

WHAT THEY DON'T KNOW CAN HURT THEM: WHY CLIENTS SHOULD
KNOW IF THEIR ATTORNEY DOES NOT CARRY MALPRACTICE
INSURANCE

Jeffrey D. Watters*

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*Jeffrey Watters clerked for Justice Don Willett in 2008–09 and is now an associate at Baker Botts, L.L.P., in Houston. The author would like to thank Justice Willett for his mentorship and assistance during his clerkship. The views in this Article are that of the author and do not necessarily reflect the views of Justice Willett, Baker Botts, L.L.P., its individual lawyers, or its clients.

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I. INTRODUCTION

A divorced mom with two young children enters your law office and tells a painful story. Her ex-husband sued to terminate her parental rights, so she hired an attorney to take and explain her side. Before the case went to trial, however, her attorney commits a major blunder that dooms the case. The upshot: Mom lost custody of her kids. Your research convinces you Mom has a strong legal-malpractice claim, but on the eve of trial, the previous attorney is disbarred and files for bankruptcy. These developments don't trouble you too much . . . until you learn the attorney didn't carry malpractice insurance. Game over: your client is left with nothing.¹

Legal-malpractice insurance is an integral part of attorneys' protection against mistakes they make while practicing law, mistakes that often cost clients far more than what their attorneys could otherwise pay. Yet, for a variety of reasons, many attorneys don't carry malpractice insurance. Given this fact, what should the profession do to protect innocent clients who are injured by uninsured attorneys? One top-down approach is requiring all lawyers to carry legal-malpractice insurance. But mandating coverage is a heavy burden, and so far only Oregon has made it work. In bigger states like Texas, it is doubtful the Oregon approach will work.² Short of mandatory coverage is this middle-ground approach: requiring uninsured attorneys to disclose that fact to clients, who can decide for themselves how to proceed.³

¹This scenario is loosely based on a story found in *State by State, Mandatory Malpractice Disclosure Gathers Steam*, 28 A.B.A. B. LEADER, Mar.–Apr. 2004, available at <http://www.abanet.org/barserv/bl2804.html>.

²Robert Johnston & Kathryn Lease Simpson, *O Brothers, O Sisters, Art Thou Insured?: The Case for Mandatory Disclosure of Malpractice Insurance Coverage*, PA. LAW., May–June 2002, at 28, 30.

³James Podgers, *Time-Out Call: Sponsor Holds Off on Proposal Regarding Malpractice Insurance Disclosures*, 89 A.B.A. J. 66, 66 (2003).

In this Article, I identify the main arguments both for and against mandatory disclosure of malpractice insurance. Then, I examine what other states have done in this area, focusing on states that have adopted mandatory disclosure rules and discussing what form those rules take. Finally, based upon the arguments of both sides and the experience of other states, I analyze whether a mandatory-disclosure rule is warranted and, if so, what form it should take. Given the need for clients to be fully informed and have all the information in front of them, I conclude that Texas should adopt a rule requiring attorneys to disclose if they do not have malpractice insurance directly to their clients as well as to the State Bar for publication on a website.

II. ARGUMENTS FOR MANDATORY DISCLOSURE

The proponents of a mandatory-disclosure rule have four main arguments: (1) whether an attorney has malpractice insurance is a material fact clients should know when making their decision on who represents them; (2) attorneys owe a heightened duty to their clients and also to the legal profession; (3) requiring disclosure will encourage attorneys to obtain malpractice insurance; and (4) disclosure gives the State Bar better information about the current state of malpractice insurance coverage.

A. *Mandatory Disclosure Gives Clients the Information They Need so They Can Make an Informed Decision on Representation*

Proponents of mandatory disclosure argue that clients deserve to know all information material to the representation before hiring an attorney.⁴ Whether or not their prospective attorney carries malpractice insurance is something clients will want to know before making their decision.⁵ In fact, in a telephone survey of the public done by the Texas State Bar, eighty percent of respondents said that when deciding to hire an attorney, it was either very important or moderately important to them to know whether their attorney carries malpractice insurance.⁶ Additionally, those surveyed were asked if an attorney should be required to inform a potential client whether or not the attorney carries malpractice insurance, and seventy

⁴ See Nicholas A. Marsh, Note, "Bonded & Insured?": *The Future of Mandatory Insurance Coverage and Disclosure Rules for Kentucky Attorneys*, 92 KY. L.J. 793, 805–06 (2004).

⁵ See Robert Elder, *Proposal Would Require Lawyers to Tell Clients if They're Insured*, AUSTIN AM.-STATESMAN, May 21, 2008, at B6.

⁶ *Id.*

percent of respondents agreed that the attorney should inform potential clients.⁷

This survey data shows that the public considers malpractice insurance an important factor when they are evaluating which attorney to hire to represent them. The focus, then, of a mandatory-disclosure rule is on giving clients a piece of information they consider important so that clients can make a fully informed decision. A mandatory-disclosure rule gives clients a chance to decide whether or not to work with an uninsured attorney, rather than force them to know enough to ask if their attorney has malpractice insurance first.⁸

On that same note, one reason why a mandatory-disclosure rule is preferable over putting the onus on clients to ask is that clients already assume attorneys must carry malpractice insurance.⁹ If they come into the representation thinking that their attorney does carry malpractice insurance, then that impression should be corrected if it is in fact not true and the attorney does not carry malpractice insurance.

B. Attorneys Have a Heightened Responsibility to Their Clients and to the Legal Profession

Another argument for why attorneys should have to disclose if they do not carry malpractice insurance is that attorneys owe a fiduciary duty to their clients.¹⁰ The fiduciary duty, encompassing the duties of good faith and loyalty, extends to letting clients know the status of the attorney's malpractice insurance.¹¹ The attorney should always act in the client's best interest and the special attorney-client relationship puts the onus on attorneys to disclose important facts material to the representation, such as their malpractice insurance status.¹²

Related to the fiduciary duty is the attorney's duty of communication—

⁷Mary Alice Robbins, *Survey: Public Wants to Know if Lawyer's Insured*, TEX. LAW., May 5, 2008, at 1, 1, available at <http://www.law.com/jsp/LawArticlePC.jsp?id=1202421197904&slreturn=1&hbxlogin=1>.

⁸Indiana State Bar Association, *Mandatory Malpractice Insurance to Be Debated Feb. 14*, RES GESTAE, Jan.–Feb. 2003, at 7, 10.

⁹See James E. Towery, *The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance*, VT. B.J., Fall 2003, at 35, 35.

¹⁰James C. Gallagher, *Should Lawyers Be Required to Disclose Whether They Have Malpractice Insurance?*, VT. B.J., Summer 2006, at 5, 5.

¹¹See *id.*

¹²*Id.*

that is specifically informing the client of information the client would consider important, even if not instructed to do so.¹³ It has been suggested that the duty of communication arises from an attorney's existing duties as the agent of his client, stemming from common law agency principles and from the attorney's existing fiduciary duties.¹⁴ As the survey results discussed above indicate, whether their attorney has malpractice insurance is certainly something clients consider important.¹⁵ Thus, with both fiduciary duties and an attorney's duties as an agent vesting a duty of communication in the attorney, attorneys might already have an implicit duty to tell clients whether or not they have malpractice insurance, even absent a formal rule recognizing it.¹⁶

Another responsibility attorneys have is to the legal profession. Due to the expectations clients have about malpractice insurance, clients are more easily injured when it turns out the attorney does not have malpractice insurance.¹⁷ When a client is injured due to an attorney's negligence and there is no malpractice insurance to provide a safety net, then the client will be let down by the very person who is supposed to vindicate his rights.¹⁸ By affirmatively taking steps and disclosing non-coverage to the client, attorneys represent the best part of our profession by pro-actively protecting clients.

C. Disclosure Encourages Lawyers to Obtain Malpractice Insurance

Proponents note that there is a coercive effect on attorneys that have to tell their clients they do not carry malpractice insurance.¹⁹ It logically follows that if clients refuse to hire attorneys who do not carry malpractice insurance, then those attorneys will have to start carrying malpractice insurance in order to attract those clients.²⁰ And more attorneys carrying

¹³ See Marsh, *supra* note 4, at 807–08.

¹⁴ *Id.* at 806–07.

¹⁵ See *supra* Part II.A.

¹⁶ See Marsh, *supra* note 4, at 810; see also Samuel C. Stretton, *Clients Need to Know Whether Their Lawyer Has Malpractice Insurance*, 27 PA. L. WKLY. 1034, 1034 (2004).

¹⁷ See, e.g., *supra* Part I.

¹⁸ See Nicole D. Mignone, Comment, *The Emperor's New Clothes?: Cloaking Client Protection Under the New Model Court Rule on Insurance Disclosure*, 36 ST. MARY'S L.J. 1069, 1081 (2005).

¹⁹ Jason Miller, *New Rule Would Require Attorney Disclosures Regarding Malpractice Coverage*, 18 LAW. J. 7, 7 (2005).

²⁰ See Farbod Solaimani, Note, *Watching the Client's Back: A Defense of Mandatory*

malpractice insurance is a desirable goal in that more clients will be protected from their attorneys' mistakes.²¹

In this respect, proponents note that mandatory disclosure is better than mandatory coverage.²² Rather than a blanket requirement that malpractice insurance be carried, mandatory disclosure will encourage attorneys to obtain malpractice insurance if that is what their clients find important.²³ But if clients do not consider malpractice insurance important, then the attorneys will not be compelled to carry malpractice insurance. Thus, a mandatory disclosure rule gives clients the power to determine what is important to them.

D. Disclosure Gives the State Bar Better Information About the Current State of Malpractice Insurance Coverage

Finally, proponents note a side benefit to mandatory-disclosure rules. One of the problems with outright mandating all attorneys carry malpractice insurance is the paucity of information regarding how many attorneys actually do not carry malpractice insurance.²⁴ The State Bar of Texas attempted to get a number by commissioning a survey and found that 36.2 percent of Texas attorneys do not carry malpractice insurance.²⁵ Still, that is just an estimate and it is hard to gauge exactly how many attorneys are without malpractice insurance. Some estimates are higher than the State Bar survey, with over fifty percent estimated to not have malpractice insurance.²⁶ If attorneys are required to disclose whether or not they have malpractice insurance to the State Bar, then the Bar will have better numbers to gauge the exact scope of the problem.

III. ARGUMENTS AGAINST DISCLOSURE

Opponents of a mandatory-disclosure rule argue: (1) there is no

Insurance Disclosure Laws, 19 GEO. J. LEGAL ETHICS 963, 974 (2006).

²¹ See *id.*

²² Steve N. Six, *Mandatory Malpractice Insurance Disclosure: Is the Time Right for Kansas?*, 72 J. KAN. B. ASS'N. 14, 14 (2003).

²³ See *id.*

²⁴ Gallagher, *supra* note 10, at 5.

²⁵ Mary Alice Robbins, *Bar Task Force Studies Insurance Disclosure Rule*, TEX. LAW., Nov. 19, 2007, available at <http://www.law.com/jsp/article.jsp?id=1202435484624>.

²⁶ Robert Elder, *Task Force Rejects Plan for Lawyers to Disclose Insurance*, AUSTIN AM.-STATESMAN, May 22, 2008, at B6.

evidence that a mandatory-disclosure rule is necessary; (2) a mandatory-disclosure rule will have an overall harmful effect; and (3) a mandatory-disclosure rule will only confuse or mislead clients.

A. *Disclosure Is Not Necessary*

The main argument against a mandatory-disclosure rule is that it simply is not necessary.²⁷ There is a lack of data that indicates that attorneys without malpractice insurance are a problem.²⁸ No one has shown a large amount of malpractice judgments that go unsatisfied due to a lack of malpractice insurance or that clients are seriously concerned with the issue.²⁹

In fact, several attorneys have noted that their clients have never asked them whether or not they carry malpractice insurance, so it can't be all that important to them. The bottom line is that there is no need to change the status quo.

B. *Disclosure Has Negative Side Effects*

Not only is disclosure not necessary, but opponents claim that there will be a number of negative side effects to a mandatory-disclosure rule. First, a mandatory-disclosure rule encourages clients to choose attorneys based solely on who has malpractice insurance.³⁰ By giving clients something to latch onto, mandatory disclosure elevates malpractice insurance above other issues, such as competency to handle the matter and billing rates, that should play at least as important a role in the client's representation decision.³¹

Because disclosure will encourage clients to choose representation based solely on who has malpractice insurance, a mandatory-disclosure rule stigmatizes those attorneys who cannot afford it, which are disproportionately small firm and solo attorneys.³² Not having malpractice insurance does not speak to the attorney's ability, experience, or the number

²⁷ See Edward C. Medrzycki, *Should Disclosure of Malpractice Insurance Be Mandatory?*, GP SOLO, Apr.–May 2003, at 37, 40.

²⁸ *Id.* at 41.

²⁹ *Id.*

³⁰ See *id.*

³¹ See *id.*

³² *Id.*

of past malpractice claims against that attorney.³³ All it usually means is that the attorney cannot afford malpractice insurance on the small amount of money he brings in.³⁴ However, that is not what the client will perceive if a mandatory-disclosure rule is enacted.³⁵

Thus, to avoid losing clients, these solo and small firm attorneys will be forced to acquire malpractice insurance.³⁶ But since their operating margin is already so slim, the costs of acquiring malpractice insurance will be passed on to their clients, thereby raising the cost of legal representation and making it less affordable.³⁷ This development would especially be alarming since solo and small firm attorneys most often serve the poor and low-income clients who are most in need of affordable legal services.³⁸

Another negative side effect to a mandatory-disclosure rule is that by alerting clients to the potential of insurance coverage, it will encourage them to sue for malpractice more readily.³⁹ If clients know a readily-accessible source of money in insurance is potentially available, they will be more ready to sue if they are unhappy about the results of their litigation.⁴⁰ It will also encourage frivolous lawsuits from clients hoping for a quick settlement with the insurance company.⁴¹

Another negative side effect of a mandatory-disclosure rule is that it will shift regulation of the profession from the State Bar over to the insurance companies.⁴² By having clients decide representation based on who does and does not have malpractice insurance, it encourages all attorneys to obtain malpractice insurance.⁴³ But not all attorneys can be covered.⁴⁴ Insurance companies will refuse to cover some attorneys, especially those

³³ *See id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See* Gallagher, *supra* note 10, at 6.

³⁸ *Id.*

³⁹ Ed Poll, *A Bigger Burden, Mandatory Malpractice Insurance Disclosure: Who Benefits?*, 7 LEGAL MGMT. 24, 26 (2006).

⁴⁰ *Id.*

⁴¹ *See* Bill Brooks, *Stage Set for House Debate Regarding Mandatory Disclosure of Malpractice Coverage*, RES GESTAE, June 2003, at 13, 13.

⁴² Rodney Snow, *Is Mandating Disclosure in Your Fee Letter That You Do Not Carry Malpractice Insurance a Sound Idea?*, 18 UTAH B.J. 12, 13 (2005).

⁴³ *See supra* Part II.C.

⁴⁴ *See* Brooks, *supra* note 41, at 13.

in high-risk practice areas and new attorneys who are unproven.⁴⁵ Requiring disclosure will, in effect, let insurance companies determine who can practice law.⁴⁶

C. Disclosure Will Not Be Helpful

Opponents also claim that a mandatory-disclosure rule will not really be all that helpful. First, mandatory disclosure itself is only a partial remedy. The only real way to ensure that all clients are protected from their attorney's malpractice is to require that all attorneys carry malpractice insurance.⁴⁷ Since the proposed rule only extends to disclosure and not coverage, the same evils currently present (i.e. unpaid malpractice claims) will continue.

Furthermore, disclosure is inherently deceptive. Telling clients that the attorney is covered by malpractice insurance alone is not enough. Most malpractice policies are claims-made, and not occurrence, policies, which means insurance will only cover claims brought in the policy period, regardless of when the malpractice actually took place.⁴⁸ Just because an attorney is covered by malpractice insurance now, that does not mean he will continue to be covered in the future when the client brings a malpractice case.⁴⁹ Furthermore, each malpractice policy has a number of exclusions, most notably an intentional-acts exclusion, that will cause a number of claims not to be covered.⁵⁰ So a bare-bones disclosure does not address the many reasons a claim will not be covered, which leads back to the original problem of malpractice without a remedy.

Additionally, just disclosing that an attorney has malpractice insurance does not speak to the amount of coverage that the attorney has.⁵¹ Passing a mandatory-disclosure rule will encourage attorneys to purchase cheap policies that do not really provide any coverage at all, just so they can say

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Solaimani, *supra* note 20, at 974; see also Edward Poll, Commentary, *Risky Business: A Look at Liability Insurance*, MINN. LAW., May 12, 2008, available at <http://www.minnlawyer.com/article.cfm?recid=77408>.

⁴⁸ See Medrzycki, *supra* note 27, at 40.

⁴⁹ *Id.*

⁵⁰ George A. Berman, *Mandatory Insurance Disclosure: A Solution in Search of a Problem*, BOSTON B.J., May–June 2005, at 31, 31–32.

⁵¹ See Indiana Bar Association, *supra* note 8, at 8.

that they have malpractice insurance.⁵² And even if adequate policy limits are purchased, most malpractice policies are eroding, with the cost of the attorney's defense coming out of the policy limits.⁵³

Finally, opponents argue that disclosure will not help because clients will not understand what malpractice insurance is and that it is not there for their benefit.⁵⁴ Many clients will be surprised, for example, to learn that the insurance company will in fact fight to try and prove the attorney did not commit malpractice and will not pay the claim unless and until they absolutely have to.⁵⁵

IV. EXPERIENCE OF OTHER STATES

In light of the more abstract arguments over mandatory-disclosure rules, it is instructive to see what other states have done in considering mandatory-disclosure rules. In looking at their experiences, we can see the various models of a mandatory-disclosure rule and the resulting ramifications in each state.

To date, of the twenty-eight states that have faced this same issue, twenty-five of them have adopted some form of a mandatory-disclosure rule and only four have not.⁵⁶ States that have adopted a mandatory-disclosure rule fall into two main categories: those that mandate disclosure to the State Bar and those that mandate disclosure directly to the client.⁵⁷ Each group of states is considered here, as well as the ABA Model Rule and the unique situations in South Dakota and Oregon.

A. *ABA Model Rule*

After four years of discussion and debate, the American Bar Association House of Delegates narrowly passed a model mandatory-disclosure rule in 2004.⁵⁸ While the ABA usually leads the charge on new ethical rules, by

⁵² *See id.*

⁵³ *See* Berman, *supra* note 50, at 31.

⁵⁴ *See* Mendrzycki, *supra* note 27, at 40.

⁵⁵ *See* Berman, *supra* note 50, at 32.

⁵⁶ *See* ABA Standing Committee on Client Protection, Chart of State Implementation of ABA Model Rule on Insurance Disclosure, http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf (last visited Dec. 9, 2009) [hereinafter ABA Chart].

⁵⁷ *See* Solaimani, *supra* note 20, at 975.

⁵⁸ ABA Annual Meeting, *ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status*, 20 ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 411

the time the model rule was adopted ten states had already passed mandatory-disclosure rules.⁵⁹ Subsequent to the adoption of the model rule, fourteen more states have adopted mandatory-disclosure rules.⁶⁰

The ABA model rule has been called the “most lawyer-friendly” version of a mandatory-disclosure rule.⁶¹ It mandates disclosure only as to whether a lawyer has malpractice insurance or not.⁶² Disclosure is made only to state bar regulators and not to the general public.⁶³ The model rule is silent as to other aspects of disclosure, such as the best way to transmit that information to the public and minimum coverage limits.⁶⁴ Decisions on those issues were left to the individuals states.⁶⁵ Finally, the model rule is a rule of court and not a disciplinary rule.⁶⁶ Thus, the penalty for non-compliance is a suspension from practice until the attorney provides the information and not a formal disciplinary proceeding.⁶⁷

B. States That Have Declined to Pass a Disclosure Rule

To date, only four states have rejected a disclosure rule.⁶⁸ In Arkansas, the State Bar Board of Governors recommended adoption of such a rule, but that recommendation was defeated by the House of Delegates.⁶⁹ Similarly, in Kentucky, the State Bar has twice recommended adoption of a disclosure directly to clients rule, only to have both suggestions rejected by the Kentucky Supreme Court.⁷⁰ Even given that, Kentucky is not totally bereft of disclosure. Attorneys who practice as limited liability corporations

(2004), available at <http://litigationcenter.bna.com/pic2/lit.nsf/id/BNAP-63Q28B> (last visited Dec. 9, 2009) [hereinafter ABA Annual Meeting].

⁵⁹ *Id.*

⁶⁰ See ABA Chart, *supra* note 56.

⁶¹ See ABA Annual Meeting, *supra* note 58, at 412.

⁶² See ABA Model Court Rule on Insurance Disclosure, http://www.abanet.org/cpr/clientpro/malprac_disc_rule.pdf (last visited Dec. 9, 2009).

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See ABA Annual Meeting, *supra* note 58, at 412.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See ABA Chart, *supra* note 56.

⁶⁹ GRIEVANCE OVERSIGHT COMM. APPOINTED BY THE SUP. CT. OF TEX., REPORT 2009 3 (2009), http://www.txgoc.com/Final_2009_Report.pdf [hereinafter GRIEVANCE OVERSIGHT COMM. REPORT].

⁷⁰ *Id.*

(LLCs) are required to make public disclosure.⁷¹ Recently, both Connecticut and Florida have also voted to reject disclosure rules.⁷²

C. Virginia

The great majority of states that have adopted a mandatory-disclosure rule have followed the ABA model rule.⁷³ These states only require attorneys to disclose whether they have malpractice insurance only to their respective state bar.⁷⁴ The best example of how this type of disclosure works is in Virginia, which has the simplest and least intrusive disclosure requirement.⁷⁵

In Virginia, each attorney must disclose whether or not he has malpractice insurance on the state bar's annual registration statement.⁷⁶ Notably, the Virginia rule does not include any minimum limits that an attorney must certify he has, just simply whether or not the attorney currently has malpractice insurance written by an insurer authorized to do business in Virginia.⁷⁷ The Virginia State Bar then takes that information from the annual registration statements and makes it available to the public via a searchable database on its website.⁷⁸ Plugging in the first and last name of an attorney pulls up all those matches who do not carry malpractice insurance.⁷⁹ Since first putting up the searchable database web page, Virginia officials report that the web page has averaged 1,200 hits a month.⁸⁰

While most states that follow this model disclose this information to the public via a webpage, some states make the information available on request or do not make that information publicly available at all.⁸¹

⁷¹ *Id.*

⁷² See ABA Chart, *supra* note 56.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Johnston & Simpson, *supra* note 2, at 31.

⁷⁶ See VA. SUP. CT. R. 6:4-18.

⁷⁷ See *id.*

⁷⁸ *Id.*; Virginia State Bar, Attorney Search, <http://www.vsb.org/attorney/attSearch.asp> (last visited Jan. 3, 2010).

⁷⁹ *Id.*

⁸⁰ Paul Felsch, *Illinois Supreme Court Amends Rule on Malpractice Insurance*, ST. LOUIS DAILY REC., July 21, 2004.

⁸¹ See ABA Chart, *supra* note 56.

D. South Dakota

On the complete opposite side of the spectrum of Virginia is South Dakota. South Dakota has the most stringent reporting requirement of any state.⁸² In essence, the South Dakota rule requires disclosure to the client or potential client in every communication with them.⁸³

Unlike all the other states, this rule requires continuous reporting, with disclosure mandated in “every written communication with a client.”⁸⁴ The rule also specifies that the disclosure must be “in black ink with type no smaller than the type used for showing the individual lawyer’s names.”⁸⁵ Also unlike other states, the disclosure requirement extends to every advertisement by the attorney, whether written or in the media.⁸⁶ To avoid the impact of the South Dakota mandatory-disclosure rule, the attorney must have malpractice insurance of at least \$100,000.⁸⁷

E. Alaska and Pennsylvania

Somewhere between Virginia and South Dakota are the five states that require disclosure directly to the client.⁸⁸ The best examples of how this type of disclosure rule works are Alaska and Pennsylvania.

Alaska was the first state to require any form of disclosure when it passed its rule in 1999.⁸⁹ The Alaska rule mandates that an attorney must inform a client in writing if the attorney does not have malpractice insurance of at least \$100,000 per claim and \$300,000 annual aggregate.⁹⁰ The rule also requires that the attorney keep a record of the written disclosures for six years after the end of the attorney’s representation of that client.⁹¹ While the rule itself does not require any specific language to be used in the written disclosure, the comments to the rule suggest language

⁸² See Marsh, *supra* note 4, at 813.

⁸³ *Id.*

⁸⁴ S.D. R. PROF’L CONDUCT 1.4(d).

⁸⁵ *Id.* R. 7.5(e).

⁸⁶ *Id.* R. 7.2(k)(1).

⁸⁷ *Id.* R. 1.4(c).

⁸⁸ See ABA Chart, *supra* note 56.

⁸⁹ Ronald E. Mallin & Jeffery M. Smith, 5 LEGAL MALPRACTICE § 36:1 (West 2008 & Supp. 2009).

⁹⁰ ALA. R. PROF’L CONDUCT 1.4(c).

⁹¹ *Id.*

that can be used.⁹²

While this was the early approach to mandatory disclosure, with two other states adopting the direct-to-client approach within the first two years of the adoption of the Alaska rule⁹³, most of the states that subsequently adopted a mandatory-disclosure rule modeled the ABA approach discussed above.⁹⁴ Recently, however, Pennsylvania became the most recent jurisdiction to adopt a direct disclosure-to-client rule.⁹⁵

F. Oregon

Oregon is unique in that it eschews a mandatory-disclosure rule in favor of mandatory malpractice coverage.⁹⁶ In the 1970s, when faced with a malpractice insurance crisis, many state bar associations formed their own insurance programs to compete against the insurance companies.⁹⁷ Oregon, however, took the movement one step further by making their bar association's insurance coverage both mandatory and exclusive.⁹⁸ This scheme ensures that everyone participates and thereby spreads the risk.⁹⁹ As of 2000, approximately 6600 lawyers participated in the Professional Liability Fund.¹⁰⁰ Coverage is provided at \$300,000 per claim and \$300,000 aggregate per year and the cost of that coverage in 2000 was \$1800 per attorney.¹⁰¹

⁹² *Id.* (Alaska Comment).

⁹³ James E. Towery, *The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance*, VT. B.J., Fall 2003, at 35, 35–36 (noting that South Dakota passed a disclosure directly to client rule in 1999 and Ohio in 2001).

⁹⁴ See ABA Chart, *supra* note 56.

⁹⁵ Asher Hawkins, *Malpractice Insurance Disclosure Rule Ok'd*, THE LEGAL INTELLIGENCER, Jan. 11, 2006.

⁹⁶ See Marsh, *supra* note 4, at 800. While Oregon is the only state that currently requires malpractice insurance coverage, Virginia is considering the issue. See Darrel Tillar Mason, *Mandatory Malpractice Insurance—It's Time to Call the Question*, US ST. NEWS, Sept. 4, 2008, available at 2008 WLNR 16916357 (also available at <http://vsb.org/site/news/item/mandatory-malp-ins-080408/>).

⁹⁷ See KIRK R. HALL, OR. ST. BAR PROF'L LIAB. FUND, MINIMUM FINANCIAL RESPONSIBILITY FOR LAWYERS, 14–15 (2000).

⁹⁸ See *id.* at 15.

⁹⁹ See *id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 15–16.

V. ANALYSIS

After review of the arguments for and against and how other states have handled this issue, Texas is faced with two distinct, yet related questions. First, is there a need for a mandatory disclosure of an attorney's malpractice insurance status? Second, if there is a need for mandatory disclosure, what form should the disclosure take?

A. *Is Disclosure Needed?*

First, does Texas need a rule for mandatory disclosure of an attorney's malpractice insurance coverage? I believe that Texas does. The principal argument against disclosure is that not enough evidence exists to support a mandatory-disclosure rule.¹⁰² But these types of claims do not lend themselves to being easily quantifiable.¹⁰³ Much more numerous than legal malpractice judgments languishing unpaid on court dockets are those cases that are never filed in the first place due to it being financially infeasible without the prospect of malpractice insurance.¹⁰⁴ There is no real way to empirically measure the exact extent of the problem.

Additionally, the arguments for mandatory disclosure do not derive their weight from recitation of statistics.¹⁰⁵ Rather, the arguments are more intangible in nature, focusing on disclosure being the right thing to do.¹⁰⁶ Clients deserve to have all relevant information at their disposal when making the decision on which attorney to hire.¹⁰⁷ And the public certainly considers their attorney's malpractice insurance coverage to be important, as evidenced by the State Bar's survey.¹⁰⁸ This obligation is further underscored by the nature of the attorney-client relationship. In fact, commentators have suggested that a duty to disclose the attorney's malpractice coverage already exists implicitly under the attorney's fiduciary duty and the duty of communication.¹⁰⁹

While malpractice insurance is primarily to protect attorneys and their assets, its availability does provide a significant amount of client protection,

¹⁰² Mason, *supra* note 96.

¹⁰³ *Id.*

¹⁰⁴ See Towery, *supra* note 93, at 36.

¹⁰⁵ See *supra* Part II.A.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See Gallagher, *supra* note 10, at 5; see Marsh, *supra* note 4, at 807-08.

even if that is not its primary purpose.¹¹⁰ In fact, legal malpractice claims are the only avenue available to most clients when their attorney negligently handles their case.¹¹¹ The grievance system is only engaged when the attorney breaches a rule, not when he commits simple negligence.¹¹² Further, even when restitution is available in grievance system cases, clients frequently suffer harm beyond the required restitution.¹¹³ And back-up measures like Client Protection Funds only compensate a client when the client has suffered loss due to the attorney's misappropriation or theft, not when the attorney commits malpractice.¹¹⁴

An additional reason in favor of the Bar adopting a disclosure rule is that it continues the tradition of the profession regulating itself. While this has been a long-standing tradition, state legislatures have increasingly intruded on that prerogative.¹¹⁵ Far from a theoretical possibility, legislative intrusion has become a reality in Texas on this exact issue. After a State Bar Task Force voted to not recommend any disclosure rule, proponents warned of a backlash in the Legislature.¹¹⁶ In the very next session, Representative Naishtat introduced a bill that would require the Texas Supreme Court to adopt a rule mandating disclosure if an attorney lacked professional liability insurance.¹¹⁷ That bill would have required the attorney either display in a prominent location a notice that the attorney is not covered by professional liability insurance or provide notice in some other manner.¹¹⁸ While that bill did not pass, it shows that the issue is on the Texas Legislature's radar and that it is monitoring the situation.

Beyond the arguments in favor of a mandatory-disclosure rule, the parade of horrors trotted out by opponents is not borne out by other states'

¹¹⁰ See Mason, *supra* note 96.

¹¹¹ See ABA Model Court Rule on Insurance Disclosure, *supra* note 62, at 4.

¹¹² *Id.*

¹¹³ Editorial, *Time May Be Right for Mandatory Malpractice Insurance*, MICH. LAW. WKLY., Oct. 27, 2003, available at 2003 WLNR 17714381.

¹¹⁴ State Bar of Michigan, Client Protection Fund History, <http://www.michbar.org/client/history.cfm#1> (last visited Dec. 28, 2009).

¹¹⁵ See Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1687 (1994). See generally Mignone, *supra* note 18, at 1102 ("[I]f lawyers wish to maintain a self-regulatory status and privileges in society, they must collectively address the current issues and develop appropriately responsive reforms.").

¹¹⁶ Robert Elder, *Task Force Rejects Plan for Lawyers to Disclose Insurance*, AUSTIN AM.-STATESMAN, May 22, 2008, at B6.

¹¹⁷ See Tex. H.B. 2825, 81st Leg., R.S. (2009).

¹¹⁸ *Id.*

experience with mandatory-disclosure rules.¹¹⁹ Disclosure rules have been on the books for ten years in some states and none of the negative consequences alleged by opponents have materialized.¹²⁰ Even in the states like Ohio that require more aggressive disclosure directly to clients, there have been no problems.¹²¹

And while just because an attorney has coverage today does not mean that the attorney will continue to carry malpractice insurance in the future, the ABA Client Protection Committee found that from experience in Alaska, most attorneys who have malpractice insurance will most likely continue to carry it in the future.¹²² Thus, the value in making the information available outweighed the potential to mislead clients.¹²³ Further, the Model Rule's solution was to have attorneys disclose not only that they had coverage, but also that the attorneys intended to maintain their coverage while practicing law.¹²⁴ This addition offers some additional protections against misleading information that opponents claim as a problem.

Additionally, the Supreme Court of Texas Grievance Oversight Committee investigated whether requiring disclosure would harm attorneys.¹²⁵ After a review of professional liability policies already on the market and the prospect of the State Bar procuring a preferred provider for professional liability insurance, the Grievance Oversight Committee "challenge[d] that the mere addition of a disclosure requirement would force lawyers out of business."¹²⁶

In fact, far from experiencing any negative side effects, many states

¹¹⁹ See Carole J. Buckner, *Malpractice Insurance Disclosure Lurches Toward Approval*, ORANGE COUNTY LAW., Apr. 2008, at 50, 51–52.

¹²⁰ *Id.*; see also Dick Dahl, *Legal Malpractice Coverage Disclosure Controversial in California*, MINN. LAW., Oct. 16, 2006, available at 2006 WLNR 24573546.

¹²¹ See Jane Pribek, *American Bar Association's House of Delegates Adopts Rule on Insurance Disclosure*, MINN. LAW., Aug. 16, 2004, available at WLNR 22296410.

¹²² See ABA Model Court Rule on Insurance Disclosure, *supra* note 62, at 5.

¹²³ *Id.*

¹²⁴ See Pribek, *supra* note 121.

¹²⁵ See GRIEVANCE OVERSIGHT COMM. REPORT, *supra* note 69.

¹²⁶ *Id.* The Committee noted that the Texas Lawyers Insurance Exchange (TLIE) offers special rates to first-year attorneys with premiums at \$500 yearly for \$100,000 per claim and \$300,000 aggregate coverage. *Id.* at 5. This rate increases over time so that by the fourth year of practice, the premium is up to \$1,750. *Id.* at 5–6. The Committee also noted that lawyers who are employed full-time by legal aid organizations are covered for free under the State Bar's insurance plan. *Id.* at 6.

report a positive response to their mandatory-disclosure rule. In Alaska, South Dakota, and Virginia, the percentage of attorneys carrying malpractice insurance has risen after the adoption of a mandatory-disclosure rule.¹²⁷

Further, the clear trend among the states is for adoption of a mandatory-disclosure rule. To date, only four states have decided against mandatory disclosure.¹²⁸ In contrast, twenty-four states over the past ten years have adopted some form of a mandatory-disclosure rule.¹²⁹

The form that a mandatory-disclosure rule takes can address the rest of the arguments against disclosure. Most states require disclosure only if the attorney does not carry malpractice insurance.¹³⁰ There is no disclosure to the client that the attorney does carry malpractice insurance.¹³¹ Thus, concerns about encouragement of litigation are not valid concerns since they are predicated on an affirmative disclosure of coverage that would not exist under the proposed mandatory disclosure rule. To avoid having attorneys buy any policy to avoid disclosure, some states also require a certain minimum amount of coverage, usually at least \$100,000 per claim and \$300,000 in aggregate.¹³² This minimum amount of coverage is chosen in most state rules for two reasons: it is usually the minimum amount of coverage that most professional liability carriers offer and such limits would cover more than ninety percent of malpractice claims.¹³³

¹²⁷GRIEVANCE OVERSIGHT COMM. REPORT, *supra* note 69 (noting an increase in the percentage of attorneys who carried malpractice insurance from eighty percent before the rule to ninety-six percent after the adoption of the rule); *see also* Betty Shaw, *A Look at Reporting Malpractice Insurance Coverage*, MINN. LAW., Apr. 5, 2004, available at <http://www.mncourts.gov/lprb/fc04/fc040504.html> (noting a decrease in Virginia in the number of uninsured attorneys from forty percent to ten percent); *see also* Yvette Donosso Diaz, *Why the Bar Might Mandate Disclosure of Uninsured Practice*, UTAH B.J., Sept.–Oct. 2005, at 8, 10 (citing anecdotal evidence of a “significant number” of attorneys who obtained malpractice insurance in light of the adoption of mandatory-disclosure rules in Alaska and South Dakota).

¹²⁸*See* ABA Chart, *supra* note 56.

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹*Id.*

¹³²ALA. R. PROF'L CONDUCT 1.4(c); N.H. R. PROF'L CONDUCT 1.19; PA. R. PROF'L CONDUCT 1.4(c); S.D. MODEL R. PROF'L CONDUCT 1.4(c); UTAH R. PROF'L CONDUCT 1.4(c) (proposed).

¹³³*See* Mason, *supra* note 96; *see also* Michael Dayton, *N.C. State Bar Adopts Rule on Disclosure of Malpractice Insurance*, N.C. LAW. WKLY., Aug. 4, 2003, available at 2003 WLNR 17711833.

While it is true that mandatory-disclosure rules are no panacea, they have been lauded as a good middle ground that does not mandate that attorneys obtain insurance, but does encourage coverage and lets clients have the information they need to make an informed choice.¹³⁴

B. What Type of Disclosure?

Given both the compelling reasons for adopting a disclosure rule and the lack of consequences in states that have already adopted disclosure rules, the question then turns to what form disclosure should take. As discussed above, the most common types of mandatory disclosure rules are disclosure to the state bar and disclosure directly to the client.¹³⁵

Both forms of disclosure have their strong and weak points. Disclosure to the state bar is easily enforceable, gives the state bar accurate statistical information relating to the prevalence of malpractice insurance coverage, and allows clients to know the status of an attorney's malpractice insurance coverage even before the initial meeting with the attorney.¹³⁶ However, disclosure to the state bar does not ensure that the information gets to potential clients. Only the informed clients who know enough to affirmatively ask will seek that information out. If most clients do not know that attorneys are not required to carry malpractice insurance, then they will not know enough to look for that information. It would not occur to a client to attempt to look up this information on a website.¹³⁷ And that would not protect the type of client most in need of a mandatory-disclosure rule, that being the uninformed client. Sophisticated clients like banks, insurance companies, and corporations usually require proof of insurance before retaining an attorney, leaving at risk the unsophisticated clients who assume their attorney already has coverage.¹³⁸

On the other hand, disclosure to the client directly addresses the main argument in favor of a disclosure rule: that all clients be fully informed if their attorney does not carry malpractice insurance. But this method of disclosure is not easily enforceable as the only way that the state bar will

¹³⁴ Editorial, *Financial Responsibility for Malpractice*, 175 N.J. L.J. 22, 22 (2004).

¹³⁵ See ABA Chart, *supra* note 56.

¹³⁶ See Felsch, *supra* note 80.

¹³⁷ Lisa K. Bruno, *A Proposal Requiring Boston Attorneys That Lack Liability Insurance to Reveal That to Their Clients*, MASS. LAW. WKLY., Feb. 2, 2004, available at 2004 WLNR 22689784.

¹³⁸ See Ramos, *supra* note 115, at 1719; ABA Chart, *supra* note 67.

know if disclosure is occurring is if a client is aware enough to report a violation. Further, without the state bar knowing who is and is not covered, it makes it difficult to determine the impact of a disclosure rule on the number of uninsured attorneys.¹³⁹ Finally, direct to client disclosure only occurs once the client is at the attorney's office. There is no way for the client to find out the attorney's malpractice insurance status before the visit.

Given that each form of disclosure has its problems, I believe that both disclosure to the bar and disclosure to clients are inadequate, by themselves, to fully insure that clients are getting the maximum benefit of required disclosure. After all, the key in crafting a mandatory disclosure rule is to tie the disclosure to the harm. If we really are concerned about giving clients the information necessary to make an informed decision, then the rule should require written disclosure directly to the client to ensure all clients are informed. To do otherwise would undercut the best argument in favor of a mandatory disclosure rule.

However, direct client disclosure should not be the only means of disclosure. Disclosure to the state bar is not a wholly inadequate solution, just an incomplete one.¹⁴⁰ If disclosure to the state bar is coupled with direct disclosure to the client, it can be a strong two-pronged approach to client protection. All of the benefits of disclosure to the state Bar (statistical purposes, savvy consumers who want to know ahead of time, and to ensure compliance with the rules) will be realized without the downside of leaving most clients in the dark. The two approaches can even build on one another.

For example, the notice given directly to the client can include on it the website address that includes the searchable database. Similar to what was proposed in Minnesota, the website can be much more than just a searchable database. Instead, it can be expanded into an educational resource to do such things as explain why an attorney might not carry malpractice insurance, more fully develop what professional liability insurance is and is not, and suggest questions for potential clients to ask their attorneys to more fully flesh out the malpractice insurance issue.¹⁴¹ Thus, both types of disclosure could work hand in glove to emphasize the best part of both models, while at the same time eliminating their respective

¹³⁹ Johnston & Simpson, *supra* note 2, at 28.

¹⁴⁰ *Id.* at 32.

¹⁴¹ Michelle Lore, *MN State Bar Association Committee Seeks Reporting of Legal Malpractice Coverage*, MINN. LAW., Apr. 11, 2005, available at 2005 WLNR 25815235.

negative aspects.

This type of dual-disclosure mechanism was recently under consideration by the California State Bar.¹⁴² In that discussion, a special Task Force did not want to choose between disclosure to the state bar or direct disclosure to the client.¹⁴³ In recommending a model that encompassed both, the Task Force cited the need for the information to get directly to the client and not burdening consumers of legal services by making them hunt for that information.¹⁴⁴ At the same time, the Task Force wanted to make the information publicly available through the California State Bar, giving potential clients the ability to ascertain the attorney's malpractice insurance status before contacting him about potential representation.¹⁴⁵ Ultimately, the Task Force concluded that a dual-disclosure rule best maximized consumer protection and a client's right to know.¹⁴⁶

VI. CONCLUSION

Texas faces a thorny issue that inspires passionate debate on both sides. Those in favor of mandatory disclosure of malpractice insurance argue it's the right thing to do and will give clients the information they need to make informed decisions. Opponents counter there is no demonstrated need for mandatory disclosure, and such a rule will spark harmful side effects.

In looking at how anti-disclosure objections have played out in other jurisdictions, twenty-four out of twenty-eight states that have considered mandatory disclosure have adopted some form of that rule. The earliest such adoptions took place roughly a decade ago, so a data set exists that reveals the real-world impact of mandatory disclosure. On the whole, those twenty-four states have had a positive experience with mandatory disclosure, with none experiencing the adverse effects predicted by opponents.

¹⁴² See Buckner, *supra* note 119, at 50–51. While the Task Force recommended a dual-disclosure rule, the California State Bar's Board of Governors voted 16–4 for a disclosure rule that only mandated disclosure to the client and only if the total amount of the attorney's work on the matter would be more than four hours. See ABA Chart, *supra* note 56.

¹⁴³ ST. BAR OF CAL. INS. DISCLOSURE TASK FORCE, STATE BAR OF CALIFORNIA INSURANCE DISCLOSURE PROPOSAL—JUNE 2006 REPORT (2006), *reprinted in* 752 PLI/LIT 255, 266 (2006).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

If mandatory disclosure is warranted, the best form for such a rule is to require dual-disclosure: directly to the client and also to the State Bar of Texas. Such a dual-disclosure requirement meets the need of adequately informing the client and the State Bar of Texas and best marries the arguments in favor of mandatory disclosure with a rule that effectuates those arguments.