Montana lawyers regarding whether malpractice insurance should be mandatory).

49. *See* CAL. BUS. & PROF. CODE §§ 6147-48 (Deering 2004) (requiring a written fee agreement if the representation generated more than a specified amount). The pertinent text mandated a written contract for contingency fee agreements, "signed by both the attorney and the client," with a statement disclosing if the attorney did not maintain "errors and omissions insurance coverage." CAL. BUS. & PROF. CODE § 6147(a) (Deering 2004) (operative until Jan. 1, 2000). Section 6148 of the California Business and Professional Code required a written fee agreement if the matter was reasonably expected to generate more than $1000 in fees or if a contingent fee existed; furthermore, the attorney had to disclose in the written agreement whether the policy included errors and omission insurance coverage. CAL. BUS. & PROF. CODE § 6148(a) (Deering 2004).

50. *See* Telephone Interview with James E. Towery, former Chair, ABA Standing Committee on Client Protection, former President, State Bar of California, Shareholder, Hoge, Fenton, Jones & Appel (Oct. 11, 2004) (on file with the *St. Mary's Law Journal*) (framing a brief synopsis of the chaotic struggles facing the California Bar when these statutory provisions approached expiration). Initially, the California Fee Arbitration Committee proposed to the legislature an insurance disclosure proposal in fee agreements as a consumer protection issue. *Id.* Because California attorneys feared that disclosure to clients created an invitation to sue, the legislature included a sunset "look and see" provision so the measure would pass. *Id.* State politics caused the state bar to shut down from 1998 to 1999, during the sunset provision of the bill. *Id.* A subsequently "new" state bar declined to "ruffle any feathers" by including in its package of persuasion to the legislature any part of the client protection reenactments of these two provisions of the California Business and Commerce Code. *Id.*

C. *Reversible Fabric: Arguments for Both Sides of the Rule*

The ABA noticed an increase in malpractice claims and knew that most solo practitioners lacked insurance.[51] Proponents of the Model Insurance Rule tout its ability to protect clients while deterring attorney negligence.[52] Opponents criticize its ambiguous wording as dangerously misleading the client into a false sense of security and protection.[53] Generally, opponents argue that simple disclosure of an attorney's malpractice insurance coverage inadequately informs and ultimately misleads the client, who must then himself determine whether the insurance covers a particular malpractice.[54] These opponents further express concern that a misinformed and misled public will exacerbate attorney-client miscommunication and the already apparent image problems for the legal profession.[55]

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51. *See id.* (painting the historical setting behind the Model Insurance Rule's debut); *see also* James E. Towery, *The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance*, 29 VT. B. J. 35, 36 (2003) (presenting the ABA's reasoning behind support of the Model Insurance Rule); *cf. Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1582 (1994) (tracing the history of the legal profession's self-regulation).

52. *See* Jane Pribek, *ABA Wants Lawyers to Disclose Insurance Coverage*, WIS. L.J., Aug. 18, 2004, at 1, 2004 WLNR 5905503 (discussing how the new model rule will protect the client by allowing him to discover insurance coverage of his prospective lawyer on his own as well as give him a remedy for negligence). Client protection funds in states traditionally cover only losses or theft by attorneys but not negligence. *See* STATE BAR OF TEX., THE CLIENT SEC. FUND OF THE STATE BAR OF TEX. (2004), http://www.texasbar.com/template.cfm?section=pamphlets (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (describing limits of the funds available to Texas residents wronged by an attorney's intentional conduct).

53. *See Malpractice: ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 LAW. MANUAL ON PROF. CONDUCT 411 (2004) (condensing the opposing view to its inability to protect clients). Specifically, opponents dislike that the Model Insurance Rule leaves clients with unanswered questions regarding insurance coverage because it does not cite or reveal coverage limits, deductibles, exclusions, quality, or the financial integrity of the insurance company. *Id.*

54. *Cf.* James Podgers, *A Close Vote on Insurance Disclosure: ABA House OKs Model Rule Requiring Malpractice Coverage to Be Reported*, 32 A.B.A. J. E-REP. 3, 3 (2004) (citing a comment by the Tort Trial Section's delegate to the House, Dianne K. Dailey, that the rule "is a well-meaning but ineffective way to provide client protection").

55. *See* ABA Standing Comm. on Lawyers' Prof'l Liab., Executive Summary, Model Court Rule on Insurance Disclosure-Statement in Opposition 1 (2004) (on file with the *St. Mary's Law Journal*) (opposing the new Model Court Rule because it does not properly inform the public consumer of legal services about the different types of malpractice insurance and therefore misleads and creates risk of increasing miscommunication between attorney and client).

1. Proponents Assert Protection

The Model Insurance Rule attempts to protect the public by disclosing information, and the attorney by allowing choice in insurance coverage.[56] Thus, the rule attempts to balance the client's right to know with the attorney's privilege to choose.[57] Proponents argue that a client's informed decision about hiring a prospective attorney should also include information disclosing whether that attorney carries malpractice insurance.[58]

Client-protection champions urge additional provisions offering clients recourse and compensation from a negligent attorney's harm.[59] Relatively few attorneys will sue on behalf of a harmed client if the negligent attorney lacks funds or insurance,[60] and high premium costs force many

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56. *See* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 1-2 (2004), *available at* http://www.ethicsandlawyering.com/Issues/files/ABAHODReport.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (summarizing the Model Insurance Rule's ultimate purpose). Emphatically, this purpose allows attorneys to have "[t]he ultimate decision whether or not to maintain professional liability insurance. . . ." *Id.* at 6.

57. *Cf. id.* at 1 (maintaining that the intention behind the Model Insurance Rule "facilitate[s] the client's ability to determine" an attorney's insurance coverage). "While the Model [Insurance] Rule does not require a lawyer to disclose directly to clients whether insurance is maintained or to maintain professional liability insurance, it does impose a modest annual reporting requirement on the lawyer." *Id.*

58. *See id.* at 6 (concluding that the new Model Insurance Rule "would reduce potential public harm by giving consumers of legal services an opportunity to decline to hire a lawyer who does not maintain professional liability insurance"). *Compare* Harry H. Schneider, Jr., *At Issue: Mandatory Malpractice Insurance, No: An Invitation to Frivolous Suits*, 79 A.B.A. J. 45, 45 (1993) (reviewing the malpractice insurance requirements debate in 1993), *with* James Podgers, *Time-Out Call: Sponsor Holds Off on Proposal Regarding Malpractice Insurance Disclosures*, 89 A.B.A. J. 66, 66 (2003) (stressing that "[t]he committee's proposed ethics rule change" concerns communication of material information to clients rather than forcing attorneys to acquire malpractice insurance). As Chairperson of the ABA Standing Committee on Professional Responsibility, Harry Schneider, Jr., advocated disclosure as an alternative to the debate on mandatory malpractice coverage. *See generally* Harry H. Schneider, Jr., *At Issue: Mandatory Malpractice Insurance, No: An Invitation to Frivolous Suits*, 79 A.B.A. J. 45, 45 (1993) (asserting that disclosure offers a "less divisive and less expensive" means of protecting the public). Moreover, the disclosure requirement would "allow clients to make informed choices, without imposing upon the profession an expensive and burdensome layer of regulation." *Id.*

59. *See* James Podgers, *Time-Out Call: Sponsor Holds Off on Proposal Regarding Malpractice Insurance Disclosures*, 89 A.B.A. J. 66, 66 (2003) (reporting on the ABA Standing Committee on Client Protection viewpoint on the original 2002 amendment to Model Rule of Professional Conduct 1.4). The Committee supported state client protection funds covering only losses due to dishonest attorney conduct, such as theft of client assets. *Id.*

60. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1727 (1994) (asserting that "[l]egal malpractice cases are rarely pursued against an uninsured attorney"); *cf.* Nicole A. Cunitz, Note, *Mandatory Malpractice*

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attorneys to forego malpractice insurance.[61] Consequently, the client can rely only on a state bar-imposed disciplinary process by filing a grievance against the attorney.[62] However, this grievance process inadequately provides financial compensation for aggrieved clients; if the state did provide client protection funds, these limited funds would rarely offer full compensation to the client.[63] Understandably, some proponents push for a mandatory malpractice insurance rule to protect injured clients as well as the innocent, but insured attorneys, often drawn into a malpractice suit to financially cover the negligent uninsured attorneys.[64] Despite opposing arguments that the increased expense of malpractice insurance ultimately renders a prohibitive result,[65] Model Insurance Rule proponents consider the additional business expense more favorable than uncompensated victims of legal malpractice.[66]

Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?, 8 GEO. J. LEGAL ETHICS 637, 643-44 (1995) (listing lawyer reluctance to sue colleagues and lack of malpractice insurance as contributory factors for previously minimal malpractice lawsuits).

61. *See* Debra Cassens Moss, *Going Bare: Practicing Without Malpractice Insurance,* 73 A.B.A. J. 82, 82-84 (1987) (explaining that by 1987, many attorneys shunned insurance because high insurance premium costs often associated with securities firms made it difficult for small firms to obtain insurance).

62. *See* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 5-6 (2004), http://www.ethicsandlawyering.com/Issues/files/ABAHOD Report.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (promoting the rule because it allows clients some redress, compared to often abandoned disciplinary procedures or malpractice claims against an uninsured attorney). The threshold issue becomes whether the attorney has insurance. *Id.*

63. *See id.* at 5 (reiterating that disciplinary procedures do not adequately compensate the client victimized by the negligent attorney and offer no financial recoupment).

64. *See* Robert I. Johnston & Kathryn Lease Simpson, *O Brothers, O Sisters, Art Thou Insured?: The Case for Mandatory Disclosure of Malpractice Insurance Coverage*, 24 PA. LAW., May 2002, at 28, 31 (advocating the following two reasons for having a mandatory rule: (1) clients suffer a double injury of being harmed by the attorney they thought would help them and left without recourse; and (2) drawing responsible attorneys into malpractice suits because of an uninsured negligent attorney).

65. *See* Jill Sundby, *What Montana Lawyers Think About Mandatory Malpractice Insurance*, MONT. LAW., Aug. 2001, at 24 (discussing how the split among Montana lawyers regarding mandatory malpractice insurance includes opposition to the high cost of premiums relative to the income of the private practice attorney).

66. *See* Glenn Fischer, *Professional Liability Insurance Coverage—Viable Form of Self-Regulation or Simply Another Business Decision?*, LPL ADVISORY (ABA Standing Comm. on Lawyers' Prof'l Liab., Chicago, Ill.), Fall 2002, at 1-2, *available at* http://www.aba net.org/legalservices/lpl/advisory/advfl02.pdf (last visited Mar. 12, 2005) (capitulating that insurance costs represent merely another business expense). Furthermore, these costs involve less expense to the profession than having uncompensated client victims, and are therefore not prohibitive. *Id.*

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Another strong argument proposes that an insurance disclosure rule would deter attorney negligence.[67] This argument's premise assumes that attorneys currently without malpractice insurance who later obtain it will ultimately exhibit more care to stabilize low rates.[68] Further, the argument presumes that those currently holding insurance will also exercise more care to prevent a premium increase.[69] Strikingly, this premise places the onus on lawyers, rather than the public, to bear the responsibility of initiating client protection.[70]

2. Opponents Argue Ambiguity

No shortage emerges for arguments against the Model Insurance Rule or its predecessors.[71] In fact, the same arguments criticizing mandatory insurance proposals ten years ago survive today.[72] Predominantly, the lingering oppositions against malpractice insurance rules include the lack of documentation regarding malpractice claims, the increase in premium costs, and the feared increase in the number of client lawsuits.[73] The

67. *See generally id.* (briefing the proponent view of self-regulation). Supporting this view are questionable beliefs that most lawyers carry malpractice insurance anyway and favor either disclosure or mandatory coverage. *Id.*

68. *Cf.* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 65-71 (1983) (applying a law and economics theory to automobile drivers). Basically, insurance premiums based on the number of accidents should encourage safer driving. *Id.*

69. *Cf. id.* (relating a cost-of-accidents theory to the pricing of automobile insurance, based on driver behavior).

70. *See* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 4 (2004), http://www.ethicsandlawyering.com/Issues/files/ABAHOD Report.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (stressing that the rule properly places the burden on the attorney because "[p]otential clients should not be required to inquire of a lawyer if professional liability insurance is maintained").

71. *See* Robert J. Derocher, *State by State, Mandatory Malpractice Disclosure Gathers Steam*, A.B.A. B. LEADER, Mar.-Apr. 2004, *available at* http://www.abanet.org/barserv/bl2804.html (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (noting the opposing arguments that disclosure rules interfere with client relationships, give insurance companies too much power, or add unnecessary costs for solo practitioners).

72. *See* Harry H. Schneider, Jr., *At Issue: Mandatory Malpractice Insurance, No: An Invitation to Frivolous Suits*, 79 A.B.A. J. 45, 45 (1993) (opposing the issuance of mandatory malpractice insurance requirements).

73. *See id.* (citing four main arguments for opposing malpractice insurance). Harry H. Schneider, Jr., former Chairman of the ABA Standing Committee on Lawyers' Professional Liability, specifically made the following points: (1) no reliable data exists documenting that legal malpractice is a widespread phenomenon; (2) mandatory legal malpractice insurance will inevitably lead to the insurance companies determining who practices law; (3) "premiums surely will rise across the board as all acceptable risks are pooled automatically with those who otherwise would be considered high-risk lawyers"; and (4) public knowledge of fund availability for malpractice claims will increase the number of claims, including frivolous ones. *Id.*

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ABA Standing Committee on Lawyers' Professional Liability (Professional Liability Committee) also opposes blanket insurance disclosure because its lack of protection potentially misleads the client into believing remedies exist to recoup losses even if they do not under the circumstances.[74]

Pointedly, the Professional Liability Committee rejects the disclosure of misleading statements asserting an attorney has coverage if having insurance and having coverage involve two different concepts.[75] The two types of insurance policies are the following: claims-made, providing coverage for loss only if the claim is first reported during the applicable policy period, and occurrence-based, covering injury or loss that occurs during the applicable policy period regardless of when the claim is first made.[76] Although most consumers of automobile and homeowners' insurance have familiarity with occurrence-based policies,[77] the majority of malpractice insurance involves claims-made policies, which cover only

74. *See* Mark Hansen, *Ensuring Insurance: Committee Recommends Requiring Disclosure of Malpractice Coverage*, 90 A.B.A. J. 61, 61 (2004) (reciting cautionary stance of the ABA Standing Committee on Lawyers' Professional Liability). Committee Chairperson, Edward C. Mendrzycki, stated that the rule falsely assures a client of something circumstantially specific. *Id.*

75. *See Malpractice: ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 LAW. MANUAL ON PROF. CONDUCT 411 (2004) (voicing concern about potential confusion over the meaning of insurance coverage).

76. ABA Standing Comm. on Lawyers' Prof'l Liab., Executive Summary, Model Court Rule on Insurance Disclosure-Statement in Opposition 2 (2004) (on file with the *St. Mary's Law Journal*); *see also* Andrew S. Hanen & Jett Hanna, *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 S. TEX. L. REV. 75, 127-28 (1992) (comparing "claims-made" policies with "occurrence policies"). Specifically, a claims-made policy provides insurance coverage between the period after the policy effectuates and before the policy expires, irrespective of when the act, error, omission, or negligence occurred. *Id.* Comparatively, an occurrence policy provides insurance coverage if the policy was active during the period when the act, error, omission, or negligence occurred. *Id.* To illustrate, take the following example:

> Law Firm A buys a legal malpractice insurance policy for the calendar year of [2001]. The firm receives no claims in [2001], and decides not to purchase legal malpractice insurance as an economy move for [2002]. In [2002], the firm receives knowledge of a claim based on legal work performed in [2001]. Does the [2001] policy cover the firm?
>
> Under a true claims [-] made policy, no coverage exists for Law Firm A since it could not report the claim, until after the expiration date of the policy. If the insurance policy was an occurrence policy, the [2001] policy would cover the claim since the act, error[,] or omission occurred in [2001].

Id.

77. ABA Standing Comm. on Lawyers' Prof'l Liab., Executive Summary, Model Court Rule on Insurance Disclosure-Statement in Opposition 6 (2004) (on file with the *St. Mary's Law Journal*).

those claims made while the policy is in effect.[78] The rarely used occurrence-based policies[79] cover transactions of the year in which the act occurred, but claims-made policies cover any claim during the policy period regardless when it occurred.[80] In other words, an attorney certifying insurance coverage today may not have the same effective coverage in a few years when today's prospective client would potentially file a claim; therefore having insurance coverage today may not always equate to having coverage later when the client needs it.[81]

Because the Professional Liability Committee maintains that the Model Insurance Rule encourages false expectations, it instead campaigns for educating both lawyers and clients on this type of insurance.[82] This Committee also challenges the new Model Insurance Rule because it presumes that "no legal malpractice insurer would ever issue a prospective opinion on whether a particular hypothetical situation would be afforded coverage."[83] As a result, a lawyer's disclosure could not ensure "that the lawyer has 'coverage' for any particular act or omission," rendering the disclosure pointless.[84] Further, the Committee cautions against both lawyers' and clients' faulty presumptions that malpractice insurance coverage operates like home or auto insurance.[85] Similarly, the ABA Tort Trial and Insurance Practice Section (TTIPS) criticizes the Model Insurance Rule's misleading language, which could ultimately misinform the public.[86] Alternatively, TTIPS proposes a rule requiring addi-

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78. *See* Mark Hansen, *Ensuring Insurance: Committee Recommends Requiring Disclosure of Malpractice Coverage*, 90 A.B.A. J. 61, 61 (2004) (verifying why the ABA Standing Committee on Lawyers' Professional Liability recommends informing the public to prevent misinformation about insurance coverage).

79. *See* Mitchell A. Orpett & Katja Kunzke, *Insurance Options for the Solo*, 20 No. 3 GPSOLO, Apr.-May 2003, at 14, 16 (defining claims-made policies compared to the rarely used occurrence-based policies).

80. Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 835 n.2 (1978) (defining [at that time] the two basic forms of liability insurance, occurrence and claims-made insurance).

81. *See* Jane Pribek, *ABA Wants Lawyers to Disclose Insurance Coverage*, WIS. L.J., Aug. 18, 2004, 2004 WLNR 5905503 (reiterating the misleading points of the new rule).

82. ABA Standing Comm. on Lawyers' Prof'l Liab., Executive Summary, Model Court Rule on Insurance Disclosure-Statement in Opposition 2 (2004) (on file with the *St. Mary's Law Journal*).

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* Jane Pribek, *ABA Wants Lawyers to Disclose Insurance Coverage*, WIS. L.J., Aug. 18, 2004, 2004 WLNR 59055030 (including opposition remarks by the TTIPS, which feels that the ABA did not adequately weigh its views about the rule prior to its passage).

tional information "such as policy limits, deductibles, exclusions from coverage, and the reputability of the insurer."[87]

Even without the misleading language, many attorneys dislike the prohibitive costs of obtaining malpractice insurance, which would eventually increase clients' legal fees.[88] Additionally, disclosing an attorney's failure to purchase malpractice insurance could potentially impose negative connotations as to the attorney's competence.[89] Accordingly, most attorneys fear that increased public access to malpractice insurance coverage information will invite frivolous lawsuits.[90] Furthermore, attorneys anticipate the slippery slope of self-regulation could result in even more restrictions on their ability to practice.[91] Other arguments resist a perceived accumulation of excessive regulations, especially if insurance companies eventually assume the role of the regulator.[92] Myopically, attorneys view

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87. *Id.*

88. *See* JOHN F. SUTTON, JR. & JOHN S. DZIENKOWSKI, CASES AND MATERIALS ON THE PROFESSIONAL RESPONSIBILITY OF LAWYERS 589 (West 2d ed. 2002) (proposing that "[t]he cost of malpractice insurance increases the cost of legal services for all clients"); *see also* Nicole A. Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO. J. LEGAL ETHICS 637, 656 (1995) (predicting, based on an economic model, that increases in insurance costs would most likely transfer to clients). Based on a 1989 ABA Professional Liability Committee publication, liability insurance represented the third highest law practice cost after rent and salaries, respectively. *Id.* at 656-57.

89. *See Malpractice: ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 LAW. MANUAL ON PROF. CONDUCT 411 (2004) (paraphrasing concern that uninsured competent attorneys would be negatively portrayed for the lack to those seeking the information); *see also Court Should Require Disclosure, Plan for Coverage*, LEGAL INTELLIGENCER, Mar. 15, 2004, at 5 (contending that organized bar associations oppose disclosure because "some lawyers would appear to commercial insurers to be such bad risks as to be uninsurable and that rates would go up for the law firms that now carry adequate insurance").

90. *See* Jane Pribek, *ABA Wants Lawyers to Disclose Insurance Coverage*, WIS. L.J., Aug. 18, 2004, 2004 WLNR 5905503 (expressing an ABA delegate's concern that the rule potentially invites frivolous claims).

91. Robert J. Derocher, *State by State, Mandatory Malpractice Disclosure Gathers Steam*, A.B.A. B. LEADER, Mar.-Apr. 2004, *available at* http://www.abanet.org/barserv/bl2804.html (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (quoting Indiana State Bar Executive Director, Tom Pyrz, on the reasons the Indiana State Bar House of Delegates vetoed a disclosure of minimum amounts of liability coverage in November 2003). Director Pyrz said: "[Opponents] were concerned that a proposal like that might lead to mandatory malpractice coverage laws coming from the Supreme Court" and lawyers are opposed to more regulations. *Id.*

92. *See* Glenn Fischer, *Professional Liability Insurance Coverage—Viable Form of Self-Regulation or Simply Another Business Decision?*, LPL ADVISORY (ABA Standing Comm. on Lawyers' Prof'l Liab., Chicago, Ill.), Fall 2002, at 1-2, *available at* http://www.abanet.org/legalservices/lpl/advisory/advfl02.pdf (last visited Mar. 12, 2005) (explain-

malpractice insurance as their protection, which contravenes any lofty ideal that disclosure protects clients.[93]

III. Analysis

The good intentions behind the Model Insurance Rule cannot overcome pervading misconceptions on both sides of the arguments concerning client protection. Further, the attempts to simultaneously appease both sides only contribute to its gossamer efficacy. If the disciplinary rules actually achieved the purpose of protecting the client, the Model Insurance Rule would not need a redundant sales pitch.[94] The Model Insurance Rule lacks the disciplinary teeth that repercussions from an affirmative duty often render. Hence, society's fleeting ideals of client protection are rarely, if ever, achieved.[95] Additionally, disillusion regarding the efficacy of malpractice insurance obscures the reality of protecting the attorney or client, and serving the public through a self-regulating legal profession. Despite the confusion and illusion, the essence of the Model Insurance Rule would benefit the Texas legal climate.

A. *The Illusion of Client Protection*

Model Insurance Rule advocates demand the self-regulating legal profession promulgate measures protecting the public from negligent attorneys based on common law, fiduciary, and professionally imposed duties

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ing the opposition's view that neither government nor insurance companies should be regulating lawyers, only lawyers should be regulating lawyers).

93. *See* James Podgers, *Time-Out Call: Sponsor Holds Off on Proposal Regarding Malpractice Insurance Disclosures*, 89 A.B.A. J. 66, 66 (2003) (noting ABA Standing Committee on Lawyers' Professional Liability Chairman, Edward C. Mendrzycki, questioned whether an insurance disclosure rule provided the best client protection). Chairman Mendrzycki advocated the idea that malpractice insurance should protect the lawyer. *Id.*

94. *Compare In re* Sullivan, 801 A.2d 933, 937 (Del. 2002) (per curiam) *modification denied*, 846 A.2d 239 (Table), 2003 WL 22701634 (Del. Nov. 12, 2003) (finding that "[t]he primary goal of the lawyer disciplinary system is to protect the public"), *with* Dent v. West Virginia, 129 U.S. 114, 122 (1889) (holding that the state has the power to protect the public welfare). Protecting the public would appropriately require a lawyer with a malpractice claims history and disciplinary rule violations to have malpractice insurance as a condition of reinstatement of license to practice. *Sullivan*, 801 A.2d at 937.

95. *Cf.* Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 Hastings L.J. 835, 842 (1978) (recognizing ethical considerations that place clients at a disadvantage with their lawyers). The authors assert that the professional rules do not allow lawyers to limit their liability because lawyers should know their competency and should therefore not endeavor to take cases imposing a loss on their clients. *Id.* Furthermore, disciplinary sanctions alone do not sufficiently compensate the client for losses. *Id.*

associated with the client-attorney relationship.[96] Fundamentally, these legal and professional rules support the assertion: The client needs to make fully informed decisions, which includes information about whether an attorney has secured professional liability insurance. The attorney's greater access to knowledge obligates him to keep the client informed, and ultimately, protected.[97]

1. A Duty to Disclose?

Within the context of the attorney-client relationship, the question arises whether the attorney should disclose "every piece of data coming into the lawyer's possession."[98] Because the legal profession requires an attorney's ethical obligation to reveal facts material to the representation, whether the attorney's malpractice insurance coverage remains material to the representation becomes relevant.[99] On the other hand, if malpractice insurance does not relate to legal representation, then some other circumstance must instill such a duty.[100]

96. *See* Robert J. Derocher, *State by State, Mandatory Malpractice Disclosure Gathers Steam*, A.B.A. B. LEADER, Mar.-Apr. 2004, *available at* http://www.abanet.org/barserv/bl2804.html (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (quoting Michigan Supreme Court Justice Clifford Taylor, who emphasized the "importan[ce] for professional organizations such as the state bar to remember that they're not there for lawyers[;] [t]hey're there for the public . . ."). Justice Taylor further commented that the disclosure proposal in his state was a modest consideration. *Id. See generally* Glenn Fischer, *Professional Liability Insurance Coverage—Viable Form of Self-Regulation or Simply Another Business Decision?*, LPL ADVISORY (ABA Standing Comm. on Lawyers' Prof'l Liab., Chicago, Ill.), Fall 2002, at 1-2, *available at* http://www.abanet.org/legalservices/lpl/advisory/advfl02.pdf (last visited Mar. 12, 2005) (presenting the proponent view of the Model Insurance Rule as the ultimate form of self-regulation).

97. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (expounding on an attorney's duty to fully discuss matters with a client because that client may not fully comprehend the extent of what he does not know); *see also* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 786 n.229 (2003) (exploring the limits of what a client appreciably "knows").

98. Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 739 (2003). The impracticality of an attorney disclosing every piece of information leads to the convincing argument that only certain circumstances or matters relating to the legal representation should invoke disclosure obligations. *Id.* at 739-41.

99. *See id.* at 782-85 (investigating how the courts interpret the issue of materiality).

100. *See id.* at 742-52 (considering disclosure duties from the perspectives of tort law and contract law).

a. Fiduciary Duty and Common Law Premises

First, a discussion of fiduciary duty necessitates a distinction between professional negligence and breach of fiduciary duty.[101] Courts failing to distinguish between breach of fiduciary duty and professional negligence claims may resultantly hold attorneys liable for more damages and indirectly influence how the public then perceives the "labeled" attorneys.[102] Whereas professional negligence includes all professional errors and omissions, fiduciary duty breaches can occur over a broad range of possibilities, including the attorney's disclosure of the client's confidential information or failure to provide loyalty to the client.[103] Professional negligence occurs when a practicing professional breaches a duty to "use such skill, prudence, and diligence as other members of his [or her] profession commonly possess and exercise."[104] The failure of loyalty occurs when the attorney, in a conflict of interest, places his own financial interests above the client's interests.[105]

The legal profession does not represent a *caveat emptor* mentality because the relationship between attorney and client extends beyond a simple contract. In essence, the lawyer's duty to the client under the common law is "[t]o save that client by all means and expedients,"[106] and the client's expectation of loyalty establishes the foundation of this relationship.[107] Even as early as 1851, the United States Supreme

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101. *See* John H. Quinn, *Breach of Fiduciary Duty: A Misunderstood Tort*, LPL ADVISORY (ABA Standing Comm. on Lawyers' Prof'l Liab., Chicago, Ill.), Fall 1998, at 1-2, *available at* http://www.abanet.org/legalservices/lpl/advisorynewsletter.html (last visited Mar. 12, 2005) (summarizing the difference between professional negligence and breach of fiduciary duty).

102. *See id.* (warning of the potential litigation problems for attorneys if the courts are not careful to distinguish between professional negligence claims and breach of fiduciary duty claims).

103. *See id.* (summarizing the difference between professional negligence and breach of fiduciary duty).

104. *Id.* (quoting Bud v. Nixon, 481 P.2d 433, 436 (Cal. 1971)).

105. *See id.* (summarizing the difference between professional negligence and breach of fiduciary duty).

106. David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 973 (1995). Professor Luban challenges whether the legal profession's adversarial system necessarily promotes the public good if attorneys perform all tasks necessary to fully represent their clients. *Id.* at 973-75.

107. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2004) (broadening the essential elements of the attorney-client relationship to include loyalty). *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1 (West 1986) (presenting the client-lawyer relationship as a fiduciary relationship and one creating an expectation of loyalty). The Model Rules stipulate that a lawyer should not represent a client if he "discovers that another interest of the lawyer, either personal or professional, might compromise the lawyer's dedication to vindicating the client's legal position." *Id.* § 4.1, at 146.

Court recognized the fragility of this precious relationship in *Stockton v. Ford*:[108]

> There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.[109]

Hence, the establishment of a framework for the fiduciary relationship and a subsequent breach of that duty should give rise to a claim of legal malpractice.[110] Notably, a claim for legal malpractice encompasses the elements of a negligence cause of action, however, further requires proof of two additional elements: (1) that "he would have prevailed [in] the underlying cause of action . . .[;]" and (2) "the amount of damages he would have recovered and collected in the underlying case if it had been properly prosecuted."[111] Consequently, even if an attorney were negligent, a client may not be able to recover under a legal malpractice cause of action if, for instance, the underlying suit lacked merit.

Significantly, two of the elements establishing a legal malpractice claim require the existence of an attorney-client relationship and the existence of a duty owed by the lawyer to the client.[112] "Because the attorney-client relationship is a fiduciary relationship, a malpractice claim can [in part] be based on the failure to disclose information."[113] First, ethical

108. 52 U.S. 232 (1851).

109. Stockton v. Ford, 52 U.S. 232, 247 (1851).

110. *See* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14.2, at 535 (5th ed. 2000) (asserting that "fiduciary breach is legal malpractice because it arises from the representation of a client and involves the fundamental aspects of an attorney-client relationship"); *cf.* Trinka Servs. v. State Bd. of Mortuary Sci., 122 A.2d 668, 670 (N.J. Super. 1956) (distinguishing the regulation of the legal and medical professions from businesses because of the "very tangible dependence . . . of a client upon his lawyer").

111. Williams v. Briscoe, 137 S.W.3d 120, 124 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

112. *See* Nicole A. Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO. J. LEGAL ETHICS 637, 638 (1995) (outlining the four basic elements of a legal malpractice claim). Similar to a negligence claim, the additional elements of the existence of a duty, the failure to perform that duty and damages resulting from the failure to perform that duty must exist. *Id.*

113. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14.6, at 560 (5th ed. 2000); *accord* Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (addressing the attorney's fiduciary duty to disclose "facts material to the client's representation" and the consequences of a subsequent breach of that duty); *see also* Vincent R. Johnson, "*Ab-*

considerations require an attorney to disclose any fact limiting his ability to comply with his fiduciary obligations.[114] Second, the attorney must inform the client of any acts or events pertaining to "the subject matter of the retention for which the client has a right to exercise discretion or control."[115] Thus, the issue becomes whether an attorney's malpractice insurance coverage pertains to the representation, and by extension, the attorney's duty to disclose.

Imposing a duty to disclose, however, could manifest an adverse relationship with the client because the attorney inherently would be looking out for his own interest.[116] If "[t]he independence of a lawyer's judgment can be affected by his or her own business, financial, property or personal interest," a conflict of interest arises.[117] Naturally, this relationship creates a conflict of interest because it could "adversely affect either the judgment or loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."[118] The attorney's self-interest, the avoidance of being sued, may take precedence over the client's interest, which belies the underlying bond of the relationship.[119] In short,

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solute and Perfect Candor" to Clients, 34 ST. MARY'S L.J. 737, 782-85 (2003) (presenting the issue of materiality within the context of an attorney's obligation to disclose).

114. *See* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14.19, at 617 (5th ed. 2000) (defining the scope of a fiduciary duty).

115. *Id.*

116. *Cf. id.* § 15.2, at 626-27 (interpreting Rule 1.8 of the Model Rules of Professional Conduct to require that any risk to the attorney's interest likely to create adversity to the client's interest should not be undertaken by an attorney without full disclosure to the client of relevant legal risks and circumstances and client consent).

117. *Id.* at 626.

118. *See* Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Mershon, 316 N.W.2d 895, 898 (Iowa 1982) (en banc) (citing the Iowa disciplinary rules definition of "differing interests"). A violation of this Code requires a showing that the lawyer and client had differing interests in the transaction, the client expected the lawyer to exercise his professional judgment for the client's protection, and the client consented to the transaction without full disclosure. *Id.* The Iowa Supreme Court reviewed an Iowa Code of Professional Responsibility, based on the ABA Canons of Professional Ethics, to determine whether this attorney had a conflict of interest. *Id.* Instructively, the court analyzed whether the attorney, by establishment of the fiduciary duty, must disclose every relevant fact and circumstance the client should know to make an intelligent decision regarding the agreement between them and bear the burden of showing a good faith contract through which he disclosed all relevant facts. *Id.*

119. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 146 (West 1986) (admonishing that a lawyer should not represent a client if he "discovers that another interest of the lawyer, either personal or professional, might compromise the lawyer's dedication to vindicating the client's legal position"); *cf.* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 15.2, at 626 (5th ed. 2000) (explaining that the same relationship-created conflicts may interfere with the lawyer's ability to exercise independent judgment or undivided loyalty).

"[p]rofessionally impermissible conflicts appear whenever an attorney prefers outcomes contrary to the client's wishes."[120]

b. The Model Rules of Professional Conduct

Professionally, the Model Rules direct the lawyer's duty to avoid circumstances that create a conflict of interest, thereby affecting the attorney's ability to fully represent current clients.[121] The former Model Code of Professional Responsibility and the current Model Rules of Professional Conduct "cover the expanse of ethical obligations traditionally applied to attorneys."[122] If disclosing insurance coverage establishes a material element in the representation of the client, then failure to disclose would influence both the decision-making process and the ethics of representation. One argument considers whether an attorney's malpractice insurance coverage qualifies as a material element of the client's decision in choosing an attorney.[123] Relevantly, Rule 1.4 of the Model Rules of Professional Conduct stipulates that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[124]

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120. Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1016 (1981); *see also* Alan R. Marks, *Where Is the Real Conflict of Interest? Examining Underlying Issues in Client Relationships*, 79 A.B.A. J. 112, 112 (1993) (explaining that an attorney's self-interest often opposes the client's interest).

121. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8 (2004) (specifying the rules governing the circumstances under which an attorney should not engage a current client to avoid creating a conflict of interest).

122. Daniel L. Draisen, *The Model Rules of Professional Conduct and Their Relationship to Legal Malpractice Actions: A Practical Approach to the Use of the Rules*, 21 J. LEGAL PROF. 67, 69 (1996). Although the rules do not expressly establish a standard used in malpractice actions, they often serve as a guideline. *Id.*

123. *Cf.* Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607, 608 (1988) (focusing on "the informed choice question [about] whether [a] doctor or vendor provided the patient or buyer adequate information to make an intelligent choice"). The article focuses on informed choice warnings, but not warnings reducing risk or alerting consumers and patients how to alter behavior and avoid risk. *Id.* at 608 n.3. The law only establishes what information the provider should offer, rather than consider how a person receiving the information makes her choice. *Id.*

124. MODEL RULES OF PROF'L CONDUCT R.,1.4(b) (2005). This section of the Model Rules concerns attorney communication with clients and the accompanying comments present the extent to which an attorney has a duty to explain matters to the client. *Id.* at R. 1.4. "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." *Id.* at cmt. 5.

An informed choice provides a client with sufficient "information to make an intelligent choice."[125] Parenthetically, a material choice concerns information that a reasonable person in the client's position would want to know prior to making a decision.[126] A deeper inquiry into the decision-making process queries whether tort law, the legal profession's own disciplinary structure, or some other guiding principle establishes the duty to disclose.[127] For some clients, knowing an attorney's malpractice insurance coverage, in addition to other factors, could influence the ultimate decision to hire that attorney.[128]

The medical profession's ethical approach to informed consent provides a useful model for the legal profession's parallel conundrum because medical malpractice claims focus on the patient's lack of information concerning the risk involved.[129] In fact, similar arguments emerged regarding the disclosure of a doctor's malpractice history to the public.[130] Just as public information disclosing a doctor's malpractice

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125. Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607, 608 (1988). Although informed choice issues specifically weigh in significance from the medical malpractice, torts and products liability perspectives, the underlying principles could apply to other areas of the law.

126. *Cf. id.* at 614-16 n.25 (1988) (referring to Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972)). The *Canterbury* court's definition of "material risk" from the "reasonable patient" perspective altered the landscape of the subsequent medical malpractice lawsuits. *Id.*

127. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2004) (particularizing the scope of duties relating to an attorney's communications with his clients); Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 737 (2003) (investigating the context and scope of an attorney's duty to disclose); Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentations by Lawyers About Credentials and Experience*, 57 OKLA. L. REV. 529, 536-61 (2004) (discussing the duty of lawyers to disclose unpleasant facts to a client). *Compare* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 (2001) (blueprinting an attorney's duties to prospective clients), *with* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (2001) (defining the standard of care for practicing attorneys). The standard of care, in pertinent part, elucidates that "a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances." *Id.*

128. *Cf.* Marshall B. Kapp, *Placebo Theory and the Law: Prescribe with Care*, 8 AM. J.L. & MED. 371, 388 (1982) (discussing how concealed information from patients is material "if it would have acted as an important consideration in the decisionmaking calculus of a reasonable person in the plaintiff's position").

129. *See* Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607, 610 (1988) (stating that the common patient claim in medical malpractice "is that the doctor inadequately warned of the risks . . .").

130. *See generally* John Zen Jackson, *Making Medical Malpractice Payouts Public: Disclosure Will Increase Insurance, Health Costs and Not Necessarily Lead to More Informed Consumers*, 176 N.J. L.J. 715 (2004) (criticizing the recent New Jersey statute im-

data does not ostensibly inform the public of a physician's competence, the disclosure of an attorney's malpractice insurance does not assuredly inform the public about the attorney's ability to represent.[131] Furthermore, "disclosing data does not automatically provide the ability to apply the information properly."[132] Thus, disclosed information could render an informed but harmful choice as easily as the lack of disclosure could render an uninformed choice with a similar outcome.[133]

2. The Truth About Legal Malpractice Insurance?

Insurance disclosure does not persuasively offer protection because of its substantive and procedural complexities. The term "liability insurance" requires a more precise explanation and an understanding from the perspective of the party insured. Furthermore, the application of liability insurance can determine its influence on public policy.

a. Ambiguity by Definition

Arguments denouncing disclosure because of the potentially misleading implications of the term "liability insurance" deserve some consideration.[134] Whether the prospective client, after learning of his prospective attorney's malpractice insurance coverage, would respond with an inquiry as to the type of policy remains questionable. Further, even if the attorney believes he is covered by malpractice insurance, his own knowledge about the type of policy he owns may be limited. First, malpractice insurance policies generally cover an attorney's "acts, omissions, or errors" as

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plementing the public disclosure of physician malpractice claims). The article further cites that no correlation exists between malpractice data and physician competence. *Id.* at 716. As a result, the author believes the negative results will be more litigation, less settlements, the defensive practice of medicine, and increased malpractice insurance premiums. *Id.*

131. *Cf. id.* (finding no correlation between public disclosure of physician malpractice claims and a physician's competency).

132. *Id.* The author laments the misplaced reasoning of a New Jersey statute requiring public disclosure of doctor malpractice information to better inform the public making doctor choices. *Id.*

133. *Cf.* Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607, 613 (1988) (distinguishing between a liability standard and a causation standard in a medical malpractice assessment). The authors suggest that the liability standard means a "patient has the right to know certain risks, yet the causation standard only compensates the patient when information about those risks would have prevented the patient from taking the course of action." *Id.*

134. *See* Section II.C.2 of this Comment (discussing the arguments against the Model Insurance Rule).

well as negligence,[135] and these policies generally exclude intentional acts of the attorney.[136] Second, coverage for an incident imposing legal malpractice liability may depend on the type of insurance policy.[137] Consequently, depending on whether the insurance policy is a pure claims-made policy or a pure occurrence policy—knowledge that may escape both an insured attorney and his client—the insurance policy may not necessarily cover the liability-ensuing event.[138] As a result, it appears that mere disclosure of the existence of a professional liability insurance policy deficiently informs a potential third-party victim of the scope of the policy's coverage.

The "cyclical nature" of liability insurance tends to influence its availability and price,[139] while the number of claims affects the coverage.[140] Statistically, the numbers for actual legal malpractice claims will be inaccurate because they will not reflect malpractice claims abandoned because the attorney lacked any insurance.[141] Currently, lawyers "can expect to pay more for coverage if [they] practice, for example, in high-risk areas such as securities, banking and real estate."[142] Attorneys could

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135. JOHN F. SUTTON, JR. & JOHN S. DZIENKOWSKI, CASES AND MATERIALS ON THE PROFESSIONAL RESPONSIBILITY OF LAWYERS 590 (2d ed. 2002) (citing RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 34 (5th ed. 2000)).

136. *See* ABA Standing Comm. on Lawyers' Prof'l Liab., Selecting Legal Malpractice Insurance 3 (2003) (warning that some exclusions in professional liability insurance policies could include dishonest, fraudulent, criminal, or malicious acts).

137. *See* Andrew S. Hanen & Jett Hanna, *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 S. TEX. L. REV. 75, 127-28 (1992) (distinguishing liability insurance coverage based on the type of policy).

138. *Id.*

139. *See* 5 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE 209 (5th ed. 2000) (documenting the tides of liability insurance for attorneys). Compared to the small number of willing insurers in the 1970s, the 1980s brought "an increase in the number of companies willing to insure against . . ." legal malpractice liability. *Id.* This change also rendered "a dramatic reduction in premium cost, and a broadening of the coverages afforded under the insurance form." *Id.*

140. *See generally* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657 (1994) (discussing the effects of legal malpractice claims on insurance coverage).

141. *See* Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 838 (1978) (observing the difficulty with ascertaining the number of clients who decline a malpractice suit after discovering an attorney lacks liability insurance).

142. ABA Standing Comm. on Lawyers' Prof'l Liab., Selecting Legal Malpractice Insurance 3 (2003); *cf.* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1660 (1994) (reciting an ABA study reporting that personal injury and real estate make up most of the malpractice claims).

even expect to pay an extra premium for specific coverage.[143] These variances in price and availability impose burdens on the attorney and the client to decipher exactly what "insurance coverage" implies.

b. Ambiguity by Application

"The economic purpose of insurance has to do with predicting expected damages for a pooled group of risk units."[144] The concept of insurance feeds the myth that its existence works like Adam Smith's Invisible Hand through some other direct legislative intervention to either prevent accidents or guide behavior.[145] Ideally, liability insurance responds to market conditions and curbs the behavior of those who cause accidents.[146] Consequently, proponents of a malpractice insurance model rule should insist that professional liability insurance resembles automobile insurance, where those who choose to drive must have insurance to protect those who become victims of negligence.[147] Similarly, the concept of professional liability insurance provides attorneys with an incentive to exercise professional care in protecting third parties and making

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143. *See* ABA Standing Comm. on Lawyers' Prof'l Liab., Selecting Legal Malpractice Insurance 6 (2003) (listing as possible underwriting criteria, the number, quality, and nature of claims, the degree of fault attributed to the attorney, and state bar disciplinary proceedings).

144. Robert J. Staaf & Bruce Yandle, *An Incentive to Avoid or Create Risks: Market Share Liability*, *in* THE ECONOMIC CONSEQUENCES OF LIABILITY RULES, IN DEFENSE OF COMMON LAW LIABILITY 91 (Roger E. Meiners & Bruce Yandle eds., 1991). Furthermore, because "all costs are ultimately paid by consumers," the market determines the amount of risk. *Id.* at 95. "[W]hen the number of defective units produced increases as a result of smaller firms producing lower-quality goods in a market-share liability environment, total damage claims will increase." *Id.*

145. *Cf.* David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 975 (1995) (chiding the adversary system, which should operate like the Invisible Hand to promote the public good, but instead acts like an "Invisible Foot"). *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970) (evaluating the cost of accidents within a framework of insurance and risk distribution).

146. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970) (modeling the cost of accidents on economic principles); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983) (using automobile accidents and insurance as an economic model).

147. *See Highlands Ins. Co. v. City of Galveston*, 721 S.W.2d 469, 471 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (stating that "liability policies . . . insure against loss arising out of legal liability, usually based upon the assured's negligence"); Nicholas A. Marsh, Note, *"Bonded & Insured?": The Future of Mandatory Insurance Coverage and Disclosure Rules for Kentucky Attorneys*, 92 KY. L.J. 793, 805 n.84 (2004) (comparing compulsory automobile insurance in the context of justification for mandatory disclosure). *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970) (evaluating the cost of accidents within a framework of insurance and risk distribution).

equally wise choices about their risks.[148] A problem with the automobile insurance model, though, is the underlying assumption that everyone carries insurance,[149] which is not the case in legal malpractice.[150]

If the state adopts a rule disclosing an attorney's malpractice insurance coverage to the public, one could plausibly expect an increase in the number of attorneys acquiring malpractice insurance.[151] Some attorneys expect that a compulsory atmosphere for acquiring malpractice insurance will actually encourage or invite clients to sue them.[152] In Texas, this concern is grounded in the history of the 1970's savings and loan crisis, when only those attorneys who had malpractice insurance bore the brunt of the resulting claims.[153] Another justifiable fear stems from recent observation of the medical profession and the exponential growth in medical mal-

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148. *Cf.* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 217 (1970) (using an economic model analysis to determine how risk influences behavior); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 51-56 (1983) (explaining how perceived risk influences individual behavior and social policies); Robert J. Staaf & Bruce Yandle, *An Incentive to Avoid or Create Risks: Market Share Liability, in* THE ECONOMIC CONSEQUENCES OF LIABILITY RULES, IN DEFENSE OF COMMON LAW LIABILITY 91-95 (Roger E. Meiners & Bruce Yandle eds., 1991) (analyzing how the market influences choice based on perceived risk versus the outcome).

149. *See* TEX. TRANSP. CODE ANN. § 601.072 (Vernon 1999) (establishing the "Minimum Coverage Amounts" requirements for financial responsibility under the Motor Vehicle Safety Responsibility chapter of the Texas Transportation Code).

150. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970) (evaluating the cost of accidents within a framework of insurance and risk distribution); *Malpractice: ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 LAW. MANUAL ON PROF. CONDUCT 411 (2004) (quoting a 2004 New Hampshire ABA meeting delegate's proclamation that a new disclosure rule in his state revealed that half the New Hampshire attorneys did not carry professional liability insurance).

151. *See* Stephanie Francis Cahill, *Coming Clean About Coverage: Committee on Client Protection Proposes Mandatory Insurance Disclosure Rule*, 12 A.B.A. J. E-REP. 10, 10 (2002) (quoting Paul Dorroh, a San Francisco insurance broker specializing in legal malpractice coverage, who stated that California's previous disclosure rule encouraged more attorneys to purchase malpractice insurance).

152. *See* Joseph T. McLaughlin et al., *Overview: Ethical Problems, Disqualification, and Lawyers' Potential Liability for Malpractice and Fraud*, C641 A.L.I.-A.B.A. 1, 8 (1991) (referencing the savings and loan crisis as a cause of political strife, resulting in even more lawsuits for deep pockets).

153. *See* David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 959 (1995) (suggesting that during the savings and loan crisis the Resolution Trust Corporation attempted to recoup from "law firms through malpractice suits only because the lawyers and the accountants [were] the sole survivors of the catastrophe whose pockets remain[ed] deep . . ."). *Compare* Susan Saab Fortney, *Professional Responsibility and Liability Issues Related to Limited Liability Law Partnerships*, 39 S. TEX. L. REV. 399, 400 (1998) (correlating the savings and loan crisis to the subsequent creation of law firm limited liability partnerships), *with* Richard Hall, *Lawyers Professional Liability Insurance*, LPL ADVISORY (ABA Standing Comm. on Lawyers' Prof'l Liab., Chicago, Ill.), Spring 1999, at 2, *available at* http://www.abanet.org/legalservices/lpl/advisory/

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practice claims and payouts.[154] Other lawyers worry that compelled acquisition of malpractice insurance will indirectly result in insurance company control over who practices law.[155]

Of course, a mandatory insurance program would alleviate the problem of whether an attorney should disclose his insurance coverage status. Consumer protection advocates support mandatory legal malpractice insurance and argue that alternative options will not minimize "the frequency of legal malpractice claims and lawsuits."[156] As support, these advocates cite that "[m]ost Canadian law societies, and the Australian, English, and Irish law societies, to which all barristers and solicitors from those countries must belong to practice law, require legal malpractice insurance."[157] In the United States, only Oregon mandates malpractice insurance,[158] and implementing similar programs in larger states exposes impracticalities.[159] For example, in the larger states of California, New York, or Texas, a mandatory insurance program's prohibitive expense would pose difficulties because "some lawyers [would] pose such a high

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advsp99.pdf (last visited Mar. 12, 2005) (referencing the 1980s savings and loan crisis as a contributor to the legal profession's later liability problems).

154. *Cf.* Nicole A. Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO. J. LEGAL ETHICS 637, 661-62 (1995) (conjecturing that because a mandatory medical malpractice insurance rule did not reduce claims or deter malpractice, the same would be true for the legal profession as well).

155. *See* Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 839 (1978) (warning that compulsory insurance cannot be "a condition of licensure unless the carriers are required to accept all applicants"). Insurance companies would effectively determine who can and cannot practice law and characteristically resist efforts to carry high-risk applicants. *Id.*; *see also* Glenn Fischer, *Professional Liability Insurance Coverage—Viable Form of Self-Regulation or Simply Another Business Decision?*, LPL ADVISORY (ABA Standing Comm. on Lawyers' Prof'l Liab., Chicago, Ill.), Fall 2002, at 1-2, *available at* http://www.abanet.org/legalservices/lpl/advisory/advfl02 (last visited Mar. 12, 2005) (citing lawyers' views that insurance companies should not be regulating lawyers).

156. Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1729 (1994).

157. *Id.* The author acknowledges the international legal societies currently implementing mandatory insurance programs. *Id.*; *see also Court Should Require Disclosure, Plan for Coverage*, LEGAL INTELLIGENCER, Mar. 2004, at 5 (advocating the propriety of the insurance disclosure due to the successes of mandatory insurance requirements in the United Kingdom, the Canadian provinces, and Australia).

158. OR. REV. STAT. § 9.080(2)(a) (2003).

159. *See* James Podgers, *Time-Out Call: Sponsor Holds Off on Proposal Regarding Malpractice Insurance Disclosures*, 89 A.B.A. J. 66, 66 (2003) (quoting the ABA Client Protection Committee Chairperson's, Lynda C. Shely, statement that mandatory insurance coverage represents an unrealistic ideal because both the economy and the attorney reticence make it unfeasible).

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degree of risk they [could not] get insurance from a commercial carrier at any price . . . ."[160]

Those against mandatory malpractice insurance argue that a program designed to cover everyone will result in penalizing the careful attorneys for the careless ones without incentives to avoid malpractice.[161] As a result, premium rates would increase for all lawyers and ultimately raise the rates charged to clients.[162] Conversely, the possibility exists that insurance premiums would be reduced by a larger number of attorneys becoming insured.[163] From an economic public policy perspective, market forces are more apt to create a risk-avoidance scenario for the solo practitioner than just a disciplinary model.[164]

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160. Robert I. Johnston & Kathryn Lease Simpson, *O Brothers, O Sisters, Art Thou Insured?: The Case for Mandatory Disclosure of Malpractice Insurance Coverage*, 24 PA. LAW., May 2002, at 28, 31 (quoting James Towery, former ABA Standing Committee on Client Protection Chairman); *accord* Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 840 (1978) (predicting that mandatory insurance, though aimed to protect the public, would "be so prohibitive as to preclude a substantial number of attorneys from practicing law"). *But see* Elizabeth A. Alston, *Coverage For a Rainy Day: Many Malpractice Policies Will Help Pay the Costs of Defending Disciplinary Complaints*, 89 A.B.A. J. 29, 29 (2003) (presenting a rebuttal to the presumption that disciplinary proceedings will trigger a rise in malpractice premiums). Alternatively, a supplemental disciplinary coverage provision in the policy could reduce or drop coverage for only multiple claims. *Id.*

161. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1727 (1994) (presenting the argument that a mandatory insurance program will result in careful attorneys paying for careless ones).

162. *See id.* (proposing that increased insurance premiums will result in increased rates for clients).

163. *See, e.g.*, Robert J. Staaf & Bruce Yandle, *An Incentive to Avoid or Create Risks: Market Share Liability*, *in* THE ECONOMIC CONSEQUENCES OF LIABILITY RULES, IN DEFENSE OF COMMON LAW LIABILITY 96 (Roger E. Meiners & Bruce Yandle eds., 1991) (discussing the effects of market-share liability and rising premiums resulting in an eventual shrinking market for liability insurance as smaller firms and solo practitioners move to self-insure); Jill Sundby, *What Montana Lawyers Think About Mandatory Malpractice Insurance*, MONT. LAW., Aug. 2001, at 26, 26 (quoting Montana attorneys favoring mandatory malpractice insurance priced according to risk, if the increased number of attorneys reduces premiums).

164. *Cf.* Robert J. Staaf & Bruce Yandle, *An Incentive to Avoid or Create Risks: Market Share Liability*, *in* THE ECONOMIC CONSEQUENCES OF LIABILITY RULES, IN DEFENSE OF COMMON LAW LIABILITY 85 (Roger E. Meiners & Bruce Yandle eds., 1991) (comparing compensatory damages within the context of product liability, which forces firms to adopt a standard of care by market balancing factors that avoids risk). Specifically, this firm-adopted standard of care more effectively avoids financial risks than a legal standard imposed by judicial or legislative processes. *Id.* This standard works much the same way as the market-share liability rule theory. *Id.* at 88-95.

"Greater risk spreading requires more complete coverage. More complete coverage, however, adversely affects the incentive to avoid losses, thus causing an inefficiency that must be borne by [both] the parties."[165]

3. The Self-Regulating Legal Profession?

"[T]he legal profession asserts exclusive authority to determine who is competent to practice law and who in the course of practice is subject to reprimand, suspension, or disbarment."[166] The legal profession prides itself on its ability to self-regulate rather than succumb to legislatively-enacted discipline.[167] Thus, while the legislature retains authority over bar admittance, the courts typically reign over the exclusive realm of attorney discipline.[168] As a self-regulating entity, the legal profession should uphold ethical ideals and standards of competence.[169] To this end, the preamble to the Model Rules creates a responsibility for the quality of

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165. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 538 (1986).

166. F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 193 (1974); *see also* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1250 (1991) (chronicling the legal standards for the profession's self-regulation). Beginning with the ABA's 1908 Canons, which evolved into the first ABA Code of Professional Responsibility in the 1970s, legal standards led to the 1983 Model Rules of Professional Conduct. *Id.*; *see also Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1582 (1994) (following the evolving, self-regulatory history of the legal profession). *See generally* Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205 (2002) (discussing the evolution of legal ethics into a highly regulated legal profession). Professor Wolfram's article delves into five factors possibly contributing to the legal profession's emergence since the 1970s as one more regulated than self-regulating. *Id.*

167. *See* F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 208 (1974) (noting that "[t]he legal profession has zealously resisted lay or even legislative intervention in the disciplinary process").

168. *See, e.g., Ex parte* Garland, 71 U.S. 333, 378-79 (1866) (declaring that attorneys "are officers of the court," which determines their competency and discipline); *In re* Cannon, 240 N.W. 441, 450 (Wis. 1932) (holding that while the legislature can determine the qualifications and requirements for bar admittance, the court retains the duty of disciplining attorneys); *cf.* Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 843 (1978) (distinguishing between the legislature-regulated bar and the courts-regulated attorneys). In *Cannon*, Justice Owen expounds on the history and tradition of this separation of powers, tracing it from England and through colonial times to justify this conclusion. *Cannon*, 240 N.W. at 448-51.

169. *See generally* Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705 (1981) (analyzing how the ABA's and the legal profession's push for competent representation and higher ethical standards emerged with the publication of the Model Rules of Professional Conduct). Bar associations actively sought to assist courts in self-disciplining and self-regulating to avoid any legislative intervention.

justice and encourages a lawyer to assist the bar in regulating itself.[170] This responsibility, though, demands that the profession at least do a good job.

Those who advocate disclosure and client protection argue that this self-regulation process affects public perception and therefore requires even more caution and care.[171] Naturally, the public criticizes a system in which judges and lawyers solely adjudicate and decide the issues of their own regulation.[172] Having more stringent disclosure requirements could regulate the profession by encouraging settlements or promoting the citizenry to become private "attorneys general," patrolling the behavior of attorneys.

Critics of the current disciplinary system want to better inform the public about client complaints against an attorney and lawyer competency.[173] For example, accessible public records could reveal competency-related information, such as client complaints and pending legal malpractice suits.[174] These critics also request that previously disciplined lawyers "be required to disclose the discipline to any new customers."[175] By exten-

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Id. The article focuses on the changing standards used to define competence within the legal profession that ultimately determine an actionable display of incompetence. *Id.*

170. *See* Glenn Fischer, *Professional Liability Insurance Coverage—Viable Form of Self-Regulation or Simply Another Business Decision?* LPL ADVISORY (ABA Standing Comm. on Lawyers' Prof'l Liab., Chicago, Ill.), Fall 2002, at 1-2, *available at* http://www.abanet.org/legalservices/lpl/advisory/advfl02.pdf. (last visited Mar. 12, 2005) (questioning how the legal profession reconciles the conflict between increased external pressure and independent self-regulation). In other words, the question becomes whether the profession should relinquish some independence to better protect the public it serves. *Id.*

171. *Cf.* F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 194 (1974) (defining why the public objects to the legal profession presenting itself as a self-regulating entity). The authors outline the misguided assumptions underlying licensure that do not necessarily protect the public from unethical conduct or substandard performance. *Id.* at 195. Almost portentously, this article, though written in 1974, still contains meritorious assertions regarding bar associations' regulation of attorney discipline, licensure, and the ethical conduct of the profession as a whole. *Id.* at 196, 235-36.

172. *See* Deborah L. Rhode, *Ethics in Practice, in* ETHICS IN PRACTICE 13 (Deborah L. Rhode ed., 2000) (questioning whether lawyers and judges can truly be sympathetic and self-regulating in an environment where their own interests are at stake). Professor Rhode claims other countries have an independent bar and more public accountability by including nonlawyers in the regulatory process. *Id.* A 1992 ABA Commission report criticizes the inadequacy of the legal profession's disciplinary system. *Id.* at 14.

173. *See* Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 485-86 (2001) (arguing for regulations in the legal profession that allow for the greatest possible information flow to the public).

174. *See id.* (suggesting where disciplinary authorities should focus).

175. *Id.*

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sion, advocates surmise that insurance disclosure will better inform the public, deter negligent attorney behavior, and pierce the veil of a secretive legal profession.[176]

Despite an evolving self-regulatory process since the ABA first enacted the Canons of Professional Ethics in 1908,[177] the legal profession's reluctance "to initiate necessary reforms that are in the public's interest" merits criticism.[178] Politically, attorneys would rather not "invite the cost and conflict involved in institutionalizing" significant change to the disciplinary process.[179] However, if lawyers wish to maintain a self-regulatory status and privileges in society, they must collectively address the current issues and develop appropriately responsive reforms.[180] If the creation of rules or guidelines for ensuring higher standards of discipline and consistency designate a profession rather than an occupation,[181] then the pub-

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176. *Compare* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 591 (1985) (positing that bar administrations "committed to maximizing public protection" would foster less-partisan disciplinary processes), *with* Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 737-40 (1981) (proffering the necessity of publicizing the grievance and disciplinary processes as an effective tool aimed at deterring unfortunate attorney behavior). Professor Martyn asserts that the secrecy enveloping the legal profession promotes the undesired behavior and therefore any attempt at encouraging discipline needs publicity to aid in enforcement and deterrence procedures. *Id.*

177. *See Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1582 (1994) (tracing the history of the legal profession's self-regulation); Daniel L. Draisen, *The Model Rules of Professional Conduct and Their Relationship to Legal Malpractice Actions: A Practical Approach to the Use of the Rules*, 21 J. LEGAL PROF. 67, 72 (1996) (denoting the historical origin and purpose of the Model Rules).

178. John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 70 (1999). The author's criticism of the legal profession's general reluctance served as a springboard for asserting his recommendations that Ohio allow more public participation in the attorney review process and advocate mandatory malpractice insurance. *Id.* at 70-73, 111-16.

179. Deborah L. Rhode, *Ethics in Practice*, *in* ETHICS IN PRACTICE 16 (Deborah L. Rhode ed., 2000). The essay suggests that those attorneys vying for more income along with the perceived resulting happiness may not place ethics in high regard. *Id.* at 17. A requirement that all attorneys carry liability insurance would instigate a move toward both disciplinary reform and a strengthening of malpractice standards. *Id.* at 20.

180. *Cf.* John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 69 (1999) (maintaining that expeditiously resolving lawyer disciplinary problems will minimize outside interference in the Ohio Bar disciplinary process). The author proposes an expeditious resolution "through continual self-study, development, vigilance, and reform." *Id.*

181. *See* F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 193 n.1 (1974) (distinguishing the practice of law as a profession compared to other occupations). The authors borrowed the following characterization of a profession: "(1) a skill acquired through higher education

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lic's expectations of professionals rightfully exceed those for licensed occupations.[182] "In dealing with licensed occupations the public expects a degree of regulation, even though it may recognize that the regulation will never be thorough."[183] The legal profession should more consciously procure for the public good because a lawyer's necessary training and skills extend beyond just mere intellectual learning.[184] Those favoring legislative regulatory intervention regard the legal profession's influential effect on the public as more heavily-weighted toward legislative rather than solely judicial regulation.[185] Regulation by the judiciary, usually comprised of other lawyers, does not abate the public's harsh criticism of the legal profession.[186]

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and specialized training as a prerequisite to entry; (2) monopoly rights over the performance of certain functions; (3) control of admission; and (4) assertion of formal and informal authority of the professional community over at least minimum standards of professional conduct . . . ." *Id.* (summarizing an unpublished 1970 monograph at the Univ. of Chicago Dep't of Sociology, *Professions and Professionalization*, by J. Ben-David).

182. *See id.* at 195 (recognizing that the public's expectations of lawyers arise from the profession's associated status and licensure requirements).

183. *Id.* at 230.

184. *See generally* Anthony T. Kronman, *The Law As a Profession*, *in* ETHICS IN PRACTICE 29-39 (Deborah L. Rhode ed., 2000) (promulgating the image of the profession as the acquisition of a culture rather than just rules governing ethics). The author suggests that the increasing sets of rules promulgated by the ABA increases the pressure for specialization in the profession. *Id.* at 38. "[L]awyers are today less public spirited and connected to their past, and more specialized and alienated from their work, than they were a quarter-century ago." *Id.* Furthermore, an increased number of rules could result in the legal profession becoming less like a profession and more resembling a job. *Id.* at 39.

185. *See* Paula A. Monopoli, *Legal Ethics & Practical Politics: Musings on the Public Perception of Lawyer Discipline*, 10 GEO. J. LEGAL ETHICS 423, 424 (1997) (enumerating proponents' arguments for legislative intervention of the legal profession). *But see* Glenn Fischer, *Professional Liability Insurance Coverage—Viable Form of Self-Regulation or Simply Another Business Decision?*, LPL ADVISORY (ABA Standing Comm. on Lawyers' Prof'l Liab., Chicago, Ill.), Fall 2002, at 1-2, *available at* http://www.abanet.org/legalservices/lpl/advisory/advfl02.pdf (last visited Mar. 12, 2005) (explaining the opposition's view that neither government nor insurance companies should be regulating lawyers, only lawyers should be regulating lawyers); *cf.* Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 710 (1981) (explaining how bar associations actively sought to assist courts in self-disciplining and self-regulating to avoid any legislative intervention during the formulation process of the Model Rules of Professional Conduct).

186. *See* Paula A. Monopoli, *Legal Ethics & Practical Politics: Musings on the Public Perception of Lawyer Discipline*, 10 GEO. J. LEGAL ETHICS 423, 423 (1997) (understanding the public's suspicion of a system "inherently biased in favor of lawyers"). Criticism focuses on the judiciary-centric disciplinary system, comprised of lawyers regulating other lawyers. *Id.*

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Lawyers rarely complain about other lawyers, so the avenue must be open for clients to lodge complaints and assist the process.[187] Imposing mandatory insurance or disclosure rules will not necessarily help the legal profession in its self-regulation because "[t]he rules of ethics have ceased to be internal to the profession; they have instead become a code of public law enforced by a formal adjudicative disciplinary process."[188] If the legal profession self-regulates through the exclusive "process of receiving and acting on complaints . . .,"[189] then perhaps the state, pursuant to its duty to protect its citizens, should set standards for professionals, such as attorneys, which affect the public interest.[190]

B. *Unintended Consequences*

Like it or not, the increased awareness of successful malpractice claims and the availability of the insurance disclosure could place the solo practitioner in a precarious position of either being vulnerably bare of insurance or spending excessive amounts on annual premiums.[191] Unfortunately, "[m]alpractice claims are made regardless of whether the lawyer is truly negligent."[192] Because the Model Insurance Rule conspicuously excludes law firms, the burden of insurance disproportionately rests on others, such as the solo practitioner.[193] The rationale supporting this choice derives from the dual assumption that solo practitioners more likely commit malpractice and less likely carry liability insurance than

187. *See* F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 207 (1974) (noting also that not all aggrieved clients complain).

188. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241-42 (1991) (suggesting that the courts' legalization process has disintegrated the legal profession's identity).

189. F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 206 (1974).

190. *See* Dent v. West Virginia, 129 U.S. 114, 122 (1889) (acknowledging that the state's power "to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud").

191. *See* Mitchell A. Orpett & Katja Kunzke, *Insurance Options for the Solo*, 20 No. 3 GPSOLO, Apr.-May 2003, at 14 (equating the balance between disgruntled clients and the inevitability of mistakes while uninsured "to walking a tightrope without a safety net").

192. *Id.*

193. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1660 (1994) (reciting an ABA study revealing that almost eighty percent of the legal malpractice claims are filed against solo practitioners or small law firms consisting of two to five lawyers). Personal injury and real estate make up most of the malpractice claims. *Id.*

large firms.[194] Arguably, firm resources can create a "checks and balances" system of either preventing malpractice or protecting the firm from the vicarious liability of newer, less-experienced associates.[195] A further consideration should be whether other areas of the law, such as criminal defense, also deserve an exemption.[196]

Another unintended consequence of the Model Insurance Rule reflects the possibility that a client may be more willing to file a lawsuit after more attorneys obtain malpractice insurance.[197] Although a potential gain exists compared to when fewer attorneys carried insurance, most plaintiffs settle a legal malpractice case for the insurance policy limits because attorneys can hide assets or choose bankruptcy.[198]

Another quandary solicits the question of why the Model Insurance Rule ambiguously applies only to attorneys engaged in private practice, but does not expressly define the scope of what a private practice en-

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194. *See id.* at 1717-18 (assessing the belief that legal malpractice is more prevalent among lawyers in solo practice or in small firms because economics decides the quality of the case); Susan Korenvaes Robin, Comment, *Attorney Malpractice and Preventative Lawyering: Are Attorneys Safer in Large Firms?*, 40 U. MIAMI L. REV. 1101, 1104 (1986) (analyzing statistical evidence suggesting that legal malpractice claims against large firms are less likely than those against small firms or solo practitioners). Robin theorizes that the size of malpractice deductibles for large firms encourages negotiation and settlement before a client formally files a malpractice claim. *Id. But see* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1673 (1994) (emphasizing that statistics can be misleading as to whether a private practice lawyer is more vulnerable than a large firm to legal malpractice claims).

195. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1719 (1994) (discussing how the large firm structure inherently builds a system of legal malpractice prevention); *see also* Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 838-39 (1978) (implying that new attorneys are more likely to err and less likely to financially address clients' injuries if included in the uninsured attorney pool). *See generally* Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707 (1998) (cogitating how large law firm hierarchies and adherence to ethical rules enhance the firm's reputation). This system could actually impose higher legal fees on clients because the risk-avoiding attorney will over work rather than suffer a malpractice claim or injury to his and subsequently, the firm's reputation. *Id.*

196. *See* Greg Bluestein, *State Bar Board Nixes Plan to Require Insurance Disclosure*, FULTON COUNTY DAILY REP., Nov. 9, 2004, at 1 (reporting how an opponent of Georgia's State Bar Board of Governors recent consideration of an insurance disclosure proposal elicited laughter regarding this particular scenario). The opponent asked the members to envision the irony of a criminal defense attorney first disclosing his limited amount of malpractice insurance coverage to his client. *Id.* Obviously, this scenario was effective; the board "took two votes and a recount" to defeat the proposal. *Id.*

197. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1727 (1994) (stating that "legal malpractice cases are rarely pursued against an uninsured attorney unless that attorney has significant assets").

198. *Id.*

tails.[199] For example, if an attorney at a large firm decided to provide *pro bono* services or draft a will for her cousin—outside the scope of her firm-related work—the rule does not distinguish whether this entails the private practice of law.[200] Equally worrisome, once an insurance carrier has declined coverage to an attorney for whatever reason, the attorney's subsequent difficulty obtaining another carrier's coverage may be negatively perceived by the public and not necessarily the attorney's fault.[201] This situation heavily affects solo practitioners, who could ultimately abandon the solo practice or pass their increased expenses of malpractice insurance on to their clients in the form of higher fees.[202]

Enforcement of the Model Insurance Rule also presents some difficulty because without an impetus to deter negligent behavior, fulfilling the purpose of protecting the public becomes questionable. If the ethical rules sufficiently provided ways to deter bad behavior, the Model Insurance Rule could be a complementary step.[203] The current self-regulating disciplinary systems do not create causes of action;[204] instead, grievances

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199. *See* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 2 (2004), http://www.ethicsandlawyering.com/Issues/files/ABAHOD Report.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (articulating the provisions of the Model Insurance Rule). The language of the rule is provided in Appendix A of this Comment.

200. *See* Jill Sundby, *What Montana Lawyers Think About Mandatory Malpractice Insurance*, MONT. LAW., Aug. 2001, at 25 (quoting some Montana attorneys opposed to the idea of mandatory malpractice insurance because they only offer sporadic pro bono advice or counsel and the requirement would act as a deterrent to that type of work). Furthermore, because insurance premiums are not pro-rated to the practice, part-time workers would suffer. *Id.*

201. *See* ABA Standing Comm. on Lawyers' Prof'l Liab., Selecting Legal Malpractice Insurance 8 (2003) (recognizing that once an attorney has been declined coverage by one carrier, other carriers will consider the declined coverage a risk, thereby rendering difficulty for attorneys).

202. *See* Molly McDonough, *Push For Mandatory Coverage: Illinois Bar Wants to Make Malpractice Insurance the Law*, A.B.A. J. E-REP., JAN. 11, 2002, at 1 (reporting on criticisms to the 2002 Illinois State Bar Association proposal to have mandatory malpractice insurance). Mainly, mandatory insurance would punish good solo attorneys trying to do a public good and leave the alternatives of either ceasing to practice or charging higher fees. *Id.*

203. *See* JOHN F. SUTTON, JR. & JOHN S. DZIENKOWSKI, CASES AND MATERIALS ON THE PROFESSIONAL RESPONSIBILITY OF LAWYERS 589 (2d ed. 2002) (noting that because insurance carriers base premium rates and coverage on an attorney's state bar disciplinary sanctions and other forms of discipline, an attorney will have a heightened sensitivity to these regulations of his conduct); *cf.* F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 207 n.25 (1974) (pointing out that the threat, rather than the actual audit of a Wisconsin attorney's handling of client funds, served as a notable deterrent of ill-gotten behavior).

204. *See* DAN B. DOBBS, 2 THE LAW OF TORTS § 485 (2001) (outlining the professional standard of care in legal malpractice).

against attorneys and the legal profession's receipt of action or inaction on those complaints summarize the main ways the legal profession self-regulates.[205]

Although the state may attempt to protect the clients harmed without available compensation, "[a] state cannot under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them."[206] For example, if the state exceeds its power by impliedly or expressly mandating insurance, it arguably acts through a taking by forcing attorneys to spend their money in order to practice their profession.[207] Similar to compelling union membership, the requirements for insurance act like a union by forcing attorneys to participate in an insurance risk pool.[208] In short, the state virtually forces one group, the legal profession, to participate and not others. The question remains whether the threat of a malpractice suit effectively encourages attorneys to engage in more cautious and ethical behavior.[209] Debates of the late 1970s focused on how disclosure to clients creates mistrust and jeopardizes the relation-

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205. *See* F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 206 (1974) (deeming the legal profession's self-regulation process as limited to investigations based upon only filed complaints). The authors criticize the profession's exclusive approach to self-regulation, which entails a "process of receiving and acting on complaints," or even worse, its "failure to act on them." *Id.*

206. Hartford Accident & Indem. Co. v. Ingram, 226 S.E.2d 498, 504-05 (N.C. 1976). The Supreme Court of North Carolina held that if the state attempted to compel the insurance company to provide medical malpractice insurance as a condition to continuing selling other types of insurance in the state, it would be in violation of the Fourteenth Amendment. *Id.* at 507.

207. *Cf.* Keller v. State Bar of Cal., 496 U.S. 1, 8-9 (1990) (considering whether a state could mandate dues as a requisite to practice law in the state).

208. *Cf. id.* (addressing the challenge by state attorneys to the California Bar Association because of mandatory dues payments). Justice Rehnquist reemphasized that "a State may [C]onstitutionally condition the right to practice law upon membership in an integrated bar association, a condition fully as justified by state needs as the union shop is by federal needs." *Id.* at 8-9 (quoting Lathrop v. Donohue, 367 U.S. 820, 849 (1961)). Justice Rehnquist further drew "a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of the employee unions and their members, on the other." *Id.* at 13. Compulsory dues must be used for purposes and activities germane to the reason for the association, and bar associations are for the purpose of regulating the legal profession and "improving the quality of legal services." *Id.* "The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members." *Id.* at 14.

209. *See* Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 698 (1990) (stating that "the threat of malpractice may deter some lawyer misconduct, but the remedy is not available to most deceived clients"). Consumer protection laws could provide a more effective deterrent to unfavorable attorney behavior if the courts began applying them to lawyers. *Id.* at 699.

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ship, however, current Model Rules have proven those arguments untrue.[210] Perhaps the threat of losing personal assets through malpractice suits provides attorneys with the best incentive to avoid negligence.[211]

C. *Texas: The Lone Star Pattern of Client Protection*

When the ABA forwards the Model Insurance Rule to the highest state courts, it remains unclear whether the Texas Supreme Court will even consider adopting it.[212] The State Bar of Texas has formed neither a committee nor an opinion regarding this particular issue.[213] None of the judicial advisory committees with the Texas Supreme Court have even considered, let alone addressed, this or the ABA's previously recommended rules regarding the requirement for malpractice insurance disclosure.[214] Predictably, the Texas Delegates to the August 2004 ABA meeting in Atlanta voted against the rule.[215]

Unquestionably, the majority of the listed legal malpractice claim areas, such as personal injury, real estate, and family law issues, exist in Texas.[216] In addition to real estate, the high-risk malpractice areas of se-

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210. *See generally* Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981) (surveying the contemporaneous debates regarding the then newly-proposed drafts of the Model Rules of Professional Conduct, which were to replace the ABA Code of Professional Responsibility). Fears associated with disclosure to clients stem from the feared consequences that such disclosure degrades client-attorney trust. *Id.* at 1017.

211. *See* Jill Sundby, *What Montana Lawyers Think About Mandatory Malpractice Insurance*, MONT. LAW., Aug. 2001, at 25 (quoting an attorney opposed to malpractice insurance as stating that "the threat of losing personal assets is the greatest deterrent to malpractice").

212. *See* Telephone Interview with Lisa Hobbs, Rules Attorney, Texas Supreme Court (Oct. 26, 2004) (on file with the *St. Mary's Law Journal*) (verifying that the court has committees and procedures for considering new rules).

213. *See* E-mail from Bill Elliott, Chairman of the Board, State Bar of Texas, to Nicole D. Mignone, St. Mary's University School of Law (Oct. 08, 2004, 11:12:00 CST) (on file with the *St. Mary's Law Journal*) (confirming the Texas State Bar had not addressed the issue at that time).

214. *See generally* Telephone Interview with Lisa Hobbs, Rules Attorney, Texas Supreme Court (Oct. 26, 2004) (on file with the *St. Mary's Law Journal*) (outlining how the supreme court reviews and addresses the court rule proposals). The Texas Supreme Court has a judicial council, which could study the ABA rule and make recommendations. *Id.* For minutes of current judicial council information, see http://www.courts.state.tx.us/jcouncil/.

215. *See* Telephone Interview with Dawn Miller, Chief Counsel for Disciplinary Procedures, State Bar of Texas (Nov. 08, 2004) (on file with the *St. Mary's Law Journal*) (verifying that the Texas delegation did not vote for this particular disclosure rule).

216. *See* ABA Standing Comm. on Lawyers' Prof'l Liab., Profile of Legal Malpractice Claims: 1996-1999 5 (2001) (tabulating the number of claims according to the respective

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curities and banking also prevail in Texas.[217] Of the almost 80,000 licensed Texas lawyers, nearly sixty percent are private practitioners or in firms comprised of less than five attorneys, representing other high-risk categories the Model Insurance Rule attempts to address.[218] Additionally, of private practitioners, thirty-seven percent are solo practitioners.[219]

Admittedly, the Texas Bar addresses some attorney misconduct issues by providing an extensive grievance filing system through its website and a Client Security Fund.[220] However, the fund only partially compensates clients for egregious intentional conduct by the attorney and was not formulated as a response to unanswered malpractice claims.[221] Also uncertain is whether a harmed or injured client has access to or knowledge of the internet resources by which to file a complaint.

Although the 1970s' savings and loan scandal in Texas could understandably explain attorneys' misgivings about malpractice insurance,[222]

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legal area). Personal injury plaintiffs represented 24.60% of claims in the 1999 study, real estate comprised 16.97%, and family law, 10.13%. *Id.*

217. *See* ABA Standing Comm. on Lawyers' Prof'l Liab., Selecting Legal Malpractice Insurance 6 (2003) (listing the specialty areas of securities, banking, and real estate as subject to higher premiums because of the higher associated risk).

218. *See* STATE BAR OF TEX. DEP'T OF RESEARCH AND ANALYSIS, STATE BAR MEMBERS: ATTORNEY STATISTICAL PROFILE (2004), http://www.texasbar.com/template.cfm?section=research_and_analysis (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (profiling the Texas State Bar members).

219. *Id.*

220. *See* State Bar of Tex., *Client Assistance & Grievance*, *at* http://www.texasbar.com/ (last visited Mar. 12, 2005) (offering services and advice to those seeking redress or grievances against Texas-licensed attorneys); STATE BAR OF TEX., THE CLIENT SEC. FUND OF THE STATE BAR OF TEX. (2004), *available at* http://www.texasbar.com/template.cfm?section=pamphlets (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (describing resources available to Texas residents wronged by an attorney's intentional conduct).

221. *See* Telephone Interview with Dawn Miller, Chief Counsel for Disciplinary Procedures, State Bar of Texas (Nov. 08, 2004) (on file with the *St. Mary's Law Journal*) (confirming that the Texas client security fund system covers financial losses from intentional or egregious attorney conduct, but is not meant to address unanswered malpractice claims); *see also* STATE BAR OF TEX., THE CLIENT SEC. FUND OF THE STATE BAR OF TEX. (2004), *available at* http://www.texasbar.com/template.cfm?section=pamphlets (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (describing resources available to Texas residents wronged by an attorney's intentional conduct).

222. *See* David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 957-58 (1995) (referencing the 1970s banking crisis involving many Texas thrifts). The debacle left the insured attorneys bearing the brunt of the cost and subsequently affected future attorney representation. *Id.*; *see also* Susan Saab Fortney, *Professional Responsibility and Liability Issues Related to Limited Liability Law Partnerships*, 39 S. TEX. L. REV. 399, 400 (1998) (correlating the Texas savings and loan crisis to the subsequent creation of law firm limited liability partnerships).

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the state projects a consumer protection attitude. Facially, Texas provides various consumer protection statutes targeting specific industries,[223] in addition to its Deceptive Trade Practices Act (DTPA).[224] Texas further regulates professions and industries through its codified Occupations Code, intending to protect a consumer, but not the consumer of legal services.[225] Correspondingly, because the DTPA provides an exception for professional services, under which legal services would apply, a client could not avail himself of this particular consumer protection statute either.[226] Even procedurally, Texas protects the issue of insurance disclosure through its evidentiary rules, which do not allow the admissibility of liability insurance as proof of negligence.[227] As a result, applying the

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223. *See, e.g.,* Business Opportunity Act, TEX. BUS. & COM. CODE ANN. § 41.002 (Vernon 2002) (protecting against false or misleading conduct regarding business opportunities); Contest and Gift Giveaway Act, TEX. BUS. & COM. CODE ANN. § 40.002 (Vernon 2002) (extending protection to persons entering contests or gift giveaways); Credit Services Organizations Act, TEX. FIN. CODE ANN. § 393.001 (Vernon 1998) (regulating the reporting of consumer credit); Debt Collection Act, TEX. FIN. CODE ANN. § 392.001 (Vernon Supp. 2004) (regulating fair debt collection procedures); Manufactured Housing Standards Act, TEX. OCC. CODE ANN. § 1201.002 (Vernon 2004) (protecting consumers of installed or constructed manufactured housing); Telephone Solicitation Act, TEX. BUS. & COM. CODE ANN. § 37.01 (Vernon 2002) (protecting consumers from telemarketers); Timeshare Act, TEX. PROP. CODE ANN. § 221.001 (Vernon 1995) (protecting consumers transacting in shared property); *see also* TEX. INS. CODE ANN. art. 21.21 (Vernon 2005) (declaring the Act's purpose to deter unfair insurance competition or claim practices).

224. *See* TEX. BUS. & COM. CODE ANN. §§ 17.41-17.49 (Vernon 2002) (defining the Texas Deceptive Trade Practices Act). *See generally* Paul Carmona, *2003 Legislative Update: The DTPA An Old Dog with New Tricks*, 66 TEX. B.J. 680 (2003) (outlining 2003 legislative changes to the Texas Deceptive Trade Practices Act). Specifically, House Bill 1282 and Senate Bill 1212 of the 78th Texas Legislature authorize the Texas Attorney General to prosecute more businesses engaging in false, misleading or deceptive conduct, in an effort to deter future unfavorable conduct. *Id.* at 681.

225. *See, e.g.,* TEX. OCC. CODE ANN., tit. § 3 (Vernon 2004) (regulating health professions); TEX. OCC. CODE ANN., tit. § 6 (Vernon 2004) (regulating "Engineering, Architecture, Land Surveying and Related Practices"); TEX. OCC. CODE ANN., tit. § 7 (Vernon 2004) (regulating "Practices and Professions Related to Real Property and Housing"). Notably, Title 5 of the Texas Occupations Code regulates financial and legal services, but not those specifically provided by attorneys. TEX. OCC. CODE ANN., tit. § 5 (Vernon 2004).

226. *See* TEX. BUS. & COM. CODE ANN. § 17.49(b) (Vernon 2002) (exempting professional services from DTPA claims). *But see* TEX. BUS. & COM. CODE ANN. § 17.49(b)(1)-(3) (Vernon 2004) (disallowing the professional services exemption for intentional or unconscionable conduct under the DTPA).

227. TEX. R. EVID. 411. Specifically, the rule recites:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

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Texas Rules of Evidence in an attorney malpractice case would favor the attorney, but not the consumer.

Nonetheless, the Texas Disciplinary Rules do imply some disciplinary caution. For instance, through Rule 7.02 of the Texas Disciplinary Rules of Professional Conduct, the attorney "shall not make a false or misleading communication about the qualifications or the services of any lawyer or firm."[228] Moreover, the rules recognize that statements can be misleading if they omit relevant information.[229] Thus, an attorney could be misleading by failing to communicate his lack of malpractice insurance coverage. Unfortunately, the disciplinary rules do not establish a cause of action for the client, once again leaving questionable options of compensation.[230]

IV. RECOMMENDATIONS

A. *Meeting the Arguments for Client Protection*

By design, the Model Insurance Rule, much like insurance, should protect innocent victims[231] rather than the attorney who purchases the pol-

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Id.; *accord* A. J. Miller Trucking Co. v. Wood, 474 S.W.2d 763, 766 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.) (affirming that "[i]t is well settled that it is reversible error to disclose to the jury that the defendant has liability insurance").

228. TEX. DISCIPLINARY R. PROF'L CONDUCT 7.02(a), *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G app. A (Vernon 2005).

229. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 7.02 cmt. 2, *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G app. A (Vernon 2005) ("recogniz[ing] that statements can be misleading both by what they contain and what they leave out").

230. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶¶ 14, 15, *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G app. A (Vernon 2005) (clarifying that the rules do not prescribe disciplinary procedures, private causes of action, or any presumption of legal duty or breach).

231. *See* Robert J. Derocher, *State by State, Mandatory Malpractice Disclosure Gathers Steam*, A.B.A. B. LEADER, Mar.-Apr. 2004, *available at* http://www.abanet.org/barserv/bl2804.html (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (interviewing a Missouri attorney who reasoned that, similar to requiring auto liability insurance because cars can do damage, rules should require liability insurance for attorneys); *see also* Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 847 (1978) (equating auto insurance to legal malpractice insurance under the umbrella of the state's interest in protecting the public from harm); *cf.* Am. Homeowners Ins. Co. v. Reserve Ins. Co., 264 F. Supp. 632, 634 (D. Md. 1967) (analyzing a financial responsibility law for Maryland auto drivers as a measure to protect innocent victims). The United States District Court for the District of Maryland found the legislative purpose behind the Maryland law was "not to afford protection to financially irresponsible motorists." *Id.* (quoting Nat'l Indem. Co. v. Simmons, 186 A.2d 595, 600 (Md. 1962).

icy.[232] Arguably, the Model Insurance Rule indirectly forces solo practitioners to pay for third parties, but even a mandatory liability insurance scheme would pass constitutional muster as an effort to protect the public.[233] Victims often bear the associated costs of accidents, which ultimately influence how they make decisions.[234] In that regard, if victims must bear the societal costs of negligence and accidents, justice should allow them to choose based on complete information. From a public policy perspective, losses resulting from inadvertence or malpractice among all attorneys should be broadly distributed among those in a better position to prevent and pay for them.[235] Otherwise, clients suffer twice, bearing both the initial loss and the subsequent societal losses of an inefficient system.[236]

B. *Appeasing the Arguments for Lawyer Protection*

Whereas Model Insurance Rule proponents present insurance disclosure as the panacea for the negligent attorney problem,[237] opponents view it as snake oil. Lawyers may resist the perceived encumbrance of

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232. *See* Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 847-48 (1978) (construing insurance as a primary benefit for innocent victims rather than for the attorney against his own carelessness).

233. *See, e.g., Ex parte* Poresky, 290 U.S. 30, 32 (1933) (verifying "the constitutional authority of the state, acting in the interest of public safety, to enact the statute assailed"); Nicole A. Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO. J. LEGAL ETHICS 637, 660-61 (1995) (reviewing courts which "have held that the state has police power to require malpractice insurance").

234. *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 14 (1985) (presenting the argument that when costs associated with accidents are placed on those involved, it influences behavior). The author further posits that this leads to intelligent decision making based on information that the person choosing the behavior can decide for himself how much risk to take. *Id.*

235. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 39 (1970) (recanting the general justifications for cost allocation asserted by legal writers). *See generally* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983) (presenting applications of law and economics to public policy decisions).

236. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970) (investigating the inefficient allocation of costs due to negligence); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983) (applying economic theories to public policy measures, including cost allocations).

237. *Contra* ABA Standing Comm. on Client Prot., Recommendation Rep., Report to the House of Delegates 5 (2004), http://www.ethicsandlawyering.com/Issues/files/ABA HODReport.pdf (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*) (proclaiming that "[m]alpractice insurance is not a panacea for injuries caused by lawyer negligence").

countless regulations, despite the knowledge that they must also avoid situations forcing a choice between their interests and those of the client.[238] If the increasing number of malpractice claims parallels the increasing number of Model Rules of Professional Conduct, the perceived slippery slope to a purely regulated profession does not seem far-fetched.[239] Simple and less oppressive regulations could "uniformly and consistently hold lawyers to the heightened duties and standards that lawyers themselves have set through the promulgation and adoption of a version of the Model Rules of Professional Conduct."[240]

C. *The Public Interest in Self-Regulation*

The legal profession holds the most advantageous position of advocating for a social good.[241] Because most state courts defer to the ABA for formulating regulatory rules and to independent state agencies for enforcing disciplinary rules,[242] "the legal profession, speaking through its organized associations, has had an important voice in its own regulation."[243] Thus, as a self-regulating organization rather than a regulatory agency, bar associations should promote more stringent disciplinary rules and procedures.[244] However, Professor Geoffrey C. Hazard, Jr. predicts that "court-promulgated rules, increasingly intrusive common law, and

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238. *Cf.* Ames v. State Bar of Cal., 506 P.2d 625, 631 (Cal. 1973) (en banc) (extending a California professional rule prohibiting dishonest attorney conduct to also include prevention). The California Supreme Court held that under its ethics rules, an honest attorney should also refrain from placing himself in a position where he may be required to choose between conflicting interests. *Id.* Significantly, this case defines injury as an element of adversity, rather than a requisite to defining an attorney's adverse interests to those of the client. *Id.*

239. *See* Daniel L. Draisen, *The Model Rules of Professional Conduct and Their Relationship to Legal Malpractice Actions: A Practical Approach to the Use of the Rules*, 21 J. LEGAL PROF. 67, 72 (1996) (prophesizing that the Model Rules will eventually have more emphasis in a lawyer's daily operations).

240. *Id.* at 68.

241. *See generally* David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955 (1995) (advocating that lawyers have a duty to take a socially responsible attitude toward the greater good).

242. *See Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1581 (1994) (discussing the resultant history of state supreme courts deferring rule writing and enforcement to outside agencies within the profession).

243. *Id.* at 1582.

244. *See* Paula A. Monopoli, *Legal Ethics & Practical Politics: Musings on the Public Perception of Lawyer Discipline*, 10 GEO. J. LEGAL ETHICS 423, 453-54 (1997) (recommending the state bar associations actively furnish the public with a perception of functioning lawyer disciplinary procedures). Professor Monopoli champions a public relations campaign to thwart public perception that 'taking care of its own' interferes with self-regulation and to dispel the need for legislative intervention. *Id.*

public statutes and regulations" will further the legalization of the profession rather than increased self-regulation.[245] He further contends that the increased, "balkanized" bar can no longer do its job of regulating and will yield to the regulation by courts, legislatures, or other disciplinary agencies.[246]

Options exist to protect clients from truly negligent attorneys without affecting the resource pool of competent attorneys.[247] For example, "licensing standards specifying a certain quantum of education and successful completion of an examination as preconditions for admission to the bar" work to assure some indicia of initial competence.[248] "Licensing of practice is the most stringent regulatory approach, and involves regulation of the practice of the profession or occupation and often the title as well."[249] If regulations truly "protect the public from a potentially serious threat to its health, safety, and welfare,"[250] the public should also have accessible information to the licensing agency created for its benefit.[251] Generally, "information on the operation and practices within an occupation . . . could help consumers understand their options [as well as] the agency's responsibilities . . . ."[252] If other professions require disclosure at a minimum and insurance at a maximum, so too should the legal profession.[253]

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245. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1279 (1991).

246. *See id.* (criticizing further the oversized bar organizations that have diluted their effectiveness as self-regulating).

247. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1693-94 (1994) (discussing the alternative ways to weed out "bad apples" in the legal profession through sanctions, self-regulation, and character certification).

248. Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 723 (1981). Preliminary "screening" devices purporting to determine attorney competence become difficult to standardize and measure, despite further efforts to maintain or improve competence through peer evaluations and Continuing Legal Education (CLE) requirements. *Id.* at 723-29.

249. TEX. SUNSET COMM'N, SUNSET OCCUPATIONAL LICENSING MODEL 1 (Oct. 8, 2003), http://www.sunset.state.tx.us/78.htm (last visited Mar. 12, 2005) (on file with the *St. Mary's Law Journal*).

250. *See id.* (outlining the history since 1977 of reviewing occupational licensing agencies in Texas).

251. *See id.* at 7 (publicizing the purpose and intent behind agency licensing models).

252. *See id.* (informing the general public about licensing agencies).

253. *See, e.g., Court Should Require Disclosure, Plan for Coverage*, LEGAL INTELLIGENCER, Mar. 15, 2004, at 5 (arguing that the practice of medicine and plumbing in Philadelphia require insurance coverage so lawyers should, too, to compensate those injured by malpractice); James E. Towery, *The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance*, 29 VT. B. J. 35, 35 (2003) (asserting that because licensing occupations require some form of insurance, so should the legal profession).

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D. *Public Policy Decisions for Texas*

If the Texas Supreme Court does not adopt the ABA's Model Insurance Rule, the State Bar of Texas should at least consider implementing some aspects of the rule in its overall efforts aimed at lawyer discipline. Legislatively, the State Bar could include insurance disclosure as part of the already mandated online attorney profiling defined under Section 81.115 of the Texas Government Code.[254] For instance, under this provision of the statute, a lawyer could make disclosure information available to the State Bar as part of the required annual registration and reporting structure, and then the information would be available through the State Bar website.[255] Alternatively, Texas could require disclosure on its annual registration forms, similar to how other states already report.[256] This compromise not only complements an already existing administrative procedure, but it also accompanies other information already available to the public.[257] As such, the publication does not negatively present the attorney to the community any more or less than the other provisions would. Finally, the Texas Legislature, with input from the State Bar, could consider some additional provisions to the current consumer protection statutes and provide the public with more options for compensation.[258] Once again, an already existing statutory framework provides an efficient, complementary alternative or addition to the Model Insurance Rule.

V. Conclusion

As the legal profession evolves, so too should the ethical rules guiding it. The *Model Court Rule on Insurance Disclosure* invites an initial effort toward the legal profession's self-regulating ideals and client protection. Unfortunately, the adopted rule offers scant protection on its own. Few professions can boast perfection in fully upholding professional ideals; however, the noble aim of cultivating consideration for the fiduciary responsibility attorneys owe to clients should distinguish the legal profession from others. Legal malpractice insurance issues elicit uneasiness

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254. Tex. Gov't Code Ann. § 81.115(b) (Vernon 2005). This *Online Attorney Profiles* section includes information about licensed attorneys in Texas specific to the attorney's legal education, specialization, and disciplinary record. *Id.*

255. *See* Tex. Gov't Code Ann. § 81.115(c) (Vernon 2005) (listing the state bar requirements).

256. Tex. Gov't Code Ann. § 81.115(d) (Vernon 2005).

257. *See generally* State Bar of Tex., *Client Assistance & Grievance*, *at* http://www.texasbar.com/ (last visited Mar. 12, 2005) (offering services and advice to those seeking redress or grievances against Texas-licensed attorneys).

258. *See* Lisa G. Lerman, *Lying to Clients*, 138 U. Pa. L. Rev. 659, 699 (1990) (proposing that consumer protection laws may offer the best deterrent to attorney negligence).

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from wary attorneys who could be financially or professionally harmed, but this must be balanced against a public need for trust and assurance from the legal profession.

Additionally, the Model Insurance Rule's ambiguous language and requirements create worrisome issues for both the attorney and the client. The Model Insurance Rule requires disclosure to the public in some form, so private practice attorneys currently without malpractice insurance may be indirectly forced to obtain it. This added business expense could greatly affect the solo practitioner or small law firm. Even worse, an attorney's greater concern is whether the disclosure of an attorney's malpractice insurance will consequently encourage clients to sue.

Viewing the Model Insurance Rule in the lights of attorney hesitation and public need, it may not be the ideal long-term solution. On the other hand, for a legal profession still dangling those few cautious toes in the hot water pool of self-regulation, the Model Insurance Rule offers a sound short-term solution. The State Bar of Texas and its cadre of members may soon face greater client protection responsibilities within the legal profession. The large number of Texas solo practitioners overwhelmingly elevates the chances of malpractice or negligence. Offering a client some assurances would not detrimentally affect attorneys and would complement currently established consumer protection measures, albeit legislatively, in Texas. A shivering man needs a coat, not a shirt. The Texas Legislature's tough stance on consumer protection does not yet include the legal profession, but the Texas Bar should not wait for the legislature to act, nor should it rely on the ABA to dictate where the trend has already been leaning. Instead, the Texas Bar can tailor its ideals to self-regulate in a way that protects clients, attorneys, and the profession.

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VI. APPENDIX A

THE MODEL COURT RULE ON INSURANCE DISCLOSURE

RULE ___.INSURANCE DISCLOSURE

A. Each lawyer admitted to the active practice of law shall certify to the [highest court of the jurisdiction] on or before [December 31 of each year]: 1) whether the lawyer is engaged in the private practice of law; 2) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance; and 3) whether the lawyer is exempt from the provisions of this Rule because the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients outside that capacity. Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall notify [the highest court in the jurisdiction] in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect or terminates for any reason.

B. The foregoing shall be certified by each lawyer admitted to the active practice of law in this jurisdiction in such form as may be prescribed by the [highest court of the jurisdiction]. The information submitted pursuant to this Rule will be made available to the public by such means as may be designated by the [highest court of the jurisdiction].

C. Any lawyer admitted to the active practice of law who fails to comply with this Rule in a timely fashion, as defined by the [highest court in the jurisdiction], may be suspended from the practice of law until such time as the lawyer complies. Supplying false information in response to this Rule shall subject the lawyer to appropriate disciplinary action.

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