

The Politics of Lawyer Regulation: The Case of Malpractice Insurance

LESLIE C. LEVIN*

ABSTRACT

This Article examines the politics of lawyer regulation and considers why some states will adopt lawyer regulation that protects the public, when others will not. It uses the debates over how to regulate uninsured lawyers as a lens through which to examine the question. Clients often cannot recover damages from uninsured lawyers who commit malpractice, even when those lawyers cause serious harm. Yet only two states require that lawyers carry malpractice insurance. This Article uses case studies to examine the ways in which six states recently have addressed the issue of uninsured lawyers to understand this regulatory failure. It uses interest group theory and cultural capture to explain why state supreme courts and legislatures rarely initiate efforts to regulate lawyers in this context, and why lawyer regulation is so dependent on the organized bar. The case studies suggest when some state bars will act to regulate lawyers in this context, and factors that affect whether states will ultimately adopt public-regarding laws. The Article concludes that if courts and legislatures will not initiate or support lawyer regulation that is unpopular with the bar, other means are needed to inject the public's interests into the regulatory process. It suggests two ways to do so.

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* Hugh Macgill Professor of Law, University of Connecticut School of Law. I thank Benjamin Barton, Jon Bauer, Susan Saab Fortney, Lynn Mather, and Laurel Terry for their comments on an earlier draft of the Article. I am also grateful to Doug Ende for providing useful information and to the incomparable reference librarians at the University of Connecticut Law Library. © 2020, Leslie C. Levin.

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INTRODUCTION

States vary in their willingness to regulate lawyers for the benefit of the public. In forty-eight states, lawyers are not required to maintain insurance to compensate victims of lawyer malpractice. Only two states—Idaho and Oregon—impose such a requirement.¹ In forty-eight states, non-lawyers are prohibited from giving legal advice to individuals in personal plight areas, even though many people cannot afford a lawyer. Only Utah and Washington allow licensed non-lawyers to provide such advice.² Likewise, only two states—New York and New Jersey—impose

1. IDAHO BAR COMM’N R. 302(a)(5) (2018); OR. REV. STAT. § 9.080 (2)(a)(A) (2018).

2. See UTAH JUDICIAL ADMIN. R. 14-802(c) (2017) (permitting licensed paralegal practitioners to engage in limited practice in areas including divorce and cohabitant abuse); WASH. ADMIN. & PRACTICE R. 28(F) (2020) (permitting Limited License Legal Technicians to give advice in defined practice areas). Arizona has also begun a two-year pilot project that will license a small number of nonlawyer “legal advocates” to provide limited advice on civil matters arising from domestic violence. See Stephanie Francis Ward, *Training for Nonlawyers to Provide Legal Advice Will Start in Arizona in the Fall*, A.B.A. J. (Feb. 6, 2020), <https://www.abajournal.com/web/article/training-for-nonlawyers-to-provide-legal-advice-starts-in-arizona> [https://perma.cc/LL9J-FAZS]. Some other

discipline on law firms,³ even though a firm's senior lawyers and ethical infrastructure affect lawyer conduct.⁴ Why do a few states, on some occasions, regulate the legal profession in ways that protect the public, while most others do not?

This is especially puzzling because the states' highest courts usually claim some responsibility for lawyer regulation and presumably share similar views of lawyers' duties and their role in society. They have adopted similar requirements for bar admission and rules of professional conduct for lawyers.⁵ They communicate with one another about issues concerning lawyer professionalism.⁶ Judges share self-interested reasons for putting public protection before lawyers' interests.⁷ When lawyers harm the public, this negatively affects the public's perception of the legal profession and the judiciary.

Of course, state courts *do* impose requirements on lawyers that protect the public. Yet courts mostly do so when the organized bar advocates for or approves of those requirements. This can be seen in demanding state bar admission requirements, which were championed by the American Bar Association ("ABA") and other bar organizations.⁸ Likewise, state courts have acted to substantially improve

states are also considering proposals to license nonlawyer legal services providers. *See, e.g.,* Aebra Coe, *Like It or Not, Law May Open Its Doors to Nonlawyers*, LAW360 (Sept. 22, 2019), <https://www.law360.com/articles/1201357/like-it-or-not-law-may-open-its-doors-to-nonlawyers> [<https://perma.cc/WR7F-NVE4>]; Jason Tashea, *Oregon Bar Considering Paraprofessional Licensing and Bar-Takers Without JDs*, A.B.A. J. (Oct. 7, 2019), <http://www.abajournal.com/news/article/oregon-bar-to-consider-paraprofessional-licensing-and-bar-takers-without-jds> [<https://perma.cc/R6SB-8LJP>].

3. *See* Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client and Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717, 772 (2016).

4. *See, e.g.,* Kimberly Kirkland, *The Ethics of Constructing Truth: The Corporate Litigator's Approach*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 158, 164–68 (Leslie C. Levin & Lynn Mather eds., 2012); Susan Fortney & Tahlia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L. J. 152, 165–67 (2012).

5. All of the states require lawyers to graduate from law school or otherwise engage in law study and demonstrate that they possess the requisite character to practice law. *See* NAT'L CONF. OF BAR EXAMINERS & AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2019, at 9–12, <http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf> [<https://perma.cc/SZ6B-99ZP>]. Virtually all states require passage of a bar examination. *Id.* at Charts 1 & 3. All states except California have adopted some version of the *Model Rules of Professional Conduct. Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules [<https://perma.cc/GC2F-4RSZ>].

6. For example, the Conference of Chief Justices has a Professionalism and the Competence of the Bar Committee. *See* *Committees*, CONF. OF CHIEF JUSTICES, <http://ccj.ncsc.org/Committees.aspx> [<https://perma.cc/6XEK-6GBH>] (last visited Apr. 19, 2020).

7. The terms "judges" and "justices" are used interchangeably in this Article to refer to judges on the states' highest courts. While these individuals are usually referred to as "justices," in Maryland and New York they are called "judges."

8. *See* RICHARD L. ABEL, AMERICAN LAWYERS 6, 54–55, 57, 63, 68 (1989); MICHAEL J. POWELL: FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 36 (1988); TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 76 (1987).

lawyer discipline systems in response to the ABA's recommendations.⁹ State lawyers' rules of professional conduct are variations on the ABA's *Model Rules of Professional Conduct*.¹⁰ State bar association committees or court-appointed task forces (composed exclusively or predominantly of lawyers) usually produce the initial draft of proposed rules, and state courts often approve these proposals with little or no change.¹¹

To be clear, many of the ABA's proposals serve to protect the public. For example, the ABA *Model Rules* require lawyers who hold client funds to maintain them in a separate bank account and to account for them promptly.¹² These requirements can be inconvenient for lawyers. Yet lawyer thefts of client funds also hurt the legal profession. Thefts undermine the professional project, i.e., lawyers' efforts to raise their status and protect their monopoly over the provision of legal services.¹³ Failure to regulate lawyers to prevent lawyer thefts may endanger the legal profession's ability to continue to be so deeply involved in its own regulation. Thus, when bar associations propose rules that protect the public, their motivations are not entirely altruistic. Moreover, much lawyer regulation stops short of imposing requirements that adequately protect the public.¹⁴

Some of the reasons why courts defer to the organized bar when regulating lawyers have been described elsewhere.¹⁵ Less studied is the question of why courts occasionally adopt public-regarding laws even when the organized bar or other lawyers oppose them.¹⁶ Courts may do so when it makes their work easier. For example, courts may permit non-lawyers to provide certain legal services to unrepresented litigants, making court proceedings more efficient.¹⁷ Courts may

9. In 1970, the ABA recommended several changes in disciplinary enforcement, including state-wide centralization of lawyer discipline under the control of the state's highest court. See SPECIAL COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 8, 24 (AM. BAR ASS'N 1970). Many courts subsequently adopted the Model Rules for Lawyer Disciplinary Enforcement, which provided for a hearing process that was dominated by lawyers. See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 3A (AM. BAR ASS'N 2002).

10. See *Alphabetical List of Jurisdictions Adopting Model Rules*, *supra* note 5; *Jurisdictional Rules Comparison Charts*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ [<https://perma.cc/DZ5Z-SMHS>].

11. See Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L. J. 73, 94 (2009).

12. See MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2018) [hereinafter MODEL RULES].

13. See, e.g., ABEL, *supra* note 8, at 158, 163.

14. For example, the *Model Rules* permit lawyers to reveal client confidences to prevent client fraud that is likely to cause substantial financial injury to another, but do not require it, and only permit it if the lawyer's services were used. See MODEL RULES R. 1.6(b)(2)–(3).

15. See, e.g., BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 137–38 (2011); Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the "Captured" Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 465–66 (2002).

16. The term "public-regarding laws" is used in this Article to mean statutes, court rules, or regulations that benefit the public rather than the interests of lawyers.

17. This occurred when the Washington Supreme Court adopted rules permitting Limited License Legal Technicians to provide out-of-court representation in family law cases, notwithstanding strong opposition by the Washington State Bar Association's Family Law section. See Brooks Holland, *The Washington State*

also adopt public-regarding rules to head off legislation aimed at lawyers; such legislation challenges the courts' claims that they have the exclusive power to regulate in this area. Some state courts may depart from the bar's preferences because of the history and culture of the court. Each supreme court develops "its own understanding of its responsibilities—its particular jurisprudential orientation and attitude toward legal change, its relationship to other political and legal institutions, and its pattern of intracourt interaction."¹⁸

Although this discussion has focused on courts, state legislatures sometimes play an important role in lawyer regulation. Even in states where courts claim exclusive authority to regulate lawyers, that claim usually focuses on issues relating to admission and discipline.¹⁹ State courts may accede to legislative efforts to regulate lawyers when the legislation is viewed as "in aid of" judicial functions or it arises in other contexts.²⁰ In some cases, legislative involvement in lawyer regulation is pro forma; in others, it can involve a complex political negotiation among courts, legislators, lawyer organizations, and (rarely) other advocates acting in the public interest.

This Article seeks to identify conditions under which some states will adopt more public-regarding laws—even in the face of lawyer opposition—while others are unwilling or unable to do so. To explore this question, it looks at a single issue: how states have addressed concerns about uninsured lawyers. Most developed common law countries and European civil law countries require lawyers in private practice to carry lawyer professional liability ("LPL") insurance.²¹ Yet while many states require doctors and other members of licensed occupations to carry liability insurance, the vast majority of U.S. jurisdictions do not require lawyers to do so. In some states, more than 40% of solo practitioners are uninsured.²² When uninsured lawyers make mistakes, their victims often cannot find another lawyer to represent them in a malpractice case.²³ This is because many victims can only afford to sue on a contingent fee basis. If there is no insurance, there are usually no other assets available to compensate the malpractice lawyer.

Limited License Legal Technician Practice Rule: A National First in Access to Justice, 82 MISS. L.J. SUPRA 75, 97–99 (2013).

18. G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 237 (1988).

19. See Leon Green, *The Courts' Power Over Admission and Disbarment*, 4 TEX. L. REV. 1, 11–12 (1925); see also *infra* notes 225, 264, 322, 361, 407–08 and accompanying text.

20. See, e.g., *In re Kaufman*, 206 P.2d 528, 539 (Idaho 1949); *infra* note 324 and accompanying text.

21. HERBERT M. KRITZER & NEIL VIDMAR, WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS 171 (2018). Australia, Canada, and England also require lawyers to carry LPL insurance. *Id.*

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

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

Consequently, victims often cannot recover from uninsured lawyers for the injuries they sustained.

In fact, most lawyers in private practice recognize the value of LPL insurance and are insured.²⁴ Yet without an insurance requirement, insured lawyers may be drawn into malpractice suits because another attorney involved in the matter may be uninsured.²⁵ An insurance requirement may also increase the public's trust in lawyers.²⁶ But some lawyers strongly believe they will be harmed by an insurance requirement. Some think that having insurance encourages malpractice lawsuits.²⁷ Others do not want to pay for it, often because they are part-time or essentially retired and are not earning much from law practice. A few claim they cannot obtain coverage or cannot afford it at the price at which it is offered.²⁸

Consequently, instead of requiring lawyers to carry LPL insurance, some states have taken half-way measures endorsed by the ABA. Seven states now require uninsured lawyers to provide written disclosure of their lack of coverage to clients. Yet even if clients read these disclosures, they are unlikely to understand their implications or to feel like they can switch lawyers. Nine other states post insurance lawyers' information on state court or judicial websites. These disclosure regimes are inadequate to alert the public that lawyers are uninsured or of the potential danger of hiring an uninsured lawyer. They are largely "symbolic reassurance" that the public is benefiting from the law.²⁹ The remaining states have taken little or no action to protect the public from uninsured lawyers.

Using debates over malpractice insurance requirements, this Article explores some of the reasons for the differences in the states' willingness to regulate

24. The percentage of insured private practitioners ranges from about 80% in Arizona and Michigan to 94% in South Dakota. See Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 FLA. L. REV. 1281, 1299, 1301–02 (2016). A much higher percentage of solo lawyers are uninsured. *Id.* at 1282 n.1.

25. *Id.* at 1324; Robert I. Johnston & Kathryn Lease Simpson, *O Brother, O Sisters, Art Thou Not Insured?: The Case for Mandatory Disclosure of Malpractice Insurance Coverage*, PA. LAW., May-June 2002, at 28, 32.

26. Uninsured lawyers can undermine the individual client's trust in lawyers when a client discovers she has no meaningful recourse against an uninsured lawyer. Public trust is also undermined when the news media report stories about clients who cannot recover for the harm caused by those lawyers. See, e.g., Robert Elder, *Limited Help for Lawyers' Victims*, AUSTIN AM. STATESMEN, June 23, 2008, at A1 (describing a client who had a large malpractice judgment against an uninsured lawyer); Molly Selvin, *Lawyers Split on Insurance Proposal*, L.A. TIMES (July 2, 2007), <https://www.latimes.com/archives/la-xpm-2007-jul-02-fi-legal2-story.html> [<https://perma.cc/7RX8-JJ4E>] (describing a client who could only recover a "tiny fraction" of a judgment against an uninsured lawyer); Andrew Wolfson, *Noninsured Lawyer Costs Woman*, COURIER J. (June 16, 2014), <https://www.courier-journal.com/story/news/local/2014/06/16/lawyers-lack-insurance-costs-okolona-woman/10638183/> [<https://perma.cc/HJ5V-LGW7>] (describing an uninsured lawyer who filed for bankruptcy to avoid paying a malpractice judgment to a disabled client).

27. For example, in a survey of more than 1000 Nevada lawyers, more than 50% agreed or strongly agreed that having insurance encourages malpractice lawsuits. See *In re Amendments to Supreme Court Rule 79, Petition of the State Bar of Nevada*, ADKT 534 (Nev. Sup. Ct. June 29, 2018), at Ex. C.

28. 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, 647 (1995); Levin, *supra* note 24, at 1282, 1291–95.

29. See MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 4, 22–23 (1985).

lawyers in ways that favor the public's interests. It employs case studies to identify possibly relevant factors.³⁰ Part I briefly describes the history of lawyer regulation in the United States and explains why lawyers continue to play such a significant role in their own regulation. Part II looks more closely at the institutional actors involved in lawyer regulation: the courts, the legislatures, and bar organizations. It discusses the reasons why courts often regulate in ways that favor the legal profession's preferences and why legislatures are (somewhat) less likely to favor lawyers. The Article then discusses some differences between mandatory and voluntary state bar organizations and some factors that influence their decisionmaking. In Part III, the Article recounts the history of the debate over malpractice insurance requirements and some of the arguments against it. It also discusses the ABA's Model Court Rule on Insurance Disclosure and demonstrates why an insurance requirement better serves the public's interests. Part IV of the Article looks closely at how Oregon (forty years ago), and six other states (California, Idaho, Nevada, New Jersey, Texas, and Washington), have handled the regulation of uninsured lawyers relatively recently. The Article discusses the political culture of the states, the historical context in which the insurance issue arose, and the role played by the state courts, the legislature, and the bar. Drawing on the case studies, Part V then identifies some factors that seemingly affect whether states will adopt public-regarding laws concerning LPL insurance. These factors include whether the organized bar supports it, the applicable lawmaking or rulemaking process, the mandatory or voluntary nature of the state bar, the views of the leadership, and the opportunities for lawyers opposed to the measures to directly lobby against the law. In the Conclusion, the Article briefly considers when states are likely to adopt public-regarding laws governing lawyers. It suggests some areas for further research and some possible ways to ensure that the public interest receives appropriate consideration in debates over lawyer regulation.

I. A BRIEF HISTORY OF LAWYER (CO-)REGULATION

Lawyer regulation is often described either as a product of lawyer "self-regulation" or as a power residing largely in the state's highest court.³¹ The first characterization is inaccurate. The second is incomplete. Lawyer regulation is

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

31. See MODEL RULES pmb1. (noting that the legal profession is "largely self-governing" but that "ultimate authority over the legal profession is vested largely in the courts").

usually a product of co-regulation by state courts, the legislature, and the organized bar, and to a lesser extent, by Congress and administrative agencies.

For the first hundred years after the American Revolution, state legislatures and the judiciary regulated lawyers.³² Some courts maintained that if the state constitution did not explicitly delegate power over the legal profession to the courts, such power lay with the legislature.³³ Other courts claimed an inherent authority to regulate the admission and discipline of lawyers.³⁴ In the late nineteenth century, a few courts began to declare they had the *exclusive* right to regulate the conduct of lawyers.³⁵ This claim was grounded in separation of powers, language in state constitutions, and the idea that lawyers were “officers of the court.”³⁶

During the 1870s, elite lawyers formed voluntary bar associations such as the ABA, the Association of the Bar of the City of New York (“ABCNY”), and the Chicago Bar Association (“CBA”), in part, to raise the status and competence of lawyers.³⁷ These bar associations quickly moved to regulate lawyers by establishing committees to handle lawyer discipline.³⁸ At that time, the courts were not performing that function unless lawyer misconduct occurred in court.³⁹ The elite bar organizations also sought to raise bar admission standards and to persuade states to

32. See Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 533 (1983). The history of lawyer regulation during that period has been well-documented elsewhere. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 305, 316–22 (2d ed. 1985); GERARD W. GEWALT, *THE PROMISE OF POWER: THE LEGAL PROFESSION IN MASSACHUSETTS, 1760–1840*, at 60–61, 107, 182–88 (1979); ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 163–64, 167–68, 172–73, 182–92, 198, 208, 227–28 (1953); CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 508–39 (1966).

33. See *In re Cooper*, 22 N.Y. 67, 93 (1860); Alpert, *supra* note 32, at 536.

34. See Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 784–86 (1976); see also *Ex Parte Smith*, 28 Ind. 47, 48 (1867); *In re Woolley*, 74 Ky. 95, 111–12 (1875); *In re Mills*, 1 Mich. 392, 393–94 (1850). Some courts explicitly tied their inherent authority to discipline to their authority to admit lawyers. See, e.g., *Beene v. State*, 22 Ark. 149, 156–57 (1860); *In re Mulford*, 1 Cal. 143, 150 (1850); *People ex rel. Moses v. Goodrich*, 79 Ill. 148, 153 (1875); *In re Payton*, 12 Kan. 398, 403–04 (1874); *Baker v. Commonwealth*, 73 Ky. 592, 597–600 (1874); *Sanborn v. Kimball*, 64 Me. 140, 146 (1875); *In re Davies*, 93 Pa. 116, 120–21 (1880).

35. See *In re Day*, 54 N.E. 646, 653 (Ill. 1899); *In re Splane*, 16 A. 481, 483 (Pa. 1889); Green, *supra* note 19, at 11–12; Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1, 6–7 (1989).

36. Alpert, *supra* note 32, at 539–41.

37. See ABEL, *supra* note 8, at 44–45; HALLIDAY, *supra* note 8, at 64–65; POWELL, *supra* note 8, at 7.

38. The ABCNY formed a committee to hear grievances in 1870 and first brought charges against a lawyer in 1877. See GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870–1970*, at 355, 361 (1970); Albert P. Blaustein, *The Association of the Bar of the City of New York: 1970–1951*, 6 REC. ASS’N B. OF CITY OF N.Y. 261, 265–66 (1951). The CBA formed a Grievance Committee in 1874 and first brought a disbarment proceeding against a lawyer in 1875. See *People v. Leary*, 84 Ill. 190, 190 (1876); HERMAN KOGAN, *THE FIRST CENTURY: THE CHICAGO BAR ASS’N 1874–1974*, at 42 (1974).

39. POWELL, *supra* note 8, at 19.

adopt higher pre-legal educational requirements.⁴⁰ The bars' efforts contributed to the perception that the bar was, and should be, responsible for its own regulation.⁴¹

By 1916, there were forty-eight state or territorial bar associations, but some had very few members.⁴² Starting in the 1920s, some state bars became mandatory (or "unified") bars to which all lawyers were required to pay dues and belong as a condition of licensure.⁴³ Much of the impetus for the mandatory bar movement came from lawyers who sought to create an autonomous, self-regulating legal profession with the power to establish its own admissions criteria, ethical standards, and disciplinary process.⁴⁴ Proponents of mandatory state bars believed that a state-wide, compulsory, and well-financed bar could benefit the economic interests of lawyers, allow them to speak with one voice, and influence the legislature more than a voluntary organization.⁴⁵

Both mandatory and voluntary bar organizations also played an important role in lawyer regulation through their development of codes of conduct. In 1908, the ABA drafted its first *Canons of Ethics*.⁴⁶ The *Canons* were adopted, with minor variations, by virtually all the states.⁴⁷ In 1969, the ABA promulgated a *Model Code of Professional Responsibility* to govern the legal profession, which most state courts adopted with variations.⁴⁸ This again occurred in 1983, after the ABA adopted the *Model Rules of Professional Conduct*. To this day, state courts consider and adopt rule changes as the ABA amends its *Model Rules*.⁴⁹ These rules

40. ABEL, *supra* note 8, at 46–49, 54, 68–69; JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 94–101 (1976); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 *YALE L.J.* 491, 499–501 (1985).

41. POWELL, *supra* note 8, at 27.

42. See ABEL, *supra* note 8, at 46; JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 287 (1950).

43. HALLIDAY, *supra* note 8, at 82.

44. DAYTON D. MCKEAN, *THE INTEGRATED BAR* 40 (1963); William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 *PEPP. L. REV.* 485, 518–19 (1995). Herbert Harley, the most influential early proponent of mandatory bars, advocated for a model like the Upper Law Society of Ottawa, which included all Ottawa lawyers and formulated standards for admission, discipline, and legal education. See Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 *AM. B. FOUND. RES. J.* 1, 9, 18 (1983).

45. MCKEAN, *supra* note 44, at 34, 36, 76; Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 *FLA. ST. U. L. REV.* 35, 38–39 (1994).

46. *CANONS OF PROFESSIONAL ETHICS* (1908).

47. Report of the Standing Committee on Professional Ethics and Grievances, 47 *A.B.A. REP.* 466, 467 (1924).

48. See William E. Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 *U. RICH. L. REV.* 49, 56 (2002).

49. This process is the primary basis for the claim that the bar "self-regulates." Indeed, some courts have reflexively repeated this claim. See, e.g., *In re Buckelew*, 731 P.2d 48, 55 (Alaska 1986) ("Society allows the legal profession the privilege of self-regulation."); *People v. Kanwal*, 357 P.3d 1236, 1246 (Colo. 2015) (noting lawyers are a "self-regulating profession"); *Averill v. Cox*, 761 A.2d 1083, 1089 (N.H. 2000) (noting that "the legal profession is self-regulated"); *State ex rel. Oklahoma Bar Ass'n v. Burns*, 145 P.3d 1088, 1095 (Okla. 2006) (noting that the legal profession "is self-regulated"). As Fred Zacharias observed, however, when regulators such as courts and legislators can trump the regulatory activities of lawyers, lawyers cannot be said to be engaged in "self-regulation." See Fred C. Zacharias, *The Myth of Self-Regulation*, 93 *MINN. L. REV.* 1147, 1153 (2009).

articulate the basis on which lawyers can be disciplined, and in some states, can be considered in legal malpractice cases as evidence of the duty of care.⁵⁰

State legislatures can also serve as a significant co-regulator of the legal profession. In states such as California, the legislature plays a substantial role in lawyer regulation.⁵¹ Even where state courts claim the exclusive authority to regulate the legal profession,⁵² these courts will sometimes accede to laws enacted by the state legislature as a matter of comity.⁵³ In the areas of admission and discipline, where courts jealously guard their prerogative to regulate lawyers, legislatures can sometimes enact reasonable regulations concerning admission and discipline in aid of the courts' powers, so long as the ultimate power of admission or disbarment lies with the courts.⁵⁴ State legislatures sometimes created mandatory bars at the request of lawyer organizations.⁵⁵ In addition, state legislatures sometimes enact other laws that impose responsibilities on lawyers, such as requirements for fee agreements and for handling client funds.⁵⁶

Finally, federal lawmakers also regulate the legal profession and the practice of law. Federal law enables lawyers who engage in an exclusively federal practice such as patent or immigration law to practice in states in which they are not licensed.⁵⁷ Lawyers must comply with additional federal requirements to practice before the U.S. Patent and Trademark Office.⁵⁸ Federal agencies—including the Securities and Exchange Commission and the Executive Office for Immigration Review—can impose discipline on lawyers.⁵⁹ The focus of this Article, however, is on the states, where most lawyer regulation occurs.

II. REGULATORY CAPACITY, EXPERTISE, AND INCENTIVES: THEORIES OF WHY THE REGULATORS ACT

To understand why some states are able to implement lawyer regulation that favors the public notwithstanding lawyer opposition, it is necessary to look

50. See generally RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* §§ 1–9 (West 2018).

51. See, e.g., *infra* notes 272–73, 277, 289 and accompanying text.

52. See, e.g., NISHA, LLC v. TriBuilt Constr. Grp., LLC, 399 S.W.3d 444, 447 (Ark. 2012) (noting the court's "exclusive authority" to regulate the practice of law); *Turner v. Ky. Bar Ass'n*, 980 S.W.2d 560, 563 (Ky. 1998) (noting the judiciary's exclusive power to make rules governing the practice of law); *Miss. Bar v. McGuire*, 647 So. 2d 706, 708 (Miss. 1994) (noting the court has asserted "its exclusive and inherent jurisdiction of matters pertaining to attorney discipline"); *Cleveland Metro. Bar Ass'n v. Davie*, 977 N.E.2d 606, 616 (Ohio 2012) (stating that state supreme court has "exclusive power to regulate, control, and define the practice of law in Ohio").

53. See Wolfram, *supra* note 35, at 16.

54. See Walter W. Steele, Jr., *Cleaning Up the Legal Profession: The Power to Discipline—The Judiciary and the Legislature*, 20 ARIZ. L. REV. 413, 418 (1978).

55. See MCKEAN, *supra* note 44, at 41–42.

56. See, e.g., CAL. BUS. & PROF. CODE § 6146(a) (West 2019); CONN. GEN. STAT. § 51-81c (2019); N.Y. JUD. LAW § 497 (West 2019).

57. See *Sperry v. Florida*, 373 U.S. 379, 401 (1963); 8 C.F.R. § 292.1 (2019).

58. 37 C.F.R. § 11.6 (2019).

59. See SEC Rules of Practice 102(e) (2018); 8 CFR § 1003.105 (2019).

closely at the main regulators—the courts, legislatures, and the bar—to identify their capacity, expertise, and incentives to effect change. Before proceeding, however, it is useful to briefly describe some of the theoretical explanations for the behavior of government institutions and interest groups.

Public choice theory posits that elected officials, like all individuals, are rational actors who act to maximize their own welfare when they create law.⁶⁰ The theory initially focused on legislators and administrative agencies, but has also been applied to courts.⁶¹ Interest group theory attempts to explain regulatory outcomes as a result of pressures brought to bear by interest groups that have enough influence to affect the regulatory process.⁶² Economist George Stigler argued that industries (and occupations) seek government regulation primarily for their own benefit, not for the benefit of the general public.⁶³ Further, producers of goods and services are more likely to invest in political action than are consumers due to producers' narrow focus on their own products or income, in contrast to consumers' more varied areas of concern.⁶⁴ Thus, certain groups “enjoy organizational advantages that enable them to exercise ‘disproportionate’ influence on politicians and regulators and thus secure laws favoring their interests even when those laws injure large groups with diverse interests (e.g., the general public).”⁶⁵ Many politically contested issue areas involve several groups with different interests, but some issue areas “are elitist, ruled by a single coalition or perhaps hav[e] just a handful of influential groups.”⁶⁶

One way in which industries achieve their goals is through regulatory capture. Regulatory capture is a process by which regulation “is consistently or repeatedly directed away from the public interest and toward the interest of the regulated industry by the intent and actions of the industry itself.”⁶⁷ Capture can occur

60. See Daniel A. Farber & Anne Joseph O’Connell, *Introduction: A Brief Trajectory of Public Choice and Public Law*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 2 (2010); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J. L. & PUB. POL’Y 209, 228 (2016); Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 52–53 (1988).

61. See Brace et al., *supra* note 30, at 93; Farber & O’Connell, *supra* note 60, at 5.

62. While many scholars use the term “interest group theory,” some describe it as a strand of public choice research. See, e.g., Roger D. Congleton, *Intellectual Foundations of Public Choice, the Forest from the Trees*, 175 PUB. CHOICE 229, 231 (2019).

63. See George J. Stigler, *A Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–13 (1971).

64. Another explanation is that smaller groups are more likely to work effectively because it is easier for them to overcome the free rider problem. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 10–36 (1965); Farber & O’Connell, *supra* note 60, at 10.

65. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 42 (1995); see also DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 33 (1991).

66. See Andrew McFarland, *Interest Group Theory*, in THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS 37, 42 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010).

67. See Daniel Carpenter & David A. Moss, *Introduction*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 13 (Daniel Carpenter & David A. Moss eds., 2014); see also Ernesto Dal Bo, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL’Y 203, 203 (2006).

when regulators “depend too much on the industries they regulate for information, political support, or guidance,” when the revolving door between an agency and the regulated industry allows industry to tempt regulators with benefits (including future employment), and in other ways.⁶⁸ Capture also occurs because the cultural or social influence of repeated interaction with the regulated industry may cause the regulator to think like the regulated industry and fail to “easily conceive another way of approaching its problems.”⁶⁹ Theories of capture are most often applied to administrative agencies and to legislatures, but have also been applied to courts.⁷⁰ Some ways in which capture occurs in the context of lawyer regulation are described below.

A. THE COURTS

Political scientists have extensively researched state supreme courts,⁷¹ although not with respect to their role in lawyer regulation. As public choice theory suggests, some judicial behavior is motivated by the desire to be re-elected or reappointed.⁷² Judicial actions are also influenced by institutional arrangements, the external political context, and the state’s legal environment.⁷³

In many states, the organized bar—and not the courts—has taken the lead in lawyer regulation. Courts are busy with their main work—deciding cases—and lawyer regulation is not at the top of their agendas.⁷⁴ They lack the time and resources to do their own fact-gathering on issues relating to lawyer regulation.⁷⁵ Consequently, they often rely on lawyer organizations to bring ideas to them, study issues, hold hearings, make recommendations, and draft language effecting changes in lawyer regulation. In some states, statutes or court rules provide for participation by bar organizations in this process.⁷⁶ As interest group theory suggests, the input from bar organizations tends to favor lawyers’ interests.

It is not surprising that lawyers’ views of regulation prevail. They not only help set the agenda, frame the issues, and make concrete proposals, but they also

68. Nicholas Bagley, *Agency Hygiene*, 8 TEX. L. REV. SEE ALSO 1, 4–5 (2010); see also James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE, *supra* note 67, at 75, 90.

69. See Carpenter & Moss, *supra* note 67, at 18.

70. See, e.g., J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543 (2018) (passim); Keith R. Fisher, *The Regulation of Lawyers Post-Enron*, 37 U. MICH. J. L. REFORM 1017, 1113–16 (2004); Kessler, *supra* note 15, at 465–66; Patrick Luff, *Captured Legislatures and Public-Interested Courts*, 2013 UTAH L. REV. 519.

71. See, e.g., TARR & PORTER, *supra* note 18; Brace et al., *supra* note 30, at 82–83.

72. Scholars disagree whether judicial appointment or a certain type of election (partisan, non-partisan, or retention) is more likely to cause judges to act in accord with their own preferences. See CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 2, 132, 137–38 (2009); Melinda Gann Hall, *Representation in State Supreme Courts: Evidence from the Terminal Term*, 67 POL. RES. Q. 335, 337 (2014).

73. Brace et al., *supra* note 30, at 84.

74. See BARTON, *supra* note 15, at 137.

75. Benjamin Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1207 (2003).

76. See e.g., 2006 ALA. CODE § 34-3-43(3) (2018); N.C. GEN. STAT. §§ 84-21, 84-23(a) (2019); *infra* notes 207–08 and accompanying text.

have unique access to judges. Lawyers have many opportunities to lobby judges to advance their interests: in the courthouse, in bar association activities, and in social situations.⁷⁷ It is more difficult for other industries or consumer groups to obtain access to judges.⁷⁸ Moreover, as interest group theory predicts, there are few organized advocates representing the public interest on issues pertaining to lawyer regulation.⁷⁹ Lawyer regulation generally is not an issue on which the public's interests are effectively communicated to the courts.

At the same time, courts tend to favor the legal profession's interests due to an "ambient bias" in favor of lawyers.⁸⁰ As Dennis Jacobs, former Chief Judge of the Second Circuit Court of Appeals explained, judges are "proud of being lawyers."⁸¹ Judges are socialized in law school to "think like a lawyer," and typically practice law for several years before entering the judiciary. They "have a high regard for our profession, its processes, its culture and values, and its judgments—the profession which (after all) did loft judges to the bench, where they presumably wanted to go."⁸² As a result, judges identify with lawyers and "[o]n a subconscious level when judges face a question that will affect the legal profession, judges naturally react in terms of how it will affect 'us' more than 'them.'"⁸³

Furthermore, courts derive institutional benefits from maintaining good relations with the bar. Bar associations support the judiciary's efforts to increase the number of judges, their compensation, and funding for the judicial system.⁸⁴ They defend the judiciary when it is under attack.⁸⁵ Bar associations assist the

77. Barton, *supra* note 75, at 1188, 1200.

78. BARTON, *supra* note 15, at 133.

79. *But see infra* notes 354, 497 and accompanying text. Starting in 1978, an organization known as HALT (Help Abolish Legal Tyranny) advocated for changes in lawyer regulation. See Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. LAW REV. 1, 26 (1998). In 2004, HALT urged the ABA to adopt a rule requiring lawyers to purchase LPL insurance. See Devin S. Mills & Galina Petrova, *Modeling Optimal Mandates: A Case Study on the Controversy Over Mandatory Professional Liability Coverage and Its Disclosure*, 22 GEO. J. LEGAL ETHICS 1029, 1036 (2009). That organization, now known as Responsive Law, does not appear to have been active in the more recent insurance debates. See *Advocacy*, RESPONSIVE LAW (2020), <https://www.responsivelaw.org/advocacy.html> [<https://perma.cc/9WZW-38LV>].

80. BARTON, *supra* note 15, at 1.

81. Dennis Jacobs, *The Secret Life of Judges*, 75 FORD. L. REV. 2855, 2856 (2007).

82. *Id.* at 2859.

83. BARTON, *supra* note 15, at 37.

84. Barton, *supra* note 75, at 1198; *Bench and Bar Respond to Judicial Pay Deadlock*, N.Y. L.J., May 14, 2008; Barbara Jones, *Minnesota Courts Get \$62.7M Budget Boost from Lawmakers*, MINN. LAW., July 9, 2001; Joel Stashenko, *Staged Raise of 27% is Endorsed for Judges*, N.Y. L.J., Aug. 29, 2011, at 1.

85. This can be seen when bar associations responded to President Donald Trump's attacks on federal judges. See, e.g., Terry Carter, *Judicial Independence "Not Up for Negotiation," ABA President Says in Speech Addressing Trump Tweets*, A.B.A. J. (Feb. 6, 2017), https://www.abajournal.com/news/article/klein_the_aba_must_defend_the_rule_of_law_and_the_independence_of_the_judic/ [<https://perma.cc/7UHT-MWQB>]. It also occurs when bar associations act to defend state court judges. See, e.g., *Russomanno Urges Lawyers to Take the Lead Defending Judicial Independence*, FLA. B. NEWS (Jan. 15, 2001), <https://www.floridabar.org/the-florida-bar-news/russomanno-urges-lawyers-to-take-the-lead-defending-judicial-independence/> [<https://perma.cc/6VW9-GAME>].

courts by making recommendations to improve courts' organization, administration, and procedural rules.⁸⁶ They also work to address the problem of access to justice for unrepresented litigants, which has become a "crisis" for the courts.⁸⁷

Judges also derive personal benefits from maintaining good relations with the bar. One common method of selecting state supreme court justices is elections,⁸⁸ and lawyers often contribute substantial sums to these campaigns.⁸⁹ Even when judges are initially appointed, they must often stand for single-candidate retention elections when their terms expire.⁹⁰ Lawyers sit on commissions that recommend which lawyers should be appointed judges, which judges should be elevated to higher judicial positions, and which judges should be retained.⁹¹ Bar associations sometimes endorse judicial candidates or rate judges and judge-aspirants as "recommended" or "not recommended."⁹² At or before the age of mandatory retirement, state supreme court judges may move into private practice.⁹³ Good relationships with the bar can facilitate their job searches.

86. POWELL, *supra* note 8, at 197–99, 201–02; Terence C. Halliday, *Legal Professions and the State: Neocorporatist Variations on the Pluralist Theme of Liberal Democracies*, in *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* 410 (Richard L. Abel & Philip C.S. Lewis eds., 1989).

87. *See Access to Justice Commissions: Increasing Effectiveness Through Adequate Staffing and Funding*, ABA RESOURCE CTR. FOR ACCESS TO JUST. INITIATIVES 12, 33, 35 (2018), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_commission_report.authcheckdam.pdf [<https://perma.cc/6CZR-VZGV>]. These efforts include bar-sponsored programs to directly assist unrepresented litigants. *See, e.g., In Court Bar Program*, COOK COUNTY BAR ASS'N (Apr. 2014), <https://cookcountybar.org/membership/in-court-bar-program> [<https://perma.cc/AVS9-793U>]; *BBA Lawyer for the Day in Boston Housing Court*, BOSTON BAR ASS'N, <http://www.bostonbar.org/in-the-community/public-service/housing-court-lawyer-for-the-day-program> [<https://perma.cc/NH8F-PDDA>] (last visited Apr. 28, 2020).

88. *See* ALICIA BANNON, BRENNAN CENTER FOR JUSTICE, *CHOOSING STATE JUDGES: A PLAN FOR REFORM 3* (2018), https://www.brennancenter.org/sites/default/files/publications/2018_09_JudicialSelection.pdf [<https://perma.cc/S7SZ-HSXJ>].

89. *See, e.g.,* Arielle Dreher, *Buying Justice: 'Dark Money' in Judicial Elections*, JACKSON FREE PRESS (Nov. 16, 2016), <http://www.jacksonfreepress.com/news/2016/nov/16/buying-justice-dark-money-judicial-elections/> [<https://perma.cc/F68P-8MZA>] (reporting that most of one supreme court justice's \$586,000 in campaign contributions came from attorneys).

90. BANNON, *supra* note 88, at 3. In most states where supreme court justices are appointed, they must be reappointed to maintain their positions. *Id.*

91. *See, e.g.,* N.Y. CONST. art. VI, §§ 2, 3.

92. *See, e.g.,* *Ohio State Bar Association Commission on Judicial Candidates Announces Ohio Supreme Court Candidate Ratings for the 2018 Election*, OHIO STATE BAR ASS'N, <https://www.ohiobar.org/about-us/media-center/osba-news/ohio-state-bar-association-commission-on-judicial-candidates-announces-ohio-supreme-court-candidate-ratings-for-the-2018-election/> [<https://perma.cc/93BG-4N6H>]; Barbara Vitello, *Bar Associations Release Cook County Judicial Candidate Recommendations*, DAILY HERALD (Mar. 1, 2018), <http://www.dailyherald.com/news/20180301/bar-associations-release-cook-county-judicial-candidate-recommendations> [<https://perma.cc/5FQP-KHNE>].

93. *See, e.g.,* Matt Chiappardi, *Retiring Del. Justice Jack Jacobs to Join Sidley Austin*, LAW360, June 13, 2014; Martin Daks, *After Hanging up their Robes, Judges Find Career Options in NJ Law Firms*, NJBIZ.COM (Nov. 13, 2017), <https://njbiz.com/after-hanging-up-the-robos-judges-find-career-options-in-nj-law-firms-3/> [<https://perma.cc/4K2E-5LCR>]; Mary Hladky, *Retired Justice Grimes Rejoins Holland & Knight in Tallahassee*, BROWARD DAILY BUS. REV., July 9, 1998; Alexander Peters, *Broussard Joins Coblentz Firm as Partner*, THE RECORDER, Dec. 4, 1991; Sheri Qualters, *Retired Maine High Court Justice Returns to Firm*, NAT'L L. J., June 26, 2007; *Justice Alexander Returning to Private Practice*, ASSOCIATED PRESS (Dec. 9,

Cultural capture also helps to explain why judges often defer to the legal profession's interests. Drawing on behavioral economic and psychological research, James Kwak shows how cultural capture occurs through shared identity, perception of status, and social relationships.⁹⁴ Cultural capture can produce the same outcome as traditional capture, i.e., regulatory action that serves the ends of industry.⁹⁵ As Kwak notes, "the more complex and information-intensive an issue is and the less capacity the agency has to devote to the issue, the greater the potential importance of cultural capture."⁹⁶ Some factors that should make cultural capture especially influential:

are a high degree of similarity between industry representatives and regulators; an industry with a notable social purpose with which regulators can identify; an industry with high social, cultural, or intellectual status; many social connections between industry and regulators; and technically complex issues for which it is not clear how the benefits of policy alternatives are shared.⁹⁷

It is not difficult to see how capture occurs in the courts' regulation of the legal profession. State supreme court justices are dependent on the legal profession to gather facts, analyze issues, and make recommendations concerning lawyer regulation. In addition, judges enter their positions believing—as they learned in law school—that the legal profession is, and should remain, "self-governing."⁹⁸ While they also identify as judges, their thoughts and actions "are influenced by the group affiliation that is most salient in a given context."⁹⁹ Simply stated, judges—like all people—tend to identify with other people who are a lot like them and they tilt toward helping people who are similar.¹⁰⁰ As between the interests of lawyers and the public, judges are more likely to identify with lawyers, especially when there are rarely opposing interest groups that are advocating for the public's interests.¹⁰¹ Their judgments are distorted in ways in which they are not even aware.¹⁰²

2011), available at <https://www.heraldnet.com/news/justice-alexander-returning-to-private-practice/> [<https://perma.cc/RA4Y-LY9T>].

94. Kwak, *supra* note 68, at 80. For example, shared identification with a group makes people more generous to the in-group members, and also more trusting of those members. *Id.* at 81. Relationships also affect behavior because people care about what other people think about them, and especially those with whom they frequently come in contact. *Id.* at 89.

95. *Id.* at 79.

96. *Id.* at 93.

97. *Id.* at 95.

98. See, e.g., MODEL RULES pmb1. (noting that the legal profession "is largely self-governing" and that "[t]o the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated").

99. Kwak, *supra* note 68, at 82 (making this observation in the agency context).

100. See MAX H. BAZERMAN & DON A. MOORE, JUDGMENT IN MANAGERIAL DECISION MAKING 125 (7th ed. 2009).

101. See BARTON, *supra* note 15, at 37.

102. See BAZERMAN & MOORE, *supra* note 100, at 130; Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, in CONFLICTS OF INTEREST: CHALLENGES AND

Of course, judges have been known to express public disapproval—or even contempt—for the practices of large swaths of the legal profession. Chief Justice Warren Burger famously noted that many trial lawyers are “not competent to give effective representation to their clients.”¹⁰³ Former Seventh Circuit Judge Richard Posner criticized the legal profession for acting like medieval craft guilds.¹⁰⁴ Yet these critiques came from federal judges with lifetime tenure.¹⁰⁵ State supreme court justices tend to be more circumspect.

B. STATE LEGISLATURES

In theory, state legislatures should be more likely than courts to enact laws that protect the public notwithstanding bar opposition. Perhaps most significantly, most legislators are not lawyers¹⁰⁶ and may not be as naturally sympathetic to the legal profession. In contrast to courts, legislatures are not as dependent on bar associations for assistance with policymaking, because legislatures often have more staff and capacity to conduct their own research.¹⁰⁷ Moreover, while judges may need to rely on the bar to defend them from verbal attacks,¹⁰⁸ legislators can speak much more freely.

State legislators are also less likely than judges to favor lawyers’ interests because they are more accountable to the public. Voters are generally more aware of who their legislators are and what they do. They are less aware of who the state supreme court justices are and their role in lawyer regulation.¹⁰⁹ Legislators may

SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 80, 83, 89 (Don A. Moore et al. eds., 2005). Professionals are vulnerable to the same motivated biases as others, including the desire to see themselves as objective and fair in their decisions. Chugh et al., *supra* at 89. The “human tendency to support the self and ingroup creates a gravitational pull toward one set of interests, even when the pull is quite invisible, even to the self.” *Id.* at 87.

103. *Burger Urges Curb on Trial Lawyers Not Fully Trained*, N.Y. TIMES, Nov. 27, 1973, at 15.

104. Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L. J. 1, 1–3, 7 (1993).

105. *See, e.g.*, *Dondi Prop. v. Commerce Sav. & Loan Ass’n*, 121 F.R.D. 284, 286–87 (N.D. Tex. 1988) (en banc) (establishing civility standards because of “unnecessary contention and sharp practices between lawyers” that threatened the administration of justice).

106. It appears that less than 20% of state legislators hold law degrees. Karl Kurz, *Who We Elect: The Demographics of State Legislatures*, ST. LEGIS. MAG. (Dec. 2015), <http://www.ncsl.org/research/about-state-legislatures/who-we-elect.aspx> [<https://perma.cc/8ZTN-VKEC>]. In some states, however, the percentage of lawyers in the legislature is closer to one-third. *See, e.g.*, Ryan Murphy, *Getting a Closer Look at the Makeup of the Leg*, TEX. TRIB. (Jan. 11, 2013), <https://www.texastribune.org/2013/01/11/legislators-are-younger-little-change-diversity/> [<https://perma.cc/AG2V-AYZJ>]; *N.J. Legislature’s Racial, Ethnic Makeup Out of Step with State’s Demographics*, NJ.COM (Jan. 9, 2012), https://www.nj.com/news/index.ssf/2012/01/analysis_nj_legislatures_racial.html [<https://perma.cc/K4P8-YMKB>].

107. Barton, *supra* note 75, at 1219.

108. Judges are limited in what they can say publicly about pending and impending cases. MODEL RULES OF JUDICIAL CONDUCT R. 2.10 (AM. BAR ASS’N 2014). Even after the case has been resolved, judges may be constrained in their ability to speak. *See* CYNTHIA GRAY, AM. JUDICATURE SOC’Y, WHEN JUDGES SPEAK UP: ETHICS, THE PUBLIC, & THE MEDIA, 18–21 (1998), <https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Publications/When-Judges-Speak-Up-Study-Materials.ashx> [<https://perma.cc/DU2S-77NS>].

109. *See* Barton, *supra* note 75, at 1222–23; Fisher, *supra* note 70, at 1115.

receive campaign contributions from lawyers and bar organizations, but they also receive contributions from a broad array of other interest groups.¹¹⁰ It is also much easier for other interest groups to directly lobby legislators than to lobby supreme court justices.¹¹¹ Indeed, the success of tort reform efforts in some states—which placed caps on recoveries and otherwise limited lawyers’ earnings—demonstrates that other interest groups can at times influence legislators more than lawyer organizations.¹¹²

Yet legislatures may also be susceptible to regulatory capture by the bar due to time, resource, and expertise constraints.¹¹³ Legislators are busy, and can devote only limited time to the complexities of lawyer regulation. Some serve in part-time legislatures with insufficient staff support,¹¹⁴ making them dependent on bar input on issues relating to lawyer regulation. The legislative committees that deal with lawyer regulation may be disproportionately composed of lawyers, who share the bar’s views of how the profession should be regulated.¹¹⁵ Lawyer-legislators may have an outsized sway on these committees due to their special knowledge and expertise.¹¹⁶

Whether state legislators will become involved in lawyer regulation depends upon a variety of factors, including the extent to which the state courts have staked out the exclusive authority to regulate the profession. It may also depend upon the type of legislature; full-time or “professional” legislatures have more time and resources to perform their work.¹¹⁷ Legislatures may be statutorily

110. See, e.g., Shannon Jenkins, *The Influence of Interest Groups on State Legislative Behavior*, 32 AM. REV. POL. 233, 238–39 (2011).

111. Barton, *supra* note 75, at 1121–22.

112. See, e.g., Steve Cohen, *On Tort Reform, It’s Time to Declare Victory and Withdraw*, FORBES (Mar. 2, 2015), <https://www.forbes.com/sites/stevecohen/2015/03/02/on-tort-reform-its-time-to-declare-victory-and-withdraw/#267cfd9c63ea> [<https://perma.cc/BA36-CLPW>] (reporting that more than half the states implemented tort reform measures that limited recoveries by victims and their lawyers).

113. See Fisher, *supra* note 70, at 1120–21.

114. The National Conference of State Legislatures categorizes state legislatures based on their capacity to operate as an independent branch of government. See *Full- and Part-Time Legislatures*, NAT’L CONF. OF STATE LEGISLATURES (June 14, 2017), <http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx> [<https://perma.cc/5CKP-XHGK>]. “Full-time legislature” means legislators generally work 80% or more of the time required of a full-time job, are well paid, and have large staffs. “Hybrid” means legislators spend more than two-thirds of their time being legislators, but their income is not enough to make a living without other sources, and they have intermediate-sized staffs. “Part-time” legislators spend half of a full-time job doing legislative work, earn low pay, and have small staffs. *Id.*

115. In 2020, for example, twenty-one out of the forty Judiciary Committee members in the Connecticut General Assembly were lawyers. Five out of six of the highest-ranking members of that committee were lawyers. See *Joint Committee on Judiciary*, CONN. GEN. ASSEMBLY, <https://www.cga.ct.gov/jud/> [<https://perma.cc/C396-U2NT>] (last visited Apr. 28, 2020).

116. For a discussion of some ways in which lawyer-legislators differ from non-lawyer legislators and how these differences may affect legislation, see MARK C. MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS* 71–75, 162–74 (1995).

117. Professional legislatures meet for longer time periods, compensate legislators sufficiently that they do not need another job, and have more staff. Robert E. Hogan, *Policy Responsiveness and Incumbent Reelection in State Legislatures*, 52 AM. J. POL. SCI. 858, 864 (2008). States with more professional legislatures may be less likely to be dominated by interest groups because public officials are less dependent on the information and

required to periodically review the activities of a mandatory state bar or a particular lawyer regulation. Or they may be galvanized by public opinion or lobbying by interest groups.¹¹⁸ Public choice theory suggests that legislators are likely to act when it helps them with re-election. If the public does not push for—or seems indifferent to—lawyer regulation that benefits the public, legislators are less likely to become involved.¹¹⁹

C. BAR ORGANIZATIONS

There are hundreds of bar associations in the United States, but the discussion here will focus primarily on the ABA and state bar associations because they play such an important role in lawyer regulation.¹²⁰ The ABA, the largest national voluntary bar organization, has more than 400,000 members.¹²¹ About 22% of all U.S. lawyers belong to the ABA.¹²² The ABA significantly influences lawyer regulation in the areas of legal education, bar admission, rules of professional conduct, and discipline. Its Center for Professional Responsibility helps develop conduct standards and assists with implementation in the states.¹²³ The ABA's Government Affairs Office lobbies the federal government on issues relating to the legal profession and lawyer regulation.¹²⁴

Thirty-one states and the District of Columbia have mandatory bars created by statute or court order.¹²⁵ These bars are usually formed as public agencies or public corporations.¹²⁶ Their bylaws or mission statements often articulate a direct

technical expertise those groups offer. See DAVID M. HEDGE, *GOVERNANCE AND THE CHANGING AMERICAN STATES* 71 (1998).

118. See Carol S. Weissert & Susan Silberman, *Legislative Demands for Bureaucratic Policymaking: The Case of State Medical Boards*, 27 LEGIS. STUD. Q. 123, 133 (2002).

119. See Gilbert Becker, *The Public Interest Hypothesis Revisited: A New Test of Peltzman's Theory of Regulation*, 49 PUB. CHOICE 222, 230 (1986) (noting legislators are more likely to act in the public's interest when "the public's awareness and voting participation are high").

120. Other local and specialty bar associations also influence lawyer regulation. Theodore Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677, 678, 703, 710–13, 734 (1989).

121. Molly McDonough, *ABA Executive Director Urges Increased Efforts to Reverse Decline in Paid Membership*, A.B.A. J. (Feb. 5, 2018), http://www.abajournal.com/news/article/aba_midyear_meeting_jack_rives_membership [<https://perma.cc/7T22-2EYF>]. The number includes law students, paralegals, and lawyers admitted outside the United States.

122. *Id.*

123. See *About Us*, AM. BAR ASS'N CTR. FOR PROF'L RESP., https://www.americanbar.org/groups/professional_responsibility/about_us/ [<https://perma.cc/AY7N-WZU5>] (last visited Apr. 28, 2020).

124. See *Advocacy & Initiatives*, AM. BAR ASS'N (Feb. 15, 2020), <https://www.americanbar.org/advocacy/> [<https://perma.cc/RE6F-M5SY>].

125. See Gallagher, *supra* note 44, at 525–26; Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. ONLINE 1, 2 n.7 (2020), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/04/Levin_The-End-of-Mandatory-State-Bars.pdf [<https://perma.cc/R6YS-EM7Q>].

126. See MCKEAN, *supra* note 44, at 26–27; *Who We Are*, N.C. BAR, <https://www.ncbar.gov/about-us/who-we-are/> [<https://perma.cc/4BCF-AL4U>] (last visited Apr. 28, 2020) (describing the Bar as “the government agency responsible for the regulation of the legal profession in North Carolina”); *infra* notes 205, 328, 365, 472 and accompanying text. *But see Overview*, STATE BAR OF WIS., <https://www.wisbar.org/aboutus/overview/>

responsibility to the public.¹²⁷ The leadership is typically elected by its lawyer-members, although some have non-lawyer members on their governing boards.¹²⁸ Some mandatory bars have responsibility for admission, lawyer discipline, and other regulatory functions.¹²⁹ Mandatory bars are usually funded through dues or licensing fees and other bar activities.¹³⁰ Most have practice sections (e.g., family law, tax) that enable lawyers in the same field to meet and stay up-to-date with the law.

The remaining states have voluntary state bar associations, which are composed of lawyers who choose to belong to a state-wide lawyer association. These organizations typically do not have regulatory responsibilities or view themselves as having an obligation to protect the public.¹³¹ Their leadership does not include members of the public and they are freer to act like guilds. Most of the lawyers practicing in some smaller states belong to the voluntary state bar, while less than half of the lawyers in some large states do so.¹³²

Both types of state bar associations may have difficulty reaching consensus on issues concerning lawyer regulation because their members' interests vary depending upon lawyers' practice setting and specialty. If voluntary bar organizations take positions that are unpopular with some members, they risk losing those members. Mandatory bars—which are frequently sued by disgruntled members

Pages/overview.aspx [https://perma.cc/L84E-CNYS] (last visited Apr. 28, 2020) (noting that the State Bar is a private association and not a state agency).

127. See, e.g., *Mission, Vision, and Core Values*, STATE BAR OF ARIZ., <https://www.azbar.org/aboutus/mission-vision-andcorevalues/> [https://perma.cc/C6PA-TMY9] (last visited Apr. 28, 2020) (“The State Bar of Arizona exists to serve and protect the public with respect to the provision of legal services and access to justice.”); *About the State Bar of New Mexico*, STATE BAR OF N.M., https://www.nmbar.org/nmstatebar/AboutUs/Nmstatebar/About_Us/Overview.aspx?hkey=17a9ff1f-c7cc-4222-8b74-af5ac0ff0211 [https://perma.cc/SY6U-5X6P] (last visited Apr. 28, 2020) (“The mission of the State Bar is to be a united and inclusive organization serving the legal profession and the public.”).

128. See, e.g., *Who We Are*, *supra* note 126; R.I. Bar Ass’n Governance & Bylaws art. 4.2, 4.3, 8.5 (2018), <https://ribar.com/page.aspx?id=27> [https://perma.cc/SXW9-93VE].

129. See Terry, *supra* note 3, at 798–801.

130. See, e.g., STATE BAR OF CAL., 2018 FINANCIAL STATEMENT AND INDEPENDENT AUDITOR’S REPORT 5 (Apr. 30, 2019), http://www.calbar.ca.gov/Portals/0/documents/reports/2018_State_Bar_Financial_Statement_Final_Report_and_Summary.pdf [https://perma.cc/QZ29-TVH3]; *Who We Are*, *supra* note 126.

131. For example, the “purposes” of the Vermont Bar Association do not mention the public at all. See VT. BAR ASS’N CONST. § I. The Delaware State Bar Association Bylaws mention the public only in the context of concern about “the proper public conception of the profession.” Del. State Bar Ass’n Bylaws art. 1, § 1.2 (2019); see also OHIO STATE BAR ASS’N CONST. art. II, § 2.1 (stating only that the Association was formed, in part, “to take positions on matters of public interest as deemed advisable”).

132. For instance, while there are more than 73,000 active lawyers licensed in Illinois, the voluntary Illinois State Bar Association has only about 28,000 members, including law students. See *About the ISBA*, ILL. STATE BAR ASS’N, <http://www.isba.org/about> [https://perma.cc/F8R9-69LJ]; ILL. SUP. CT., ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION ANNUAL REPORT OF 2019, at 15 (2020), <https://www.iardc.org/AnnualReport2019.pdf> [https://perma.cc/Y4SS-6QTD]. In contrast, Delaware has 3062 active in-state lawyers and 590 active lawyers who work out of state. See E-mail from Lisa Dolph, Clerk of Del. Supreme Court, to Tonya Johnson, Reference Librarian, Univ. of Conn. Law Sch. (Oct. 10, 2019, 10:04 EDT). The Delaware State Bar Association has 3151 lawyer-members. See E-mail from LaTonya Tucker, Dir. of Bar Services & Membership, Del. State Bar Ass’n, to Leslie C. Levin (Oct. 7, 2019, 17:09 EDT).

who are forced to belong to the organization¹³³—may be concerned that taking positions unpopular with some members will fuel more lawsuits. Organizational bylaws that require votes by the entire membership on regulatory proposals can make it difficult for bar organizations to effect changes from the status quo.

III. INSURANCE REQUIREMENTS VS. INSURANCE DISCLOSURE

LPL insurance is the primary—and often the only—way to compensate victims of lawyer malpractice. Yet some lawyers oppose an insurance requirement because they do not want to pay for it, among other reasons.¹³⁴ LPL insurance is not required in most U.S. jurisdictions, largely because the organized bar has not supported such a requirement.¹³⁵ Instead, the ABA has endorsed a weaker measure that only requires lawyers to make disclosures concerning their insurance coverage.¹³⁶ As discussed below, disclosure is an inadequate substitute for an insurance requirement. Yet even disclosure is preferable to the approach in many states, which do nothing to enable the public to identify uninsured lawyers.¹³⁷

A. MANDATORY INSURANCE

The debate over whether lawyers should be required to carry LPL insurance first arose in the 1970s.¹³⁸ At that time, legal malpractice claims increased sharply, and it became harder—and more expensive—for lawyers to obtain LPL insurance.¹³⁹ State bars in California, Oregon, Washington, and Wisconsin considered whether to require all lawyers to purchase malpractice insurance from state insurance funds that would be created in an effort to lower insurance costs and protect the public from uninsured lawyers. Only Oregon adopted this

133. See, e.g., MCKEAN, *supra* note 44, at 85–86; Smith, *supra* note 45, at 50; Marcia Coyle, *US Supreme Court Ruling Fuels Suits Challenging Mandatory Bar Fees*, NAT'L L. J. (Feb. 14, 2019), <https://www.law.com/nationallawjournal/2019/02/14/us-supreme-court-ruling-fuels-suits-challenging-mandatory-bar-fees/> [https://perma.cc/46KQ-YDK9].

134. See Levin, *supra* note 24, at 1290–95.

135. *But see In re* Amendment to Supreme Court Rule 79, Order Denying Petition for Amendment to Supreme Court Rule 79, ADKT 534 (Nev. Sup. Ct. Oct. 11, 2018) (denying the State Bar of Nevada's petition to impose an insurance requirement).

136. See MODEL CT. RULE ON INS. DISCLOSURE (AM. BAR ASS'N 2004).

137. Some of the largest states that do not require either insurance or disclosure that a lawyer is uninsured include Florida, New York, and Texas. ABA STANDING COMM. ON CLIENT PROTECTION, STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON INSURANCE DISCLOSURE (2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrd.pdf [https://perma.cc/UB3D-EASY].

138. See George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 308 (1997); Jerome B. Schultz, *Ensured Insurance: Bars Look at Mandatory Coverage*, B. LEADER, Jan.–Feb. 1987, at 18.

139. Cohen, *supra* note 138, at 307–08; Fredric L. Goldfein, *Legal Malpractice Insurance*, 61 TEMPLE L. REV. 1285, 1285–86, 1295 (1988); Mary Ann Galante, *Malpractice Rates Zoom; Legal Insurance Crisis*, NAT'L L. J., June 3, 1985, at 19; John J. Lynch, *The Insurance Panic for Lawyers*, A.B.A. J., July 1, 1986, at 42, 43.

approach.¹⁴⁰ In 1977, it required its lawyers in private practice to purchase insurance from its newly created Professional Liability Fund.¹⁴¹ Since then, at least eighteen states have considered the issue and declined to require private practitioners to carry LPL insurance.¹⁴²

The argument in favor is primarily grounded in public protection. Clients with personal plight matters (e.g., personal injury, divorce, criminal) are usually represented by solo and small firm lawyers, who are the most likely to be uninsured.¹⁴³ If there is no insurance, plaintiffs' malpractice lawyers will almost never take on the malpractice case.¹⁴⁴ This is because even if they prevail, the malpractice lawyers will not get paid their contingent fee because there is no money to pay the judgment. Some uninsured lawyers lack other means to pay judgments against them. If they have assets, they may have moved them into a family member's name.¹⁴⁵ Moreover, as one lawyer explained, "[i]t does not make sense to chase [uninsured] lawyers for their condos and BMWs. They will file for bankruptcy."¹⁴⁶

Opponents of an insurance requirement claim there is no evidence that uninsured lawyers pose a significant problem for the public.¹⁴⁷ But in fact, there are numerous cases in which uninsured lawyers cause significant harm for which they do not compensate clients.¹⁴⁸ Opponents also argue that the cost of an LPL insurance requirement would prevent some lawyers from practicing law.¹⁴⁹ In fact, lawyers can purchase \$100,000 per occurrence/\$300,000 annual aggregate coverage in most states for \$3000 or less annually,¹⁵⁰ although the premiums are

140. Goldfein, *supra* note 139, at 1296; Schultz, *supra* note 138, at 18.

141. *About the PLF*, OR. STATE BAR PROF'L LIABILITY FUND, <https://www.osbpflf.org/about-plf/overview.html> [https://perma.cc/RX7Z-STB9] (last visited Mar. 2, 2020).

142. See KRITZER & VIDMAR, *supra* note 21, at 38. Some state bars did, however, form bar-related (lawyer-owned) mutual insurance companies to provide more affordable LPL insurance to lawyers. See Cohen, *supra* note 138, at 308; Leslie C. Levin, *Regulators at the Margins: The Impact of Malpractice Insurers on Solo and Small Firm Lawyers*, 49 CONN. L. REV. 553, 565 (2016).

143. See, e.g., *supra* note 22 and accompanying text; Petition of the State Bar of Nevada, *supra* note 27, at Ex. C.

144. See KRITZER & VIDMAR, *supra* note 21, at 148.

145. Levin, *supra* note 24, at 1316, 1324.

146. *Id.* at 1313; see also Wolfson, *supra* note 26 (quoting plaintiff's malpractice lawyer who noted that some lawyers do not purchase insurance because they know "[t]hey can duck into bankruptcy court and protect virtually everything, making it impossible to bring justice").

147. See Schultz, *supra* note 138, at 19; John Schlegelmilch, *Insufficient Evidence to Support Mandatory Malpractice Insurance Requirements*, NEV. LAW., June 2000, at 9; Darrel Tillar Mason, *Mandatory Malpractice Insurance—It's Time to Call the Question*, VA. ST. BAR (Aug. 4, 2008), <http://www.vsb.org/site/news/item/mandatory-malp-ins-080408> [https://perma.cc/RP68-FWGP].

148. See, e.g., Levin, *supra* note 24, at 1311–16 (describing cases in which clients were unable to recover); Thomas G. Bousquet, *It's Time for Mandatory Malpractice*, TEX. LAW., Dec. 6, 1993, at 11.

149. See Cunitz, *supra* note 28, at 655–57; Glenn Fisher, *Professional Liability Insurance Coverage—Viable Form of Self-Regulation or Simply Another Business Decision?*, LPL ADVISORY, Fall 2002, at 1.

150. Levin, *supra* note 24, at 1320.

considerably higher in a few jurisdictions and specialties.¹⁵¹ This level of coverage would cover most claims.¹⁵² In Oregon, where insurance costs lawyers \$3300 annually for \$300,000/\$300,000,¹⁵³ the requirement has not reportedly created a problem for lawyers. Idaho's recent experience requiring lawyers to carry LPL insurance also suggests that lawyers who wished to practice in the state were able to secure insurance.¹⁵⁴

Another argument against an insurance requirement—that it would force some uninsured lawyers who provide pro bono and low-cost legal services to raise their rates or discontinue their pro bono work¹⁵⁵—appears overstated. A survey of New Mexico uninsured lawyers revealed that less than 18% performed *any* pro bono work, and it was unclear how much of that work was for persons of limited means.¹⁵⁶ For lawyers who exclusively perform pro bono work, this problem can be addressed by exempting them from purchasing insurance if they work through bar-approved pro bono programs that provide insurance coverage to volunteer lawyers.¹⁵⁷ While there may still be a small number of lawyers who serve low-income populations, charge very little, and cannot afford LPL insurance, their clients might instead be afforded some protection through a client malpractice fund.¹⁵⁸

Finally, the claim by some opponents that an insurance requirement would enable insurance companies, and not the courts, to determine who can practice law¹⁵⁹ is vastly overstated. There are multiple insurance companies in every state

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

152. In Missouri, the mean claim payment for solo lawyers was \$52,678 and the median payment was \$24,351. KRITZER & VIDMAR, *supra* note 21, at 114. For law firms of two to five lawyers, the mean paid was \$110,994 and the median payment was \$34,034. *Id.*

153. Coverage, OR. STATE BAR PROF'L LIABILITY FUND, <https://www.osbplf.org/coverage/overview.html> [<https://perma.cc/TX9P-MB6B>] (last visited Mar. 2, 2020).

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

155. See Alan Cooper, *VSB Sinks Mandatory Insurance*, VA. LAW. WKLY., Oct. 27, 2008; Jill Sunby, *What Montana Lawyers Think About Mandatory Malpractice Insurance*, MONT. LAW, Aug. 2001, at 25; James C. Gallagher, *Should Lawyers Be Required to Disclose Whether They Have Malpractice Insurance?*, 32 VT. B. J. 5 (2006).

156. See Levin, *supra* note 24, at 1321 n.220.

157. Oregon lawyers are exempted from purchasing insurance if they are exclusively providing pro bono services for Oregon State Bar certified pro bono programs. *Exemptions-Annual and Midyear*, OR. STATE BAR PROF'L LIABILITY FUND, <https://www.osbplf.org/assessment-exemptions/exemptions.html> [<https://perma.cc/PMZ8-G54V>] (last visited Mar. 2, 2020). Idaho lawyers may also obtain an exemption when they are exclusively providing pro bono services through the Idaho Volunteer Lawyers Program. See Annette Strauser, *2018 Malpractice Coverage Requirement: General Information*, IDAHO STATE BAR, <https://isb.idaho.gov/blog/author/astrouser/> [<https://perma.cc/72CH-XJGV>] (last visited Mar. 2, 2020); E-mail from Susan R. Pierson, Dir., Idaho Volunteer Lawyers Program (July 30, 2018, 14:14 EDT) (on file with author).

158. If a malpractice claims fund were formed to compensate the victims of uninsured lawyers, low-income uninsured lawyers could, in lieu of purchasing LPL insurance, be required to contribute a lesser sum annually to a malpractice claims fund. See Levin, *supra* note 154, at 122.

159. See Mason, *supra* note 147; Cunitz, *supra* note 28, at 657; Fisher, *supra* note 149, at 1; Schultz, *supra* note 138, at 19.

that will write insurance for solo and small firm lawyers.¹⁶⁰ Only a small number of uninsured lawyers report they cannot obtain coverage.¹⁶¹ If states require lawyers to purchase LPL insurance and those lawyers cannot obtain it, they can seek to join law firms that provide insurance. They can also work in other settings (e.g., the government, in-house) where insurance coverage is not required.¹⁶² And, of course, if insurance rates were to rise precipitously or the insurance market tightens significantly, states could revisit the insurance requirement.

B. INSURANCE DISCLOSURE

Instead of an LPL insurance requirement, many states have settled on some version of an insurance disclosure requirement. Some states began to adopt disclosure requirements in the 1990s, and in 2002, the ABA proposed an amendment to the *Model Rules* that would require lawyers to directly disclose to their clients whether they maintain LPL insurance.¹⁶³ The proposal was later withdrawn due to bar opposition.¹⁶⁴ In 2004, the ABA instead adopted a weaker Model Court Rule on Insurance Disclosure, which requires lawyers to disclose whether they carry LPL insurance on their annual registration forms and provides for courts to determine how to make this information available to the public.¹⁶⁵ Twenty-three states have adopted some type of disclosure requirement. The seven states with the strongest disclosure rules require uninsured lawyers to disclose directly to their clients—in writing—that they do not carry LPL insurance (“direct disclosure”).¹⁶⁶ Nine states require that the insurance information be posted on state bar or judicial

160. See, e.g., WASH. STATE BAR ASS'N, MANDATORY MALPRACTICE INS. TASK FORCE, REPORT TO WSBA BOARD OF GOVERNORS 77 (Feb. 2019), https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-report.pdf?sfvrsn=558e03f1_0 [<https://perma.cc/3NN5-X3Z5>] (noting a large number of admitted carriers in Washington).

161. In surveys in Nevada, New Mexico, and New Jersey, five or fewer lawyers in each of those states indicated that the main reason they were uninsured was because they could not obtain coverage or their claims experiences were unacceptable. See Levin, *supra* note 24, at 1293 (describing results of New Mexico survey); Petition of the State Bar of Nevada, ADKT 534, *supra* note 27, Ex. C, at 5; REPORT OF THE SUPREME COURT AD HOC COMM. ON ATTORNEY MALPRACTICE INSURANCE, June 2017, at app. Z, at 10, <https://www.njcourts.gov/courts/assets/supreme/reports/2017/attmalpracticeinsurance.pdf> [<https://perma.cc/PZ9V-ZWNY>]. It is unclear in some of those cases whether the lawyers truly could not obtain coverage or whether they simply could not afford it at the price at which it was offered.

162. In Oregon, only private practitioners are required to carry insurance. OR. REV. STAT. § 9.080(2)(a)(A) (2018). In Idaho, in-house counsel are required to maintain insurance, but coverage may be purchased by the corporate employer. See, e.g., *Make sure your in-house attorneys are properly insured*, THE HARTFORD (2013), <https://houstonbusinessinsurance.com/wp-content/uploads/2015/01/Hartford-Employed-Lawyer-Liability-Brochure.pdf> [<https://perma.cc/M7T4-YYTY>].

163. ABA STANDING COMM. ON CLIENT PROTECTION REPORT 2 (Aug. 2004).

164. See *id.*

165. MODEL CT. RULE ON INS. DISCLOSURE preface (AM. BAR ASS'N 2004).

166. These states are Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania, and South Dakota. ABA STANDING COMM. ON CLIENT PROTECTION, STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON INSURANCE DISCLOSURE, *supra* note 137. Pennsylvania also posts the information on the Pennsylvania Supreme Court's Disciplinary Board website. *Id.*

websites (“website disclosure”).¹⁶⁷ Seven other states adopted very weak disclosure rules, requiring lawyers to disclose whether they are insured on attorney registration forms, but only making this information available to the public if they call or write to regulators—or not disclosing this information at all (“weak disclosure”).¹⁶⁸

The arguments in favor of insurance disclosure primarily are grounded in public protection and in the view that under the rules of professional conduct, insurance coverage is a material fact about which a client should be informed before retaining a lawyer.¹⁶⁹ Proponents also hoped it would encourage uninsured lawyers to purchase insurance.¹⁷⁰ The evidence is inconclusive as to whether it actually does so.¹⁷¹ It is also doubtful that the current disclosure regimes do much to inform clients. In direct disclosure states, clients may never read the information provided by uninsured lawyers.¹⁷² As Omri Ben Shahar and Carl Schneider note, there is substantial evidence that “people often overlook disclosures, ignore them when they notice them, [and] treat them perfunctorily when they read them.”¹⁷³ Even if clients read the disclosure, it is unlikely they fully understand the implications of lawyers being uninsured.¹⁷⁴ Clients may assume these lawyers have other assets if they need to sue.¹⁷⁵ Moreover, the timing of direct disclosure is problematic.

167. *Id.* Arizona, Colorado, Illinois, Massachusetts, Minnesota, Nebraska, Virginia, Washington, and West Virginia post the information on websites.

168. In Delaware, Kansas, Nevada, North Dakota, and Rhode Island the public can obtain this information by contacting state authorities. Hawaii and Michigan collect the information but will not disclose it to the public. Levin, *supra* note 24, at 1300.

169. See ABA STANDING COMM. ON CLIENT PROTECTION REPORT, *supra* note 163, at 2; Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 FORDHAM URB. L.J. 177, 196 (2012); Nicole D. Mignone, *The Emperor’s New Clothes? Cloaking Client Protection Under the New Model Court Rule on Insurance Disclosure*, 36 ST. MARY’S L.J. 1069, 1072, 1081 (2005); Jeffrey D. Watters, *What They Don’t Know Can Hurt Them: Why Clients Should Know If Their Attorney Does Not Carry Malpractice Insurance*, 62 BAYLOR L. REV. 245, 247 (2010).

170. See, e.g., Mark Hansen, *Under Covered*, A.B.A. J., Nov. 2001, at 47, 48; Jason Mil, *New Rule Would Require Attorney Disclosures Regarding Malpractice Coverage*, J. ALLEGHENY COUNTY B. ASS’N, Sept. 2005, at 7, 7.

171. Memorandum from James E. Towery, Chair, Ins. Disclosure Task Force, to Members of the California State Bar Bd. of Governors, Sept. 14, 2007, at 9; Levin, *supra* note 24, at 1303–07.

172. This is especially true in jurisdictions that do not require written acknowledgement from clients. See, e.g., ALASKA RULES OF PROF’L CONDUCT R. 1.4(c) (2018).

173. OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 67 (2014). Mandated disclosures fail to inform even when disclosure occurs under “ideal circumstances” and when people should be attending to the information because it involves life-and-death matters. *Id.* at 42–53.

174. For example, in Ohio, the notice to clients states: “Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.” OHIO RULES OF PROF’L CONDUCT R. 1.4(c) (2018). This notice does not clearly convey that the lawyer may carry no LPL insurance whatsoever or that the lawyer may be unable to satisfy a malpractice judgment as a result.

175. See, e.g., LEO J. SHAPIRO & ASSOCS., PUBLIC PERCEPTION OF LAWYERS: CONSUMER RESEARCH FINDINGS 18 (2002), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/public_perception_of_lawyers_2002.authcheckdam.pdf [<https://perma.cc/48H9-2T3E>] (noting that the public believes that law careers are lucrative); David O’Boyle & Michael Smith, *Survey Reveals Public Perceptions of Lawyers and Legal Profession*, WASH. LAW. (Apr. 2015), <https://www.dcbar.org/bar-resources/publications/>

Direct disclosure is typically not required until the client engages the lawyer.¹⁷⁶ Time constraints, social norms, and power imbalances may make it difficult for a client to change course once the client has orally agreed to hire the lawyer.¹⁷⁷

States that disclose a lawyer's lack of insurance coverage on websites theoretically enable clients to obtain this information before they contact a lawyer, but clients are unlikely to do so. Many solo and small firm lawyers obtain new clients through word of mouth.¹⁷⁸ Clients are less likely to perform extensive online research if a lawyer has been personally recommended. Even clients who perform an internet search may not consider checking whether a lawyer carries LPL insurance because the public generally believes that lawyers are required to maintain insurance.¹⁷⁹ Members of the public are also unlikely to know they can check a state court or state bar website to learn whether a lawyer maintains LPL insurance. This information typically does not appear when a lawyer's name is input into an internet search engine (e.g., Google). Even if individuals find the information, the potential implications of a lawyer being uninsured are not explained.¹⁸⁰

Consequently, insurance disclosure rules do not enable the public to engage in truly informed decisionmaking with respect to the risks of hiring an uninsured lawyer. They are an inadequate substitute for mandatory LPL insurance.

IV. THE POLITICS OF LAWYER MALPRACTICE INSURANCE: CASE STUDIES

This Part describes the circumstances under which some states have considered—and even adopted—public-regarding laws concerning LPL insurance. It starts with Oregon, which adopted an insurance requirement more than forty years ago.¹⁸¹ It then looks at six states that more recently considered the

washington-lawyer/articles/april-2015-legal-beat.cfm [https://perma.cc/7XD8-WUG3] (reporting that nearly half of respondents think lawyers are rich).

176. The exception may be South Dakota, as lawyers there must include this information in advertising. See S.D. RULES OF PROF'L CONDUCT R. 1.4(d), 7.2(l) (2019).

177. Cognitive biases may also make it difficult for a client to change course once a decision to retain a lawyer is made. Levin, *supra* note 24, at 1326–27.

178. See CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* 139–40 (1996); Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers: Dealing with the Possible but Not Certain*, 60 DEPAUL L. REV. 337, 366 (2011).

179. See Nancy McCarthy, *Bar Board Will Tackle Malpractice Insurance Disclosure Again*, CAL. B.J., Nov. 2007; *State by State, Mandatory Malpractice Disclosure Gathers Steam*, B. LEADER, Mar.–Apr. 2004. Indeed, I have spoken with many lawyers who were surprised to learn that lawyers in private practice are not required to maintain LPL insurance.

180. For example, the Washington State Bar Association website states that not all lawyers maintain LPL insurance and that “[s]ome lawyers may make a responsible decision not to maintain insurance because . . . the lawyer may choose to be financially responsible (self-insured).” *Professional Liability Insurance*, WASH. STATE BAR ASS'N, <https://www.wsba.org/for-legal-professionals/license-renewal/license-renewal-faqs/professional-liability-insurance> [https://perma.cc/V87V-HJ32] (last visited Mar. 2, 2020). This statement may suggest to the public that they need not be concerned about uninsured lawyers because those lawyers will “self-insure.”

181. Ideally, case studies should compare cases that occurred more or less contemporaneously. For the sake of completeness, however, and because the experience in Oregon is also instructive, it is included in the discussion.

insurance issue: California, Idaho, Nevada, New Jersey, Texas, and Washington.¹⁸² Idaho imposed an insurance requirement. California, Nevada, and Washington have disclosure requirements and recently considered requiring LPL insurance. New Jersey considered both approaches and seemingly settled upon a weak disclosure requirement. Texas never considered mandatory insurance and declined to adopt a disclosure rule.¹⁸³ The states' consideration of the lawyer malpractice insurance issue is used as a lens through which to examine when some states will adopt public-regarding laws and when others will instead protect lawyers' interests.

Before proceeding, it is worth noting that the number of western states that have recently focused on the insurance issue may not be coincidental. States (and regions) are culturally and politically different.¹⁸⁴ Political culture shapes government, institutions, processes, and policies in a variety of ways.¹⁸⁵ Daniel Elazar identified three dominant cultures within the United States, which he labeled moralistic, individualistic, and traditionalistic.¹⁸⁶ Each is tied to specific areas of the country due to migration streams that carried people of different backgrounds across the country.¹⁸⁷ In the moralistic political culture, which is found in Oregon and some other Western states, politics is viewed as a positive activity in which citizens have an obligation to participate, and “[g]ood government is measured by the degree to which it promotes the public good.”¹⁸⁸ Moralistic states have higher levels of political participation and are more likely to adopt political reforms and innovations.¹⁸⁹ Individualistic political culture, which is associated with some of the Rocky Mountain, Midwest, and Mid-Atlantic states, is based on a more utilitarian view that politics should work like a marketplace and places a premium on limiting government intervention into private activities.¹⁹⁰

182. Georgia is also considering an insurance requirement, but its deliberations have not concluded. See E-mail from Paula Frederick, Gen. Counsel, State Bar of Ga., to Leslie C. Levin (June 10, 2020, 19:12 EDT) (on file with author). In 2017, Illinois adopted a requirement that uninsured lawyers must complete a four-hour on-line assessment of their firm's operations. See Matthew Hector, *New Rule Requires Uninsured Lawyers to do Self-Assessment*, ILL. B.J., Mar. 2017, at 22.

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

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

185. See, e.g., Joel Lieske, *The Changing Regional Subcultures of the American States and the Utility of a New Cultural Measure*, 63 POL. RES. Q. 538, 538 (2010). Political culture is distinct from political ideology. States of any of the three subcultures can be liberal or conservative. For example, Utah and Minnesota are both moralistic states. Daniel J. Elazar, *Minnesota—The Epitome of the Moralistic Political Culture*, in MINNESOTA GOVERNMENT AND POLITICS (Daniel J. Elazar et al. eds., 1999).

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

187. Patrick I. Fisher, *Definitely Not Moralistic: State Political Culture and Support for Donald Trump in the Race for the 2016 Republican Presidential Nomination*, 49 POL. SCI. & POL. 743, 744 (2016).

188. *Id.* at 744.

189. *Id.*; David R. Morgan & Sheilah S. Watson, *Political Culture, Political System Characteristics, and Public Policies Among the American States*, 21 PUBLIUS 31, 34–35 (1991).

190. Patrick Fisher, *State Political Culture and Support for Obama in the 2008 Democratic Presidential Primaries*, 47 SOC. SCI. J. 699, 702–03 (2010).

“Traditionalistic” political culture, found mostly in the South,¹⁹¹ accepts the inevitability of a hierarchical society and tries to limit the role of government to maintaining the existing social order.¹⁹² While the political cultures are changing in some regions,¹⁹³ they have proved to be a good predictor of public policy variations among the states.¹⁹⁴ They by no means, however, provide a complete explanation of when states will adopt public-regarding laws.

This Part begins with states that have adopted LPL insurance requirements and then considers states that have afforded less protection (i.e., disclosure requirements), or none at all. A chart depicting some of the differences among the states appears below.

STATE BY STATE COMPARISON: LPL INSURANCE REQUIREMENTS

State	Active Lawyer Pop.	Type of State Bar	Political Culture	Current Approach to Issue	Most Recent Action
Or.	14,000 ¹⁹⁵	Mandatory	Moralistic	Mandatory insurance	Legislature adopted insurance requirement proposed by Bar (1977)
Idaho	5076 ¹⁹⁶	Mandatory	Moralistic/ Individualistic	Mandatory insurance	Court adopted insurance requirement proposed by Bar (2017)
Cal.	189,814 ¹⁹⁷	Mandatory	Moralistic/ Individualistic	Direct disclosure to clients	Bar reached no conclusion about insurance requirement; recommended adding website disclosure (2019)

191. Lawrence M. Mead, *State Political Culture and Welfare Reform*, 32 POL’Y STUD. J. 271, 275 (2004).

192. Fisher, *supra* note 190, at 702.

193. *See, e.g., id.* at 703; Lieske, *supra* note 185, at 548.

194. C. David Moon et al., *Political Culture in the Urban West: Is It Really Different?*, 33 STATE & LOCAL GOV’T REV. 195, 195 (2001).

195. *About the Oregon State Bar*, OR. STATE BAR, <https://www.osbar.org/about.html> [<https://perma.cc/V83E-V5RN>] (last visited Mar. 2, 2020). In 1977, when the Oregon State Bar proposed legislation authorizing the Professional Liability Fund, there were about 5000 members of the State Bar and 3500 lawyers in private practice. *See* Carl R. Neil, *Report to the Membership*, OR. ST. B. BULL., Mar. 1977, at 5; John D. Ryan, *Growing Pains: Recollections of the 1977 OSB Specialization Controversy*, OR. STATE BAR (Aug.–Sept. 2002), <https://www.osbar.org/publications/bulletin/02augsep/heritage.html> [<https://perma.cc/B744-KZ6K>].

196. *Membership Count & Statuses*, IDAHO STATE BAR, <https://isb.idaho.gov/licensing-mcle/membership-count-statuses/> [<https://perma.cc/AJ7G-DQML>] (last visited Mar. 2, 2020). The membership, including judges, in-house counsel, senior, and emeritus members is 5670. *Id.*

197. *Demographics*, STATE BAR OF CAL. (2019), <https://members.calbar.ca.gov/search/demographics.aspx> [<https://perma.cc/3XPY-XFEP>]. This number excludes judges.

State	Active Lawyer Pop.	Type of State Bar	Political Culture	Current Approach to Issue	Most Recent Action
Wash.	32,189 ¹⁹⁸	Mandatory	Moralistic/ Individualistic	Website disclosure	Bar rejected insurance requirement (2019); public interest group now proposing requirement (2020)
Nev.	9056 ¹⁹⁹	Mandatory	Individualistic	Disclosure upon call or email inquiry to Bar	Court rejected Bar's recommendation to require insurance (2018)
N.J.	98,657 ²⁰⁰	Voluntary	Individualistic	Website disclosure of insured lawyers planned	Court accepted task force recommendation against insurance requirement; agreed to some website disclosure (2019)
Tex.	103,342 ²⁰¹	Mandatory	Traditionalistic/ Individualistic	Generally unregulated	Court accepted Bar's recommendation against disclosure (2010); did not consider insurance requirement

A. OREGON

As Tom Lininger has noted, Oregon “has distinguished itself from the other forty-nine states in many areas of the law,” being the first in the nation to pass a bottle bill, the first to establish a statewide system of land planning, the first to permit physician-assisted suicide, and the first to create a near-universal system

198. WASH. STATE BAR ASS'N, MANDATORY MALPRACTICE INS. TASK FORCE, REPORT TO WSBA BOARD OF GOVERNORS, *supra* note 160, at 8. Of the lawyers licensed to practice in Washington in 2017, 19,813 were private practitioners. *Id.*

199. STATE BAR OF NEV., ANNUAL REPORT 2018 (2019), <https://www.nvbar.org/wp-content/uploads/SBN-AnnualReport2018.pdf> [<https://perma.cc/B7CP-KTFK>].

200. *See* OFFICE OF ATTORNEY ETHICS, 2018 STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT 59 (2019), <https://www.njcourts.gov/attorneys/assets/oe/2018oeannualrpt.pdf?c=qY5> [<https://perma.cc/EM4J-74YN>]. In December 2018, there were 37,006 lawyers engaged in private practice in New Jersey. *Id.* at 62.

201. STATE BAR OF TEX., MEMBERSHIP: ATTORNEY STATISTICAL PROFILE (2018–2019), https://www.texasbar.com/AM/Template.cfm?Section=Content_Folders&Template=/CM/ContentDisplay.cfm&ContentID=43800 [<https://perma.cc/L5DC-RQM5>].

of health insurance.²⁰² It is therefore not surprising that Oregon was the first—and for many years the only—state to require lawyers to maintain LPL insurance. Nevertheless, Oregon’s decision in the 1970s to require insurance was unusual for two reasons. First, the Oregon Supreme Court did not play a significant role in the adoption of the requirement. Second, the insurance proposal was initiated by—and drew broad support from—the Oregon State Bar (“OSB”).

The justices of the seven-member Oregon Supreme Court are elected in non-partisan elections to six-year terms.²⁰³ The Court claims the inherent authority to regulate lawyers under the state constitution, but it recognizes the state legislature can also engage in lawyer regulation as long as it does not unduly burden the court’s judicial functions.²⁰⁴ In 1935, the legislature created the mandatory OSB as a public corporation.²⁰⁵ The OSB helps to administer lawyer admissions and discipline in the state.²⁰⁶ Its Board of Governors, with the approval of the State Bar’s House of Delegates, has the statutory power to formulate rules of professional conduct for adoption by the Supreme Court.²⁰⁷ The Court does not “formulate” rule changes, but justices sometimes work with OSB committees that draft proposed amendments.²⁰⁸

By 1970, many LPL insurance underwriters in Oregon had pulled out of the market or were considering eliminating coverage.²⁰⁹ The OSB sent a questionnaire to 725 members and found that 84% of respondents favored a bar-sponsored plan for LPL insurance that would be mandatory for all private practitioners.²¹⁰ Almost 40% reported that their LPL insurance premiums had increased and 10% indicated that their insurers were showing reluctance to renew coverage.²¹¹ At the OSB’s request following its 1972 Annual Meeting, the Oregon legislature amended the Oregon Bar Act in 1973 to authorize a mandatory professional liability program.²¹² The OSB’s members voted at its 1976 Annual Meeting to seek legislation authorizing the creation of a Professional Liability Fund and

202. Tom Lininger, *Should Oregon Adopt the New ABA Model Rules of Professional Conduct?*, 39 WILLAMETTE L. REV. 1031, 1031–32 (2003).

203. *Oregon Blue Book*, OR. SUPREME COURT, <https://sos.oregon.gov/blue-book/Pages/state/judicial/supreme.aspx> [<https://perma.cc/8HRW-32RB>].

204. *See, e.g.*, *Sadler v. Oregon State Bar*, 550 P.2d 1218, 1221–22 (Or. 1976); Roy Pulvers, *Separation of Powers Under the Oregon Constitution: A User’s Guide*, 75 OR. L. REV. 443, 457 (1996).

205. Edwin J. Peterson, *Lawyer-Client Conflicts of Interest Law: Contributions of Chief Justice Wallace P. Carson, Jr. During a Time of Dynamic Change*, 43 WILLAMETTE L. REV. 527, 528, 537 (2007).

206. OR. REV. STAT. § 9.010(2) (2017); *About the Oregon State Bar*, *supra* note 195.

207. OR. REV. STAT. § 9.490(1) (2017).

208. *See* Peterson, *supra* note 205, at 527–28, 535.

209. 1970 COMMITTEE REPORTS: THIRTY-SIXTH ANNUAL MEETING OF THE OREGON STATE BAR, PROFESSIONAL INSURANCE RECOMMENDATION 226 (1970).

210. *Insurance Survey*, OR. ST. B. BULL., April 1970, at 23. Of the 725 questionnaires returned, 605 lawyers favored such an arrangement, 34 opposed it, and 86 were undecided. *Id.*

211. *Id.*

212. Oregon State Bar Statement of the Board of Governors Professional Liability Fund, 1977 Annual Meeting, at 1.

require all lawyers to purchase insurance from it.²¹³ The Oregon legislature enacted such legislation in 1977.²¹⁴ That same year, the OSB passed a resolution establishing the OSB Professional Liability Fund (“PLF”).²¹⁵ The initial six-month assessment for a \$100,000/\$200,000 claims-made policy was \$250.²¹⁶

The OSB viewed the benefits of mandatory insurance to include “greater protection to the clients and the public.”²¹⁷ Yet as Manuel Ramos observed, “[a]ltruism, or concern for the consumer, was not entirely behind Oregon’s decision establishing PLF.”²¹⁸ By the mid-1970s, claims against lawyers had increased “dramatically,” only two commercial insurers wrote LPL coverage in Oregon, and Oregon lawyers paid “among the highest premiums in the country.”²¹⁹ Oregon lawyers may have believed that the OSB’s assessment of \$250 for six months—which was below the amount many lawyers were paying private insurers for LPL insurance²²⁰—would continue to be lower than if it were purchased in the commercial market. Moreover, as one member of the OSB Board of Governors observed:

[T]he importance of being covered by our own Fund cannot be overstated. It is a fund which is created by ourselves, governed by ourselves, for the protection of ourselves, and which relieves us of being bound to a commercial insurer. We now can control our own destiny regarding costs and coverage. . . .²²¹

B. IDAHO

While Idaho and Oregon share a border, they differ politically and demographically.²²² The five-member Idaho Supreme Court is elected in non-partisan elections for six-year terms.²²³ It is not known as an activist court and typically

213. *Id.* at 2–3.

214. *Id.* at 3.

215. *Id.*

216. *Id.*

217. *Professional Liability Fund Report Due at Convention*, OR. ST. B. BULL., 1977, at 6.

218. Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2610 (1996).

219. Oregon State Bar Statement of the Board of Governors, *supra* note 212, at 2.

220. Cunitz, *supra* note 28, at 652.

221. Daniel O’Leary, *The Professional Liability Fund: Milestone*, OR. ST. B. BULL., June 1978, at 9.

222. Oregon is somewhat more ethnically diverse than Idaho, but both states are predominantly comprised of Caucasians. *QuickFacts United States – Idaho, Oregon, Washington*, U.S. CENSUS, <https://www.census.gov/quickfacts/fact/table/US,ID,OR,WA/PST045219> [<https://perma.cc/A859-6Q97>]. Idaho is 18% Mormon, making it the state with the highest percentage of Mormons after Utah. *The Religiously Distinct States of America*, GALLUP (Feb. 9, 2018), <https://news.gallup.com/poll/226844/religiously-segregated-states-america.aspx> [<https://perma.cc/KM59-6MGY>]. Oregon has voted Democratic since 1988. *Presidential Election in Oregon, 2020*, BALLOTPEdia, https://ballotpedia.org/Presidential_election_in_Oregon,_2020 [<https://perma.cc/V5YM-HFAN>]. Idaho voters have consistently favored Republicans since the 1960s. See Adam Cotterell, *How Idaho Became A One Party State*, BOISE PUB. RADIO (May 13, 2014), <https://www.boisestatepublicradio.org/post/how-idaho-became-one-party-state#stream/0> [<https://perma.cc/59ZL-MKZX>].

223. CHARLES S. LOPEMAN, *THE ACTIVIST ADVOCATE* 88 (1999).

recognizes the legislature as the state's main policymaker.²²⁴ Nevertheless, the Court claims the inherent authority to regulate admission to the legal profession, and while noting that the legislature may "enact valid laws in aid of [judicial] functions," it has rejected legislative efforts to relax certain bar admission requirements.²²⁵ Idaho's legislature is part-time²²⁶ and rarely attempts to regulate the practice of law.

Proposals for rule changes relating to lawyer regulation almost always come from the mandatory Idaho State Bar ("ISB"),²²⁷ which was formed by the state legislature in 1923.²²⁸ The ISB currently has more than 5000 active members,²²⁹ and is a "self-governing state agency" with responsibility for the administration of lawyer admission and discipline.²³⁰ Its governing body, the Board of Commissioners, consists of five commissioners elected for three-year terms.²³¹ The Board of Commissioners has the authority to determine the requirements for admission to practice, subject to a vote of ISB members and the approval of the Supreme Court.²³² The commissioners and a representative from each of the ISB's seven district bar associations meet in October to vote on whether to circulate resolutions to the membership for a vote.²³³ In November, the commissioners then embark on a "road show" during which they meet with each district bar association to discuss the proposed resolutions before the membership vote, which concludes in December.²³⁴

224. *Id.* at 87–88, 100.

225. *In re Kaufman*, 206 P.2d 528, 539 (Idaho 1949) (finding that the legislature could set minimum, but not maximum, requirements for bar admission); *see also* *State v. McCoy*, 486 P.2d 247, 252 (Idaho 1971) (noting "that control and administration of the organized Bar had always been recognized as a function peculiar to the judiciary").

226. The Idaho legislature convenes in early January and typically adjourns in late March or early April. IDAHO LEGIS. SESSION DATES, <https://legislature.idaho.gov/sessioninfo/sessiondates/> [<https://perma.cc/9A6X-JXDF>]. Its members earn less than \$7500 annually. *Idaho State Legislature*, BALLOTPEdia, https://ballotpedia.org/Idaho_State_Legislature [<https://perma.cc/LGW7-NZPK>].

227. There has only been one instance in more than thirty-five years in which the Supreme Court has initiated a rule change. Telephone Interview with Diane Minnich, Exec. Dir., Idaho State Bar (May 11, 2018).

228. *About Us*, IDAHO STATE BAR, <https://isb.idaho.gov/about-us/> [<https://perma.cc/RN8B-EXZA>] (last visited May 26, 2020) [hereinafter *Idaho About Us*]. Some lawyers asked the legislature to form the ISB. For a discussion of the legislation and opposition to it by some lawyer-legislators, *see* Jess B. Hawley, *Bar Integration in Idaho*, J. AM. JUD. SOC. 141, 142 (1931).

229. *See supra* note 196 and accompanying text.

230. *Idaho About Us*, *supra* note 228.

231. *Board of Commissioners*, IDAHO STATE BAR, <https://isb.idaho.gov/about-us/governance/boc/> [<https://perma.cc/SH5Y-4D9D>].

232. IDAHO CODE § 3-408 (2018); IDAHO BAR COMM'N RULES R. 906(a) (2019). Any bar member can recommend changes to the rules of the Bar by proposing a resolution. IDAHO BAR COMM'N RULES R. 906(b) (2019).

233. IDAHO BAR COMM'N RULES R. 905(b), 906(b) (2019).

234. *Resolution Process (aka Roadshow)*, IDAHO STATE BAR, <https://isb.idaho.gov/about-us/governance/resolution-process/> [<https://perma.cc/2ETQ-GHC5>].

In 1993, the ISB's membership passed a resolution directing its commissioners to study the feasibility of mandatory LPL insurance and to submit a proposal.²³⁵ The commissioners then formed a Malpractice Task Force, which in 1994 recommended the creation of the professional liability fund to which all active ISB members would be required to contribute for insurance coverage.²³⁶ The proposal met some opposition and the Task Force withdrew it to consider an opt-out provision for government lawyers, in-house counsel, and part-time lawyers.²³⁷ In 1995, the ISB's Board of Commissioners voted to sponsor resolutions that would require lawyers to maintain LPL insurance provided through a bar-sponsored program.²³⁸ The ISB's members rejected the resolutions by a 67-451 vote.²³⁹

In 2005, in response to the ABA's adoption of the Model Court Rule on Insurance Disclosure, the Board of Commissioners proposed amendments to the Bar Commission Rules requiring lawyers to certify to the ISB whether they carried LPL insurance.²⁴⁰ The ISB bar members approved the resolution²⁴¹ and in 2006, the Idaho Supreme Court adopted a rule requiring lawyers to disclose to regulators whether they maintained LPL insurance.²⁴² The information was not posted on the ISB website, but the public could contact the ISB to learn whether a lawyer was insured.²⁴³

The issue of mandatory LPL insurance again arose in late 2015. An ISB commissioner raised the question of whether to propose a rule requiring lawyers to carry a minimum amount of LPL coverage.²⁴⁴ She did so because she had recently represented a client whose former lawyer committed malpractice, but was uninsured.²⁴⁵ The commissioners researched the experiences in other states and talked with insurers.²⁴⁶ In October 2016, the commissioners and district bar presidents approved a resolution to require lawyers who represent private clients to submit proof of LPL coverage in the minimum amount of \$100,000/

235. Jeffrey M. Wilson, *President's Message: Mandatory Malpractice Insurance is Feasible*, THE ADVOCATE, Sept. 1994, at 6.

236. *Id.*

237. Jeffrey M. Wilson, *President's Message: Mandatory Malpractice Insurance – The Debate Continues*, THE ADVOCATE, Nov. 1994, at 6, 16.

238. *Board of Commissioners Meeting Review*, THE ADVOCATE, Oct. 1995, at 35; Andrew Schwam, *Mandatory Malpractice Insurance Resolutions Should Be Defeated*, THE ADVOCATE, Nov. 1995, at 4; *Fifteen Resolutions Will be Presented at '95 Roadshow*, THE ADVOCATE, Nov. 1995, at 9.

239. Diane K. Minnich, *1995 Resolution Results*, THE ADVOCATE, Jan. 1996, at 6.

240. IDAHO BD. OF COMM'RS, Resolution 05-1 (on file with author); Telephone Interview with Diane Minnich, *supra* note 227.

241. Diane K. Minnich, *Executive Director Report, 2005 Resolutions – The Results*, THE ADVOCATE, Jan. 2006, at 6.

242. *See* IDAHO BAR COMM'N RULES R. 304(a)(4) (2007).

243. *See* Telephone Interview with Annette Strauser, MCLE & IT Adm'r, Idaho State Bar (May 22, 2015).

244. Telephone Interview with Diane Minnich, *supra* note 227.

245. Telephone Interview with Michelle Points, former president, ISB (May 8, 2018).

246. *Id.*

\$300,000.²⁴⁷ The proposal contemplated that lawyers would purchase LPL insurance on the open market.

A six-page voter pamphlet mailed to ISB members in mid-October described the resolution in a single paragraph that focused on the issue of public protection.²⁴⁸ During the November road show, lawyers were split on the resolution in the district meetings, but no organized opposition emerged.²⁴⁹ Ballots were due by December 5, 2016.²⁵⁰ The resolution passed by a vote of 51-49%, with less than 25% of the active members voting.²⁵¹ The Board of Commissioners then proposed the rule changes to the Idaho Supreme Court, which had not previously been involved in the initiative.²⁵² The Supreme Court adopted the new rule with non-substantive amendments, and it became effective on January 1, 2018.²⁵³

Why was the ISB able to effect this significant rule change? The percentage of uninsured Idaho lawyers at the time of the vote may have been low.²⁵⁴ Moreover, the idea of an insurance requirement may not have seemed radical to Idaho lawyers. Idaho attorneys could obtain reciprocity to practice in Oregon without taking a bar exam,²⁵⁵ but were required to obtain LPL insurance to be licensed there.²⁵⁶ In addition, prior to the road show, there was no task force report that might have attracted attention. There was limited media coverage of the issue during the short time period between the Board of Commissioners' October 2016 approval of the resolution and the membership's vote on the resolution.²⁵⁷ Consequently, there was limited opportunity to mount any organized opposition before the vote. Nor was there a mechanism for disgruntled lawyers to appeal directly to the Supreme Court thereafter. The simplicity of the proposal also may have helped, because unlike the 1995 proposal, it did not involve the creation of a

247. Idaho State Bar Bd. of Comm'rs, General Session Minutes, Oct. 6, 2016; Idaho State Bar, 2016 Resolution Process: Res. 16-02, at 6, https://isb.idaho.gov/wp-content/uploads/2016_voter_pamphlet.pdf [<https://perma.cc/US89-CBJC>] [hereinafter Idaho State Bar, 2016 Resolution Process]. Two voted against the proposal and one abstained. Idaho State Bar Bd. of Comm'rs, General Session Minutes, *supra*.

248. Idaho State Bar, 2016 Resolution Process, *supra* note 247, at 6 (noting that "[r]equiring attorneys to have minimum limits of professional liability insurance coverage would help to ensure the public as consumers of legal services are financially protected from attorney error").

249. Telephone Interview with Michelle Points, *supra* note 245.

250. Idaho State Bar, 2016 Resolution Process, *supra* note 247, at 1.

251. See Diane K. Minnich, *2016 Resolution Process – The Results*, THE ADVOCATE, Jan. 2017, at 22.

252. Telephone Interview with Michelle Points, *supra* note 245.

253. *In re* Amendments to the Sections of the Idaho Bar Comm'n Rules, Amended Order, Mar. 30, 2017.

254. A survey conducted in 2016 of all ISB members indicates that about 9% of Idaho lawyers were uninsured. See 2016 Idaho State Bar Membership Survey 38, https://isb.idaho.gov/wp-content/uploads/2016_isb_membership_survey.pdf [<https://perma.cc/R5NK-A3YJ>].

255. The Northwest Tri-State Compact among Washington, Oregon, and Idaho became effective in 2002 and enabled lawyers to gain reciprocal admission after three years of continuous practice in one of the states. See Mark J. Fucile, *Reciprocity, In-House Counsel Admissions and Multi-Jurisdiction Practice in Washington (and Beyond)* 6-4-6-5 (2015). The required period of practice is now five years. OR. RULES FOR ADMISSION OF ATTORNEYS 15.05(1) (2019).

256. OR. RULES FOR ADMISSION OF ATTORNEYS 15.05(6) (2019).

257. The only discussion appeared in the Idaho Bar Association's magazine, which briefly announced that there would be a vote on the resolution. See *News Briefs*, THE ADVOCATE, Nov.–Dec. 2016, at 18–19.

state professional liability fund.²⁵⁸ The relatively low cost of LPL insurance in Idaho also probably helped with passage.²⁵⁹ Finally, Idaho’s “moralistic/individualistic” political culture²⁶⁰ may have contributed to the result.

C. CALIFORNIA

California’s experience with the insurance issue is lengthier and more complicated. Like Idaho, its political culture is “moralistic/individualistic.”²⁶¹ The seven justices of the California Supreme Court are initially appointed by the governor,²⁶² confirmed by the voters during the next general election, and subject to retention votes thereafter.²⁶³ The Court claims the inherent and exclusive power to control lawyer admission and discipline.²⁶⁴ Yet it accedes to the legislature’s exercise, under its police power, of a “reasonable degree of regulation and control over the profession and the practice of law.”²⁶⁵ In fact, as explained below, the California legislature exercises an unusual degree of control over the State Bar.

The State Bar of California is a mandatory bar, formed in 1927 by the California legislature as an arm of the California Supreme Court.²⁶⁶ The requirement that lawyers belong to the State Bar is now enshrined in the state constitution.²⁶⁷ The State Bar has almost 190,000 active lawyer members.²⁶⁸ The State Bar’s governing body, the thirteen-member Board of Trustees, is composed of seven attorneys appointed by the state Supreme Court and the legislature, and six non-attorney members.²⁶⁹ Changes to the rules of professional conduct can be formulated by the State Bar Board of Trustees but must be approved by the California Supreme Court.²⁷⁰

258. See Telephone Interview with Diane Minnich, *supra* note 227.

259. See WASH. STATE BAR ASS’N, MANDATORY MALPRACTICE INS. TASK FORCE, REPORT TO WSBA BOARD OF GOVERNORS, *supra* note 160, at 30 (noting that the average premiums paid by Idaho solo lawyers to ALPS, a bar-affiliated insurer, was \$2200).

260. Lieske, *supra* note 185, at 544; Mead, *supra* note 191, at 275.

261. Mead, *supra* note 191, at 275.

262. *How Appellate Court and Supreme Court Justices are Selected*, CAL. COURTS, <http://www.courts.ca.gov/7434.htm> [<https://perma.cc/WEJ7-ZPYT>].

263. *Id.* Justices are typically elected to twelve-year terms. *Id.*

264. Santa Clara County Counsel Attorneys Ass’n v. Woodside, 869 P.2d 1142, 1151 (Cal. 1994).

265. *Id.* (quoting *Hustedt v. Workers’ Comp. Appeals Bd.*, 636 P.2d 1139, 1143 (Cal. 1981)).

266. *About Us*, STATE BAR OF CAL., <http://www.calbar.ca.gov/AboutUs.aspx> [<https://perma.cc/T2FX-C9EA>]. For discussions of how the California State Bar became unified through lawyers’ efforts, see MCKEAN, *supra* note 44, at 46–47; Gallagher, *supra* note 44, at 522–25.

267. CAL. CONST. art. 6, § 9.

268. See *supra* note 197 and accompanying text.

269. CAL. BUS. & PROF. CODE §§ 6001.2(a), 6013.5(a) (West 2019).

270. CAL. BUS. & PROF. CODE § 6076 (West 2019). In 2017, the legislature enacted legislation requiring the formation of a separate voluntary lawyers association (now known as the California Lawyers Association) so that the California State Bar could focus on admissions and discipline while the voluntary association could focus on section activities and educational programs. See *Frequently Asked Questions*, CAL. LAWYERS ASS’N, <https://calawyers.org/frequently-asked-questions/> [<https://perma.cc/EU3R-SDE3>].

California has a professional, full-time legislature.²⁷¹ One way the legislature influences the State Bar is through the budget process, because the State Bar is statutorily required to submit a proposed budget for legislative approval.²⁷² For example, in September 1985, due to the legislature's displeasure with the State Bar over its political activities and its Bar-run lawyer discipline system, it declined to approve the bill needed to enable the State Bar to collect fees before the end of the legislative session.²⁷³ This left the State Bar unable to raise money for its operations until the legislature reconvened in January 1986. When the State Bar asked the California Supreme Court to bail it out of this crisis by allowing it to collect dues pending the legislature's return, the Court declined to do so.²⁷⁴ In January 1986, Senator Robert Presley introduced a bill to establish an agency separate from the State Bar to regulate lawyers.²⁷⁵ The State Bar and voluntary lawyer organizations resisted the bill, which was initially rebuffed.²⁷⁶ Ultimately, in 1988, the legislature voted to create a new State Bar Court under the Supreme Court's control to replace the State Bar in handling disciplinary matters.²⁷⁷

Where was the California Supreme Court—which had a reputation for being activist and liberal²⁷⁸—when the legislature was stepping in to regulate lawyers? The Court was vulnerable to political attack during this period²⁷⁹ and may have been unwilling to speak out to protect a lawyer discipline system that the public viewed unfavorably.²⁸⁰ In 1985, when the legislature began to act, Chief Justice Rose Bird was facing a contentious retention election.²⁸¹ She and two other

271. The California legislature meets throughout the year and pays its members more than \$110,000 annually. *States with a Full-Time Legislature*, BALLOTEDIA, https://ballotpedia.org/States_with_a_full-time_legislature [https://perma.cc/WVX4-KMPW]; *Comparison of State Legislative Salaries*, BALLOTEDIA, https://ballotpedia.org/Comparison_of_state_legislative_salaries [https://perma.cc/FDM8-6ZVQ].

272. See CAL. BUS. & PROF. CODE § 6140.1 (West 2019).

273. See Dan Morain, *Justices Reject California Bar's Financial Plea*, L.A. TIMES, Nov. 20, 1985, at A20 (noting that Assembly Republicans were “angry at the Bar for failings in its lawyer discipline system and for taking stands on legislation and blocking judicial races”); see also RICHARD L. ABEL, *LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT* 19–20, 22–23 (2011); Gallagher, *supra* note 44, at 490, 546–49. The problems with lawyer discipline were highlighted by the *San Francisco Examiner* in a six-part series that appeared in March 1985. The news stories revealed that the discipline system was slow, unresponsive, and overprotective of lawyers. Gallagher, *supra* note 44, at 490, 538.

274. Morain, *supra* note 273, at A20.

275. Gallagher, *supra* note 44, at 554.

276. Instead, the legislature required an outside Discipline Monitor to oversee the State Bar's lawyer discipline system. *Id.* at 555–57.

277. See S.B. 1498, 1987–88 Leg., Reg. Sess. (Cal. 1987); Meighan A. Rowe, Note, *Protecting Those Who Protect Others: The Implications of the State Bar Act on Attorneys' Rights in Disciplinary Proceedings*, 4 J. LEGAL ADVOC. & PRAC. 137, 140 (2002).

278. John H. Culver, *The Transformation of the California Supreme Court: 1977–1997*, 61 ALB. L. REV. 1461, 1465–66 (1998); Kevin M. Mulcahy, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 SANTA CLARA L. REV. 863, 879–83 (2000).

279. See TARR & PORTER, *supra* note 18, at 271; Culver, *supra* note 278, at 1466–67.

280. See Gallagher, *supra* note 44, at 551–53.

281. See John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81, 87 (1986).

Supreme Court justices lost their seats in the November 1986 election, in part because of their judicial activism.²⁸² The new Supreme Court, headed by Chief Justice Malcolm Lucas, became more moderate and cautious.²⁸³ The California Supreme Court has since been described as “deferential to legislative authority, non-interventionist, non-supervisory and conflict avoiding.”²⁸⁴

California’s initial consideration of how to regulate uninsured lawyers predated these political changes, but was later informed by these dynamics. In the 1970s, many LPL insurers left the California market and the cost of insurance increased exponentially.²⁸⁵ In 1976, the State Bar president suggested the creation of a fund that would finance the actual cost of insurance, with all bar members participating in it.²⁸⁶ The public protection aspects of the proposal were reportedly “obscured by contests over whether it would serve all lawyers well and whether the compulsory aspects of the plan [were] legal.”²⁸⁷ In 1985, Assembly Speaker Willie Brown introduced a bill that would require all doctors and lawyers to maintain malpractice insurance.²⁸⁸ That bill did not pass, but in 1986, the legislature passed a bill requiring the State Bar to “develop rules and regulations providing that all active members of the State Bar shall possess professional liability insurance.”²⁸⁹ The governor vetoed it because it did not expressly exclude public agency attorneys and lawyers not engaged in law practice.²⁹⁰ In May 1987, the State Bar Board of Governors (the predecessor to the Board of Trustees) voted 16-4 to tentatively support a measure to require attorneys to obtain LPL insurance provided through an insurance liability fund.²⁹¹ The Board provided for a sixty-day comment period and planned a final vote thereafter.²⁹² Not coincidentally, Assemblyman Lloyd Connelly was sponsoring a bill in the legislature requiring lawyers to maintain LPL insurance, which he threatened to pursue even if the

282. Mulcahy, *supra* note 278, at 890–92.

283. *Id.* at 892–93; *see also* Culver, *supra* note 278, at 1488.

284. Mulcahy, *supra* note 278, at 893. Not surprisingly, a survey of judges who faced retention elections found that “even though judges rarely lose retention elections . . . three-fifths believed judicial retention elections have a pronounced effect on judicial behavior.” Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312 (1994).

285. ABEL, *supra* note 273, at 14; *see also* Galante, *supra* note 139, at 19.

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

287. Benjamin Franklin Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835, 836 (1978).

288. Jerry Gillam & Ann Blackman, *Sacramento File*, L.A. TIMES, Mar. 10, 1985, at 20.

289. State Assemb. B. 4255, 1985–86 Leg., Reg. Sess. (Cal. 1986); *see also* Jerry Gillam, *Sacramento File: Assembly Floor Action*, L.A. TIMES, Aug. 30, 1986, at 32.

290. GOVERNOR’S OFFICE, VETO MESSAGE—ASSEMBLY BILL NO. 4225 (Sept. 30, 1986).

291. Ed Jahn, *Lawyers’ Insurance Measure Supported*, SAN DIEGO UNION-TRIB., May 10, 1987, at A-3.

292. *Id.*

State Bar did not endorse it.²⁹³ Local bar associations were split on the issue, with most strongly opposing.²⁹⁴ Insurance carriers also opposed it because they feared a mandatory insurance liability fund would end their voluntary insurance programs with the bar.²⁹⁵ Ultimately the State Bar did not proceed with the vote because key legislators advised that the proposal would not pass due to opposition from local bar associations and other constituencies.²⁹⁶ As Terry Anderlini, former California State Bar president explained, “There were so many special interest groups lining up to say ‘no’ and no special interest group to push it.”²⁹⁷

Due to the legislature’s concern about uninsured lawyers, in 1992, California became the first state to require lawyers in private practice to disclose to clients in their written fee contracts whether they carried at least \$100,000 of LPL insurance.²⁹⁸ A year later, the California Trial Lawyers Association tried to eliminate the provision, which it viewed as onerous, and obtained a sunset provision.²⁹⁹ The disclosure requirement lapsed in 2000 and was not immediately reenacted.³⁰⁰ After the ABA adopted its Model Rule on Insurance Disclosure in 2004, the State Bar, in consultation with the California Supreme Court, appointed a State Bar Insurance Disclosure Task Force to study the issue.³⁰¹ In September 2007, after two public comment periods on proposed rules,³⁰² the Task Force recommended to the Board of Governors that a lawyer’s lack of insurance should be disclosed directly to clients and should be posted on the California State Bar website.³⁰³ At

293. *Id.*; see also Anne Krueger, *As More Lawyers Become Defendants, Malpractice Insurance is in Spotlight*, SAN DIEGO UNION-TRIB., June 27, 1987, at A-1. As one county bar association president noted about an insurance requirement, “[w]e’re going to have it one way or another.” Lorie Hearn, *Attorneys May Face Mandatory Malpractice Insurance*, SAN DIEGO UNION-TRIB., Apr. 25, 1987, at B-3.

294. See Hearn, *supra* note 293; see also Krueger, *supra* note 293.

295. See Telephone Interview with Terry Anderlini, former president, Cal. State Bar (June 25, 2019).

296. *Id.* The opponents included the Los Angeles County Bar Association, which would lose its voluntary insurance program and associated commission payments, if all lawyers were required to belong to a single fund. *Id.* Other opponents included insurers, some solo lawyers, and criminal defense lawyers who did not think that they needed LPL insurance. *Id.*

297. *Id.*

298. CAL. BUS. & PROF. CODE § 6147(a)(6) (West 1992); CAL. BUS. & PROF. § 6148(a)(4) (West 1992); Telephone Interview with Terry Anderlini, *supra* note 295. In 1986, the state legislature had previously considered adopting an insurance disclosure rule, but it failed to do so. See S.B. 1569, 1985–86 Leg., Reg. Sess. (Cal. 1986).

299. Mike McKee, *Bar Mulls Requisite Insurance Disclosure*, THE RECORDER, June 21, 2006, at 1. The law was also amended so that lawyers were only required to disclose if they did not carry the minimum level of insurance. Act of Oct. 11, 1993, ch. 295, § 2, 1993 Cal. Legis. Serv. 4177, 5614.

300. James E. Towery, *Should Disclosure of Malpractice Insurance Be Mandatory?: Pro*, GPSOLO MAG., Apr.-May 2003, at 36, 38. For an explanation of the political reasons why this occurred, see Mignone, *supra* note 169, at 1079 n.50.

301. Towery Memorandum, *supra* note 171, at 2. The Task Force included an adviser to the California Supreme Court and one member of the public. *Id.*

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

303. *Id.* at 3.

that time, five other states had direct disclosure requirements.³⁰⁴ By a 9-8 vote, the Board of Governors voted against the recommendations.³⁰⁵ There had been a tie, which was broken by State Bar president Sheldon Sloan, who opposed posting the insurance information online.³⁰⁶

The Task Force subsequently revised the proposal to drop the controversial provision about posting the insurance information on the State Bar website.³⁰⁷ In May 2008, the Board of Governors voted 16-4 to adopt a requirement that uninsured lawyers disclose directly to their clients in writing that they do not carry LPL insurance.³⁰⁸ At that time, State Bar president Jeff Bleich predicted that regardless of what the State Bar did, the Supreme Court was likely to adopt some kind of disclosure rule.³⁰⁹ He also noted that the compromise essentially reflected the old statutory system that lapsed in 2000.³¹⁰ The California Supreme Court adopted the rule without change in 2009.³¹¹

In September 2017, the state legislature enacted as part of the 2018 State Bar Fee Bill a requirement that the State Bar study LPL insurance for California lawyers, including the advisability of mandating insurance, and to report its findings by March 2019.³¹² Senator Hannah-Beth Jackson, a lawyer, introduced it as part of the bill that separated the State Bar's regulatory functions from its other activities.³¹³ The Board of Trustees appointed a seventeen-member Malpractice Insurance Working Group composed almost entirely of lawyers.³¹⁴ After studying the issue, the Working Group found that "legal malpractice insurance is readily available in California, and attorneys are able to obtain coverage at levels and with terms commensurate with their needs."³¹⁵ Nevertheless, it concluded that further study was required before a recommendation could be made about

304. *Id.* at 7.

305. Memorandum from Saul Bercovich, Staff Attorney, to Members of the Board of Governors 1 (Oct. 24, 2007).

306. *Legal Services Regulatory Roundup*, B. LEADER, Nov.–Dec. 2007, at 30, 30.

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

308. Dan Levine, *Bar: Uninsured Lawyers Must Inform Clients*, THE RECORDER, May 20, 2008.

309. McCarthy, *supra* note 179.

310. *See* Levine, *supra* note 308.

311. Steven M. Ellis, *Supreme Court Adopts Malpractice Disclosure Rule*, METROPOLITAN NEWS-ENTERPRISE (Aug. 27, 2009), <http://www.metnews.com/articles/2009/malp082809.htm> [<https://perma.cc/SE6Z-8BH9>].

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

313. S.B. 36, 2017–18 Legis., Reg. Sess. (Cal. 2017), ch. 422 § 40; *see* Dan Walters, *Legislature Tries State Bar Fix, but Remedy Falls Short*, SACRAMENTO BEE (May 14, 2017), <https://www.sacbee.com/news/politics-government/politics-columns-blogs/dan-walters/article150328762.html> [<https://perma.cc/2HJN-364P>].

314. STATE BAR OF CAL., MALPRACTICE INS. WORKING GROUP, CHARTER, <http://www.calbar.ca.gov/Portals/0/documents/cc/Malpractice-Insurance-Working-Group-Charter.pdf> [<https://perma.cc/6V9V-7YDD>]. Four members of the Board of Trustees served in the Working Group. *Id.* There was one consumer advocate. *Id.*

315. *See* STATE BAR OF CAL., MALPRACTICE INSURANCE WORKING GROUP REPORT TO THE BOARD OF TRUSTEES 3–4, 7, 10 (Mar. 15, 2019), http://www.calbar.ca.gov/Portals/0/documents/reports/Malpractice-Insurance-Report_Summary_and_Supreme-Court-Cover-Letter.pdf [<https://perma.cc/GM3V-9D45>].

mandatory LPL insurance and suggested topics for study.³¹⁶ It further recommended to the Board of Trustees that information about an attorney's lack of insurance should be included on the State Bar's website.³¹⁷ The Board of Trustees forwarded these recommendations to the Supreme Court and the legislature.³¹⁸ Whether further action will be taken remains to be seen.

D. WASHINGTON

The Washington Supreme Court is known as an activist court³¹⁹ that has broken new ground in the area of lawyer regulation. In 2012, it approved the licensing of non-lawyer legal services providers, known as Limited License Legal Technicians ("LLLTs"), for the benefit of the public, notwithstanding some strenuous lawyer opposition.³²⁰ Washington's nine Supreme Court justices are elected to six-year terms in non-partisan elections.³²¹ The Court claims the exclusive and inherent power to admit and discipline lawyers.³²² It rebuffed the legislature's efforts to audit the Washington State Bar Association ("WSBA") under state agency auditing statutes,³²³ but has held that the legislature may enact laws that govern the entrepreneurial aspects of law practice.³²⁴ The part-time legislature³²⁵ has generally deferred to the Supreme Court in the area of lawyer regulation.³²⁶

316. *Id.* at 12.

317. *Id.* at 12–13.

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

319. TARR & PORTER, *supra* note 18, at 368; *see also* Jim Brunner & Nina Shapiro, *State Supreme Court: Activist Justices, or Just Different?*, SEATTLE TIMES (Sept. 12, 2015), <https://www.seattletimes.com/seattle-news/politics/state-supreme-court-activist-justices-or-just-different/> [<https://perma.cc/NS9W-QBAR>] (describing criticism that the Court has become more liberal and activist).

320. *See* Holland, *supra* note 17, at 77, 106–11. In doing so, the Court noted that "[p]rotecting the monopoly status of attorneys in any practice area is not a legitimate objective." In the Matter of the Adoption of APR 28-Limited Practice Rule for Limited License Legal Technicians, No. 257-A-1005, at 7 (2012).

321. *Washington Supreme Court Justices*, WASH. COURTS, https://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.justices [<https://perma.cc/ZV67-UQNH>] (last visited May 26, 2020); *Brief History of Washington State Supreme Court*, WASH. COURTS, <https://www.courts.wa.gov/education/?fa=education.supreme> [<https://perma.cc/FC83-PUDK>] (last visited May 26, 2020).

322. *See In re Discipline of Blanchard*, 144 P.3d 286, 292 (Wash. 2006); *Hizey v. Carpenter*, 830 P.2d 646, 652 (Wash. 1992); *Short v. Demopolis*, 691 P.2d 163, 169 (Wash. 1984); *State ex rel. Laughlin v. Wash. State Bar Ass'n*, 176 P.2d 301, 302–03 (Wash. 1947).

323. *Graham v. State Bar Ass'n*, 548 P.2d 310, 314–15 (Wash. 1976).

324. *See Short v. Demopolis*, 691 P.2d 163, 170 (Wash. 1984) (finding that Washington's Consumer Protection Act could be applied to lawyers).

325. The legislature meets for 105 days in odd-numbered years and 60 days in even-numbered years. *Welcome to the Washington State Legislature*, WASH. STATE LEGIS., <http://leg.wa.gov/legislature/Pages/AboutUs.aspx> [<https://perma.cc/F5P5-W7L2>] (last visited May 26, 2020). Legislators are paid about \$49,000 annually. *Comparison of State Legislative Salaries*, *supra* note 271.

326. For example, in 1997, the legislature passed a law that promoted the suspension of the occupational licenses of individuals who failed to pay child support. WASH. REV. CODE § 74.20A.320 (1997). It added a note stating that it was mindful of the separation of powers among the branches of government, and therefore "strongly encourages the state supreme court to adopt rules providing for suspension and denial of licenses

The Washington Bar Association was originally formed in 1888 as a voluntary association.³²⁷ By 1930, some lawyers wanted a more formal structure, and in 1933, the legislature established the WSBA as a mandatory bar and a state agency.³²⁸ Today it is part of the judicial branch and administers the bar admissions process and the lawyer discipline system.³²⁹ The Board of Governors, which is the governing body of the WSBA, is elected by WSBA members, and the Board elects the president.³³⁰

Like lawyers in other states, Washington lawyers experienced high premiums and difficulty obtaining insurance coverage in the mid-1970s.³³¹ The WSBA petitioned the Washington Supreme Court for a rule requiring all lawyers to carry LPL insurance, but then the only insurer writing such insurance in the state withdrew.³³² Premiums again rose sharply in the mid-1980s, and in 1986, the WSBA began to consider establishing a professional liability fund and a bar-related insurance company.³³³ A WSBA task force designed a proposed professional liability fund, and the Board of Governors then held hearings to discuss the plan with bar members.³³⁴ In December 1986, the Board of Governors considered a motion to recommend to the Washington Supreme Court that it adopt the proposed program and professional liability fund, which would require Washington lawyers in private practice to participate in the fund, and would provide coverage of \$250,000/\$250,000.³³⁵ After extended debate, it decided to submit the question of whether to adopt the insurance program and fund to the membership in a referendum before making any recommendation to the Washington Supreme Court.³³⁶ The membership defeated the referendum by a 6971 to 1693 vote.³³⁷

related to the practice of law to those individuals who are in noncompliance” with a support or visitation order. 1997 Wash. Sess. Laws ch. 58, § 809.

327. *History of the Bar*, WASH. STATE BAR ASS’N (Oct. 4, 2018), <https://www.wsba.org/about-wsba/who-we-are/history-of-the-wsba> [https://perma.cc/28JW-D8LH].

328. *Id.*

329. *Id.*

330. Wash. State Bar Ass’n Bylaws IV.A (adopted 2010), https://www.wsba.org/docs/default-source/about-wsba/governance/proposed-bylaw-amendments/bylaws-amended-may-17-2018-1.pdf?sfvrsn=ba3c04f1_17 [https://perma.cc/ZVS9-FWYX]. The president is also a member of the Board. *Id.*

331. William H. Gates, *Lawyers’ Malpractice Insurance: What Shall We Do?*, WASH. ST. B. NEWS, May 1986, at 4.

332. Boyer & Conner, *supra* note 287, at 839.

333. Gates, *supra* note 331, at 4; *Status Report on Malpractice Insurance Coverage and Professional Liability Fund Proposal*, WASH. ST. B. NEWS, Oct. 1986, at 27.

334. Gates, *supra* note 331, at 4.

335. Carole Grayson, *The Board’s Work*, WASH. ST. B. NEWSLINE, Dec. 12–13, 1986; *Professional Liability Fund Plans Finalized; Issue Set for Membership Vote*, WASH. ST. B. NEWS, Jan. 1987, at 30, 30.

336. Grayson, *supra* note 335; Memorandum from Douglas J. Ende, Chief Disciplinary Counsel, to Mandatory Malpractice Insurance Task Force, Jan. 17, 2018, at 1. A referendum was not required, but the Board of Governors did so “[i]n view of the importance of the issue.” *Professional Liability Fund Plans Finalized*, *supra* note 335, at 30.

337. Memorandum from Douglas J. Ende, *supra* note 336, at 1.

In 2004, Robert Welden, who was both chair of the ABA Standing Committee on Client Protection and the WSBA's General Counsel, wrote to the Washington Supreme Court about the ABA's Model Court Rule on Insurance Disclosure. Chief Justice Gerry Alexander responded that the Court would not consider adopting such a rule without first hearing from the WSBA.³³⁸ The WSBA began considering the issue and in July 2005, invited public comment on a proposed insurance disclosure rule.³³⁹ The Board of Governors subsequently voted 10-2, with one abstention, to recommend a disclosure rule that would require lawyers to annually certify insurance information to the WSBA and would make the information available on its website.³⁴⁰ The Washington Supreme Court adopted the rule effective July 2007.³⁴¹

In 2016, after a Washington lawyer raised the issue of mandatory insurance with the WSBA's president, the WSBA's Board of Governors formed a working group to gather information about mandatory malpractice insurance.³⁴² The Board was mindful of the disparity between the treatment of Washington lawyers and two other legal services providers—limited practice officers and LLLTs—who were required to carry liability insurance or to demonstrate financial responsibility in order to maintain their licenses.³⁴³ In September 2017, the Board of Governors formed a task force to review the available data, obtain member input, and recommend whether to proceed with a mandatory malpractice insurance proposal.³⁴⁴ The seventeen-member task force was composed predominantly of WSBA members, but also included a federal judge, an insurance broker, two academics, an LLLT, and two non-lawyer representatives.³⁴⁵ In its March 2019 Report, it recommended that the WSBA Board of Governors propose a mandatory malpractice insurance rule for consideration by the Washington Supreme Court that would require all Washington lawyers in private practice to maintain minimum insurance of \$250,000/\$500,000.³⁴⁶ In preparing its report, it had obtained assistance from ALPS, the WSBA's endorsed professional liability provider, including estimates of the likely cost of the insurance.³⁴⁷ In May 2019, after

338. See Letter from Robert D. Welden, General Counsel, Wash. State Bar Ass'n, to Chief Justice Gerry L. Alexander, Wash. Supreme Court (Aug. 24, 2005) (on file with author).

339. Bob Welden, *Insurance-Disclosure Rule Information and Request for Comments*, WASH. ST. B. NEWS, July 2005, at 38.

340. Letter from Robert D. Welden, *supra* note 338.

341. See Robert Welden, *New Rule on Malpractice Insurance Disclosure*, WASH. ST. B. NEWS, June 2007, at 36.

342. Memorandum from Douglas J. Ende, *supra* note 336, at 1.

343. See WASH. STATE BAR ASS'N, MANDATORY MALPRACTICE INS. TASK FORCE, CHARTER (Sept. 28, 2017), https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/task-force-charter.pdf?sfvrsn=381a3bf1_6 [<https://perma.cc/F2TX-GLFK>].

344. Memorandum from Douglas J. Ende, *supra* note 336, at 2.

345. WASH. STATE BAR ASS'N, MANDATORY MALPRACTICE INS. TASK FORCE, REPORT TO WSBA BOARD OF GOVERNORS, *supra* note 160, at 1, app. B.

346. *Id.* at 3.

347. *Id.* at 7, 33–34. ALPS estimated that the annual cost of \$250,000/\$500,000 coverage for a solo corporate lawyer in Seattle would be about \$2400. *Id.* at 33–34.

the Board of Governors held a lengthy public hearing and received written comments, it rejected this recommendation by a 9-5 vote.³⁴⁸ The majority of the Board indicated they were reflecting the will of the State Bar members, who were “overwhelmingly opposed” to mandatory insurance.³⁴⁹

Kevin Whatley, a non-lawyer who had been the victim of legal malpractice by an uninsured lawyer, was outraged by the decision and decided to pursue the matter further.³⁵⁰ Whatley formed Equal Justice Washington for the purpose of lobbying the legislature for an LPL insurance requirement.³⁵¹ He also spoke at public comment sessions before the Supreme Court Work Group on Bar Structure, where he met Chief Justice Mary Fairhurst, and told her about his disappointment with the WSBA’s decision to reject an LPL insurance requirement.³⁵² Chief Justice Fairhurst told Whatley that anyone could propose a rules amendment to the Court.³⁵³ In October 2019, Equal Justice Washington submitted a proposed amendment to Admission and Practice Rule 26 to the Supreme Court, using the same language contained in the WSBA Task Force’s Proposal.³⁵⁴ In December 2019, the Court approved the suggested amendment for publication and invited public comment.³⁵⁵ It has received several comments, including a letter opposing the proposed amendment from the WSBA’s president.³⁵⁶ The deadline for comments is September 2020.³⁵⁷

E. NEVADA

Nevada came closer to adopting an insurance requirement, but it, too, ultimately failed. In recent years, Nevada has become one of the fastest-growing and most diverse states in the country.³⁵⁸ Its political culture is “individualistic.”³⁵⁹

348. Timothy Darragh, *Washington State Bar Nixes Mandatory Malpractice Insurance*, BEST’S INS. NEWS, May 31, 2019.

349. *See id.*

350. Telephone Interview with Kevin Whatley, Exec. Dir., Equal Justice Wash. (June 12, 2020). Whatley’s uninsured lawyer had neglected his personal injury case against an airline, which resulted in it being dismissed with prejudice. As a result of his experience, Whatley had spoken in favor of mandatory LPL insurance both before the WSBA’s Task Force and at the Board of Governors’ hearing. Telephone Interview with Kevin Whatley, Exec. Dir., Equal Justice Wash. (Apr. 15, 2020).

351. Telephone Interview with Kevin Whatley, Exec. Dir., Equal Justice Wash. (June 12, 2020).

352. *Id.*

353. Telephone Interview with Kevin Whatley, *supra* note 350.

354. *See* Suggested Amendment, Admission and Practice Rule 26 Submitted by Equal Justice Washington (comment period active through Sept. 30, 2020), http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=4751 [<https://perma.cc/WESL-K8PK>] [hereinafter Suggested Amendment to APR 26].

355. Order *in re* Proposed Amendment to APR 26—Insurance, Publication Order 25700-A-1281 (Dec. 4, 2019).

356. *See* Letter from Rajeev D. Majumdar, WSBA President, to Susan L. Carlson, Clerk of the Wash. Supreme Court (Jan. 26, 2020), http://www.courts.wa.gov/court_Rules/proposed/2019Dec/APR26/Rajeev%20Majumdar%20-%20APR%2026.pdf [<https://perma.cc/QWA5-L2JR>]. In the interest of full disclosure, the author notes she submitted a letter in support of the proposal.

357. *See* Suggested Amendment to APR 26, *supra* note 354.

358. *Nevada and Idaho Are the Nation’s Fastest-Growing States*, U.S. CENSUS (Dec. 19, 2018), <https://www.census.gov/newsroom/press-releases/2018/estimates-national-state.html> [<https://perma.cc/4CAR-QVGL>];

Nevada's seven Supreme Court justices are elected to six-year terms in non-partisan elections.³⁶⁰ The Court claims that “[a]uthority to admit to practice and discipline is inherent and exclusive in the courts.”³⁶¹ The legislature has not challenged this assertion. Nevada's part-time legislature, which meets every other year, is the fourth-smallest in the country.³⁶² There is currently a “mismatch between institutional capacity and the policy demands of a fast-growing, urban and diverse state,”³⁶³ which may help account for why the legislature has been relatively uninvolved in lawyer regulation.

In 1928, the legislature formed the mandatory State Bar of Nevada.³⁶⁴ After the legislature repealed the State Bar Act in 1963, the Nevada Supreme Court reconstituted the mandatory bar in 1965 as a public corporation under the supervision of the Court.³⁶⁵ The State Bar currently has more than 9000 active attorneys, with more than 70% of Nevada lawyers living in Clark County (which includes Las Vegas).³⁶⁶ The State Bar is responsible for administering admissions and lawyer discipline.³⁶⁷ Its fifteen-member Board of Governors is composed entirely of lawyers.³⁶⁸ The State Bar's Board of Governors has the power to formulate rules of professional conduct, subject to approval by the Supreme Court.³⁶⁹ Most of the proposals for changes in lawyer regulation come from the State Bar.³⁷⁰

Nevada reportedly considered mandatory insurance in the 1980s,³⁷¹ but no records could be located. The State Bar of Nevada considered mandatory insurance in 2000, when a committee proposed to the Board of Governors that Nevada lawyers be required to maintain LPL insurance in the amount of \$500,000.³⁷² The Board sought input from the members and ultimately rejected the proposal in June 2000, concluding there was insufficient support among the membership for

David F. Damore, *Limits on Nevada's Legislature Keep it From Serving the State*, BROOKINGS (June 14, 2019), <https://www.brookings.edu/blog/fixgov/2019/06/14/limits-on-nevadas-legislature-keep-it-from-serving-the-state/> [<https://perma.cc/8HJM-G6PG>].

359. See Mead, *supra* note 191, at 275.

360. *Nevada Supreme Court*, BALLOTEDIA, https://ballotpedia.org/Nevada_Supreme_Court [<https://perma.cc/J468-EGW4>] (last visited May 26, 2020).

361. NEV. SUP. CT. R. 39 (2018).

362. NEV. CONST. art. 4, § 2; Damore, *supra* note 358. The legislature meets for about four months and legislators are only paid for the first sixty days of the session, plus a per diem thereafter. NEV. CONST. art. 4, §§ 2, 3, 4; Damore, *supra* note 358.

363. Damore, *supra* note 358.

364. *Our History*, STATE BAR OF NEV., <https://www.nvbar.org/about-us/our-history/> [<https://perma.cc/K8EU-V559>] (last visited May 26, 2020).

365. See NEV. SUP. CT. R. 78 (2018).

366. See Lieske, *supra* note 185 and accompanying text.

367. NEV. SUP. CT. R. 49, 103 (2018).

368. NEV. SUP. CT. R. 81 (2018).

369. NEV. SUP. CT. R. 86(6) (2018).

370. Telephone Interview with Richard Pocker, former president, State Bar of Nev. (May 15, 2019).

371. See Goldfein, *supra* note 139, at 1296.

372. Schlegelmilch, *supra* note 147, at 9.

mandatory insurance.³⁷³ The Board of Governors instead appointed a new committee to explore alternatives to mandatory insurance,³⁷⁴ but it does not appear that the State Bar took any further action in the next few years.

After the ABA adopted its 2004 Model Court Rule on Insurance Disclosure, the Nevada State Bar Board of Governors debated the issue and concluded that they favored adoption of insurance disclosure.³⁷⁵ There is no indication that the Board sought the membership's views.³⁷⁶ During an annual Nevada Supreme Court/Board of Governors meeting, Justice James Hardesty indicated it would be helpful if any such proposal included an analysis of the availability of malpractice insurance in Nevada.³⁷⁷ In its petition in support of the rule change, the State Bar reported that there were approximately thirty-five malpractice carriers on file with the Division of Insurance and reported anecdotal information about the cost of insurance.³⁷⁸ The State Bar petition to the Supreme Court asserted that disclosure "will reduce potential public harm and increase the public trust by allowing the public to make an informed decision when hiring a lawyer."³⁷⁹ It further stated that the information should be available to the public, but did not specify the manner in which that should occur.³⁸⁰ In September 2005, the Supreme Court adopted an insurance disclosure rule that required lawyers in private practice to certify annually on their registration forms whether they maintain LPL insurance and the name and address of the carrier.³⁸¹ The order further stated that the "information shall be public."³⁸² The insurance information was subsequently only made available by phone or email inquiry to the State Bar.³⁸³

Nevada again considered mandatory LPL insurance starting in 2017, after a prominent Las Vegas plaintiffs' lawyer wrote an "open letter" to the Nevada Supreme Court and the Nevada State Bar Board of Governors that appeared in

373. *Id.*

374. *Id.*

375. See *In re* Amendments to Supreme Court Rule 79 Regarding Member Reporting Requirement, ADKT 384, at 2–3 (Nev. Sup. Ct. May 27, 2005).

376. The only mention of the subject in the *Nevada Lawyer* refers to the Board's approval of the petition to be filed in the Supreme Court "seeking the imposition of mandatory disclosure of professional liability insurance by all Nevada attorneys." See Allen Kimbrough, *Board of Governors Meets in Reno*, NEV. LAW, July 2005, at 42.

377. Amendments to Sup. Ct. R. 79, *supra* note 375, at 3.

378. *Id.* at 4.

379. *Id.* at 2. The petition included draft rule language; Welden's 2004 letter to the Nevada Chief Justice, accompanied by the attachments previously sent to the Court; and a summary of the Bar's findings about the availability of insurance in Nevada.

380. This approach was consistent with the ABA Model Court Rule, which states that insurance information "will be made available by such means as designated by the highest court in the jurisdiction." See ABA MODEL CT. RULE ON INS. DISCLOSURE (AM. BAR ASS'N 2004).

381. See Order Amending Rule 79 of the Supreme Court Rules, *In re* Amendments to Supreme Court Rule 79, ADKT 384 (Nev. Sup. Ct. Sept. 13, 2005).

382. *Id.*

383. See ABA STANDING COMM. ON CLIENT PROTECTION, STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON INSURANCE DISCLOSURE, *supra* note 137, at 5.

Vegas Legal Magazine.³⁸⁴ He decried the “hypocrisy” of not requiring lawyers to maintain liability insurance, especially when many other Nevada professionals were required to do so.³⁸⁵ The State Bar formed a Professional Liability Insurance Task Force composed entirely of lawyers³⁸⁶ to study whether lawyers “should be required to carry, or disclose whether they carry” LPL insurance.³⁸⁷ The Task Force surveyed uninsured Nevada lawyers to learn more about them.³⁸⁸ It also conducted an “unofficial survey” of the public, and found that respondents believed attorneys should maintain malpractice insurance.³⁸⁹ In addition, it met with LPL insurers who indicated they supported certain options being considered by the Task Force.³⁹⁰ The Task Force ultimately recommended that all attorneys engaged in law practice—except government and corporate counsel—carry a minimum of \$250,000/\$250,000 in liability insurance.³⁹¹ The Board of Governors approved the proposal in November 2017, but voted to survey State Bar members to learn their views before submitting a petition to the Court.³⁹² The survey they conducted revealed that more than 56% of the approximately 1000 members who responded to the survey opposed direct disclosure, and many voiced concerns about an insurance requirement.³⁹³ Nevertheless, the Board of Governors petitioned the Supreme Court in June 2018 for a rule change to require lawyers in private practice to carry LPL insurance.³⁹⁴ The petition included a summary of the results of the lawyer survey, and the open-ended survey responses from over 400 members.³⁹⁵ It also included a discussion of the likely cost of LPL insurance for uninsured Nevada practitioners, which it estimated would start low but rise after six years to an average of about \$3500 for Clark County lawyers and \$3100 for lawyers in the rest of Nevada.³⁹⁶

384. See Robert T. Eglet, *An Open Letter*, VEGAS LEGAL MAG., Jan. 12, 2017.

385. *Id.*

386. *Join the Discussion: Whether Malpractice Insurance Should be Mandatory for Nevada Attorneys*, NEV. LAW., Dec. 2017, at 28; Telephone Interview with Richard Pocker, *supra* note 370.

387. Bryan K. Scott, *Message from the President: Updates from the Bar*, NEV. LAW., Apr. 2017, at 4.

388. See Petition of the State Bar of Nevada, ADKT 534, *supra* note 27, at Ex. C.

389. See Vernon Leverty, *Message from the President: Tipping the Scales in Honor of Our Profession*, NEV. LAW., Apr. 2018, at 4.

390. See *Join the Discussion*, *supra* note 386, at 29.

391. State Bar of Nevada, Minutes of Board of Governors Meeting, Nov. 8, 2017, at 2. It also recommended, alternatively, that if lawyers did not maintain insurance, they must disclose this information in writing to clients. *Id.*

392. *Id.* at 2.

393. See Petition of the State Bar of Nevada, ADKT 534, *supra* note 27, at Ex. D.

394. *Id.* This is not the first occasion that the State Bar’s leadership evidenced a greater commitment to the public than some of its members. In the 1990s, the State Bar of Nevada’s Board of Governors approved and filed a petition with the Supreme Court to implement a mandatory pro bono plan. They subsequently withdrew the petition because they had not consulted with members, who voiced strong opposition. See Kendra Emi Nitta, *An Ethical Evaluation of Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 909, 913–17 (1996).

395. Petition of the State Bar of Nevada, ADKT 534, *supra* note 27, at Ex. D.

396. *Id.* at 11–12.

The Nevada Supreme Court then invited written comments from the bench, bar, and public, and held a public hearing.³⁹⁷ Written support came from a few individual lawyers and the Nevada Justice Association (the trial lawyers).³⁹⁸ Far more lawyers wrote in opposition to an insurance requirement, including a letter signed by 127 members of the State Bar.³⁹⁹ At the public hearing in July 2018, the Court also heard “great opposition” from bar members.⁴⁰⁰ The Court subsequently rejected the proposed insurance requirement, stating that the Bar had not provided sufficient data, but without explaining what type of data were missing.⁴⁰¹ Lawyer opposition from well-respected bar members contributed to the Court’s decision to effectively kill the insurance initiative.⁴⁰²

F. NEW JERSEY

The seven-member New Jersey Supreme Court has long been known for judicial activism, liberal reformist activities, and a commitment to individual and consumer rights.⁴⁰³ The governor nominates and appoints the Supreme Court justices, subject to confirmation by the state senate.⁴⁰⁴ After the first seven-year term, the justice can be reappointed by the governor with the consent of the senate, but thereafter, the judge receives tenure until age seventy.⁴⁰⁵ This

397. Order Scheduling Public Hearing and Requesting Public Comment, ADKT 534, *In re* Amendment to Supreme Court Rule 79 (Nev. Sup. Ct. July 3, 2018).

398. See, e.g., Robert T. Eglet, Comment Filed *In re* Amendments to Supreme Court Rule 79 Regarding Professional Liability Insurance, ADKT 0534 (Jul. 10, 2018); Nancy Avanzino-Gilbert, Comment Filed *In re* Amendments to Supreme Court Rule 79 Regarding Professional Liability Insurance, ADKT 0534 (Jul. 16, 2018); Mark W. Knobel, Comment Filed *In re* Amendments to Supreme Court Rule 79 Regarding Professional Liability Insurance, ADKT 0534 (Jul. 16, 2018).

399. Mauricio Hernandez et al., Comment Filed *In re* Amendments to Supreme Court Rule 79 Regarding Professional Liability Insurance, ADKT 0534 (Jul. 11, 2018).

400. David Eric Kassab, *Avoiding Accountability: The Rise of Mandatory Legal Malpractice and Insurance Disclosure*, ABA/BNA LAW. MANUAL OF PROF'L CONDUCT, Oct. 30, 2018.

401. Order Denying Petition for Amendment to Supreme Court Rule 79, ADKT 534, *supra* note 135.

402. See Telephone Interview with Richard Pocker, *supra* note 370.

403. TARR & PORTER, *supra* note 18, at 184, 237; John B. Wefing, *The Performance of the New Jersey Supreme Court at the Opening of the Twenty-First Century: New Case, Same Script*, 32 SETON HALL L. REV. 769, 771, 815–18 (2001); Virginia A. Long, *The Purple Threat; Social Justice as a Recurring Theme in the Decisions of the Poritz Court*, N.J. L.J., Oct. 30, 2006; Charles Toutant, *NJ Justices Call Provision of Consumer Contract Unenforceable*, LEGAL INTELLIGENCER, Jan. 15, 2019, at 3. The current Chief Justice, Stuart Rabner, has also been characterized as an activist. See *Supreme Court's Stuart Rabner, Saved from Christie's Axe*, NJ.COM (May 22, 2014), https://www.nj.com/opinion/2014/05/christie_reappoint_chief_justice_stuart_rabner.html#incart_river [<https://perma.cc/8QP9-K4DP>].

404. N.J. CONST. art. VI, § VI (I). The New Jersey State Bar Association reviews the qualifications of a governor’s intended nominees, but a compact with the governor’s office requires the Bar to keep the vetting process confidential and to report only to the governor on whether it deems a candidate qualified. Michael Booth, *Supreme Court Nominee Faces Resistance as Hearing Looms*, N.J. L.J., May 28, 2012, at 1. The State Bar reserves the right to testify at a confirmation hearing, however, if the Bar gives the candidate a “not qualified” rating and the governor nominates the candidate anyway. *Id.*

405. N.J. CONST. art. VI, § VI (3).

provides the justices with a large measure of autonomy.⁴⁰⁶

The New Jersey Supreme Court claims the exclusive authority to regulate lawyers under the state Constitution,⁴⁰⁷ which vests the Court with “jurisdiction over the admission to the practice of law and the discipline of persons admitted.”⁴⁰⁸ The Court has shared its jurisdiction with the legislature “in the spirit of comity,” but it will not do so when the legislature enacts laws governing procedural matters or lawyer discipline.⁴⁰⁹ The legislature meets annually⁴¹⁰ and occasionally passes laws affecting legal practice but has generally steered clear of the areas of admission and discipline.⁴¹¹ In 1998, it passed legislation requiring physicians and podiatrists to carry malpractice insurance⁴¹² but did not impose such a requirement on lawyers.

More than 98,000 lawyers are admitted to practice in New Jersey.⁴¹³ The state has no mandatory bar association. The voluntary New Jersey State Bar Association (“NJSBA”), which was formed in 1899, has more than 18,000 members, including paralegals and law students.⁴¹⁴ The Board of Trustees, which is mostly elected by the members, manages the affairs of the NJSBA.⁴¹⁵ It has no regulatory authority but often provides input during the rulemaking process. One indication of the Supreme Court’s view of the NJSBA’s role can be seen in Chief Justice Robert Wilentz’s statement in 1982, “I will not take any action which affects the Bar without giving you a meaningful opportunity to comment, discuss and argue.” He added, “I assure you that there are six justices determined to help me keep that vow.”⁴¹⁶

406. Nevertheless, in recent years, Governor Chris Christie declined to renominate two sitting justices for reasons unrelated to the judges’ qualifications. See *NJSBA Resolution Urges Constitutional Amendment to Protect Judicial Independence*, N.J. L.J., Apr. 11, 2014.

407. *In re Application of LiVolsi*, 428 A.2d 1268, 1271 (N.J. 1981); Michael P. Ambrosio & Denis F. McLaughlin, *The Redefining of Professional Ethics in New Jersey Under Chief Justice Robert Wilentz: A Legacy of Reform*, 7 SETON HALL CONST. L.J. 351, 353–54 (1997).

408. N.J. CONST. art. VI, § II.

409. See *McKeown-Brand v. Trump Castle Hotel & Casino*, 626 A.2d 425, 429 (N.J. 1993) (limiting the application of a New Jersey statute proscribing frivolous lawsuits so that it imposed attorneys’ fees on a party but not the party’s lawyers).

410. N.J. CONST. art IV, § 1. The legislature is not, however, considered a professional legislature, in part because legislators only receive salaries of \$49,000 per year. See *Comparison of State Legislative Salaries*, *supra* note 271.

411. For example, it has passed legislation governing lawyers’ fees and retainer agreements in family law cases. See N.J. STAT. ANN. §§ 5:3-5 (West 2018).

412. N.J. STAT. ANN. §§ 45:5-5.3, 45:9-19.17 (West 2018).

413. See *supra* note 200 and accompanying text.

414. *About Us*, N.J. STATE BAR ASS’N, <https://tcms.njsba.com/PersonifyEbusiness/AboutUs.aspx> [<https://perma.cc/P2EX-E32M>]; *Join the NJSBA*, N.J. STATE BAR ASS’N, <https://tcms.njsba.com/PersonifyEbusiness/JointheNJSBA.aspx> [<https://perma.cc/9FYZ-TPXW>].

415. N.J. State Bar Ass’n Bylaws art. VI, § 2.

416. Cheryl Baisden, *The New Jersey State Bar Association: The First 100 Years*, N.J. LAW., Oct. 1999, at 19, 52.

New Jersey was a national leader in the area of attorney regulation in the 1980s and 1990s.⁴¹⁷ It was on the forefront of efforts to protect clients with client protection funds, random audits, mandatory fee arbitration, and continuing legal education requirements.⁴¹⁸ The New Jersey Supreme Court has been willing to disregard the NJSBA's preferences in order to protect the public. For example, in 1984, it adopted a controversial rule which stated that a lawyer may not "knowingly fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure."⁴¹⁹ The NJSBA asked the Supreme Court to withhold implementation of the rule,⁴²⁰ but the Court declined to do so. In 1994, the Court sided with the New Jersey Ethics Commission's recommendations to make lawyer discipline complaints public when a discipline complaint became formal and to eliminate private admonitions, notwithstanding "vehement opposition" from the NJSBA.⁴²¹

New Jersey's experience with LPL insurance requirements began in 1970, when the New Jersey Supreme Court first required lawyers practicing in professional corporations to carry LPL insurance.⁴²² In 1993, the Michels Commission, which Chief Justice Wilentz appointed to recommend changes to New Jersey's ethics system, recommended that uninsured attorneys should be required to disclose non-coverage, but that recommendation was rejected without comment by the New Jersey Supreme Court.⁴²³ Starting in 1997, court rules required all limited liability companies ("LLCs") and limited liability partnerships ("LLPs") utilized by lawyers to maintain liability insurance.⁴²⁴ In late 2003, as Assemblyman Jon Bramnick was poised to introduce a bill requiring New Jersey lawyers to carry LPL insurance, commentary appeared in the *New Jersey Law Journal*

417. See Mark E. Hopkins, *Open Attorney Discipline: New Jersey Supreme Court's Decision to Make Attorney Disciplinary Procedures Public—What it Means to Attorneys and the Public*, 27 RUTGERS L. REV. 757, 786 (1996).

418. *Id.* at 786.

419. See N.J. RULES OF PROF'L CONDUCT R. 3.3(a)(5) (1984). This rule had no counterpart in the *Model Rules* and is triggered even without an earlier affirmative misrepresentation by the attorney or the client.

420. See Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 95 n.52 (1994).

421. Hopkins, *supra* note 417, at 764. Likewise, in 1995 it overturned an advisory rule issued by its Committee on the Unauthorized Practice of Law that would have prohibited brokers and title companies from handling real estate closings without a lawyer. Joyce A. Palomar, *The War Between Attorneys and Law Conveyancers—Empirical Evidence Says "Cease Fire!"*, 31 CONN. L. REV. 423, 436 (1999). The Supreme Court concluded the public interest would be better served by permitting laypersons to perform those legal services, notwithstanding arguments to the contrary from the NJSBA. *Id.* at 445–46, 464–65, 475–76.

422. See Bennett J. Wasserman, *All Clients Deserve Protection from Professional Negligence*, N.J. L.J., Jan. 20, 2014.

423. REPORT OF THE SUPREME COURT AD HOC COMM. ON ATTORNEY MALPRACTICE INSURANCE, *supra* note 161, at 1–2.

424. See *id.* at 14. Lawyers working in those entities could limit their vicarious liability, but the LLPs and LLCs were required to maintain at least \$100,000 per occurrence for each attorney employed by the firm, up to \$5 million. See David S. Neufeld, *Shelter from the Storm: A Review of Business Entities Available to New Jersey Professionals*, N.J. L.J., Mar. 2, 1998, at 3.

questioning whether the Court would uphold such legislation.⁴²⁵ The legislature never voted on the bill.⁴²⁶

The next year, when the ABA was considering adopting its Model Court Rule for Insurance Disclosure, the NJSBA's Executive Director wrote a letter opposing such a rule. The main reasons were that it would "impose cumbersome and unnecessary requirements on lawyers," and it might "open the door" to consideration of an LPL insurance requirement.⁴²⁷ During the 2006–2008 rules cycle, the New Jersey Supreme Court Professional Responsibility Rules Committee, which was composed of judges and lawyers, considered whether disclosure should be required, but concluded it was not in a position to make a recommendation and sought more time.⁴²⁸ In December 2009, it recommended the formation of an ad hoc committee to gather data to consider the issues of mandatory disclosure and mandatory insurance.⁴²⁹

In January 2010, Bennett Wasserman and Krishna Shah, private practitioners knowledgeable about legal malpractice issues, published an article in the *New Jersey Law Journal* calling for mandatory LPL insurance.⁴³⁰ Although the Supreme Court reportedly formed a committee to study the issue in October 2010,⁴³¹ it is unclear what happened to that effort. Wasserman again published an article in the *New Jersey Law Journal* in January 2014 making the case for requiring lawyers to maintain LPL insurance.⁴³² The next month, the Supreme Court formed an eighteen-member Ad Hoc Committee on Malpractice Insurance chaired by a retired Appellate Division judge and mainly composed of lawyers.⁴³³ It included Wasserman and Robert Hille, the NJSBA's designee who practices in the area of professional liability defense.⁴³⁴ The Committee also included one public member and an insurance industry member.⁴³⁵

In June 2017, the Ad Hoc Committee issued a 174-page report (plus appendices) recommending against mandatory insurance. It stated that the creation of a

425. See William H. Michelson, *Mandatory Malpractice Insurance: Laudable but Unenforceable*, N.J. L.J., Nov. 3, 2003, at 7.

426. See Assemb. B. 617, 211th Leg., Reg. Sess. (N.J. 2004)

427. Letter from Harold L. Rubenstein, Exec. Dir., NJSBA, to John Holtaway, ABA Ctr. for Prof'l Resp. (Feb. 26, 2004) (on file with author).

428. REPORT OF THE SUPREME COURT AD HOC COMM. ON ATTORNEY MALPRACTICE INSURANCE, *supra* note 161, at 2–3.

429. *Id.* at 3, app. A.

430. Bennett J. Wasserman & Krishna J. Shah, *Mandatory Legal Malpractice Insurance: The Time Has Come*, N.J. L.J., Jan. 14, 2010.

431. See Charles Toutant, *Panel to Study Mandatory Malpractice Insurance for Lawyers*, N.J. L.J., Oct. 4, 2010.

432. Wasserman, *supra* note 422.

433. REPORT OF THE SUPREME COURT AD HOC COMM. ON ATTORNEY MALPRACTICE INSURANCE, *supra* note 161, at 3–4, 167–68.

434. *Id.* at 167–68; ROBERT B. HILLE, McELROY, DEUTSCH, MULVANEY & CARPENTER, <http://www.mdmc-law.com/tasks/sites/mdmc/assets/file/pdfs/bio/RobertB-Hille.pdf> [<https://perma.cc/5U52-AR62>].

435. REPORT OF THE SUPREME COURT AD HOC COMM. ON ATTORNEY MALPRACTICE INSURANCE, *supra* note 161, at 3–4, 167–68.

fund modeled on Oregon’s PLF would be “unworkable in the New Jersey marketplace.”⁴³⁶ It also concluded that a mandate “would be unfairly punitive” to solo and small firm lawyers and attorneys engaged in part-time practice, presumably due to the cost.⁴³⁷ The Committee report further expressed concerns about insurers being able to decide who could practice law.⁴³⁸ Some Committee members were also concerned, based on communications with insurers, that insurers would withdraw from the market if LPL insurance were required.⁴³⁹ Instead of requiring lawyers to maintain insurance, the Committee recommended insurance disclosure to the Court and direct disclosure to clients.⁴⁴⁰

In November 2017, the Supreme Court invited written comments from lawyers—but not the public—on the Committee’s report.⁴⁴¹ The New Jersey Association for Justice (the trial lawyers) wrote a letter supporting mandatory disclosure.⁴⁴² Two lawyers in private practice wrote letters opposing mandatory insurance and direct disclosure.⁴⁴³ Hille, then the NJSBA’s president, also sent a letter stating that the NJSBA opposed both mandatory insurance and any disclosure requirement.⁴⁴⁴ He argued that NJSBA studies “show that malpractice insurance rates in New Jersey start at 33% higher than in Pennsylvania and 49% higher than in New York, due to New Jersey’s longer statute of limitations for malpractice claims and the potential of attorneys’ fee awards [to plaintiffs] under *Saffer v. Willoughby*.”⁴⁴⁵ At about that same time, state Senator Nicholas Scutari introduced a bill to require attorneys to carry LPL insurance that was referred to the Judiciary Committee, but no action was taken.⁴⁴⁶

These events must be viewed in the context of other longstanding efforts by some New Jersey lawyers and insurance companies to limit plaintiffs’ recoveries

436. *Id.* at 7, 132.

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

438. *Id.* at 132–34.

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

440. REPORT OF THE SUPREME COURT AD HOC COMM. ON ATTORNEY MALPRACTICE INSURANCE, *supra* note 161, at 7–10, 144–45.

441. See Notice to the Bar, Report of the Supreme Court Ad Hoc Comm. on Attorney Malpractice Insurance – Publication for Comment (Nov. 14, 2017), <https://www.njcourts.gov/notices/2017/n171113a.pdf> [<https://perma.cc/E28Z-N56P>].

442. Letter from Eric G. Kahn, President, N.J. Ass’n for Justice, to Glenn A. Grant, Acting Admin. Dir. of the N.J. Courts (Jan. 2, 2018) (on file with author).

443. See Letter from Robert W. Ruggieri to Glenn A. Grant, Acting Admin. Dir. of the N.J. Courts (Dec. 20, 2017) (on file with author); Letter from Albert H. Sauer to Glenn A. Grant, Acting Admin. Dir. of the N.J. Courts (Dec. 20, 2017) (on file with author).

444. Letter from Robert B. Hille, President, N.J. State Bar Ass’n, to Glenn A. Grant, Acting Admin. Dir. of the N.J. Courts (Jan. 15, 2018) (on file with author).

445. *Id.* at 1.

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

in legal malpractice cases. In its 1996 decision in *Saffer*, the New Jersey Supreme Court held that a successful malpractice plaintiff could recover attorneys' fees as compensatory damages in a legal malpractice case.⁴⁴⁷ Initially, insurers' lawyers sought to repeal or limit the *Saffer* case through litigation because it increased the cost of malpractice claims.⁴⁴⁸ The NJSBA subsequently joined with the insurance industry in that fight. Since 2008, the NJSBA has lobbied in the New Jersey legislature to shorten the six-year statute of limitations for lawyer malpractice to two years and for legislative abrogation of the *Saffer* case.⁴⁴⁹ These efforts were supported by some other county and affinity bar associations in the state, and the insurance industry.⁴⁵⁰ They were opposed by the New Jersey Association for Justice.⁴⁵¹

In February 2018, the *New Jersey Law Journal* published an editorial urging the Supreme Court to adopt the direct disclosure requirement.⁴⁵² It was not until March 2019 that the Supreme Court issued a Notice to the Bar of its decision and planned next steps. The relatively brief notice stated that the Court agreed with the Task Force not to require lawyers to maintain LPL insurance.⁴⁵³ It then indicated that it would require insured lawyers to file with the Court certificates of insurance setting forth policy information, and would devise procedures to make that information available to consumers online.⁴⁵⁴ The Court stated that after considering the comments received on the direct disclosure proposal, it would withhold action on the recommendation until an unspecified later date.⁴⁵⁵

It is conceivable that the Supreme Court was persuaded that mandatory insurance was inappropriate in the New Jersey market because of the cost of LPL

447. *Saffer v. Willoughby*, 670 A.2d 527, 535 (N.J. 1996). The court subsequently permitted non-clients to recover attorneys' fees in some malpractice cases. See *Innes v. Marzano-Lesnevich*, 136 A.3d 108, 116 (N.J. 2016).

448. See Henry Gottlieb, *Carriers' Lawyers Marshal Forces for Assault on Saffer Fee-Shifting Rule*, N.J. L.J., Nov. 12, 2001, at 45; Charles Toutant, *A Broadside at Saffer Fee Shifting*, N.J. L.J., Aug. 12, 2002, at 28; Henry Gottlieb, *Testing the Reach of Saffer Fee-Shifting; Defense Lawyer Seeking Repeal*, N.J. L.J., Oct. 18, 2004, at 22.

449. Valerie Brown, *Pro-Attorney Legislation Tops NJSBA Legislative Agenda*, N.J. LAW., Aug. 11, 2008, at 2. This lobbying continued into 2019. See *New Jersey State Bar Association—Capitol Report*, N.J. L.J., Apr. 1, 2019.

450. See *Bar Report—Capitol Report*, N.J. L.J., Mar. 25, 2019. USI Senior Vice President Mike Mooney, who made a presentation and arguments in favor of the bill before the legislature, also acted as a "resource associate member" of the Ad Hoc Committee and provided information to that Committee about LPL insurance costs in New Jersey. REPORT OF THE SUPREME COURT AD HOC COMM. ON ATTORNEY MALPRACTICE INSURANCE, *supra* note 161, at app. FF.

451. *Bar Report*, *supra* note 450.

452. *Malpractice Insurance Status Should be Disclosed to Clients*, N.J. L.J. (Feb. 19, 2018), <https://www.law.com/njlawjournal/2018/02/19/malpractice-insurance-status-should-be-disclosed-t/> [<https://perma.cc/2H6F-BBAP>].

453. Notice to the Bar – Ad Hoc Comm. on Attorney Malpractice Insurance; Supreme Court Action and Next Steps (Mar. 11, 2019), <https://njcourts.gov/notices/2019/n190313b.pdf> [<https://perma.cc/P2PK-639P>].

454. *Id.*

455. *Id.*

insurance there.⁴⁵⁶ It is unclear, however, why this consumer-oriented court did not follow the Ad Hoc Committee's recommendation for direct disclosure. The Court was in no hurry to form a committee to study these issues or to release its conclusions, and may have been affected by events that were playing out in the legislature. One New Jersey lawyer familiar with the matter suggested that the Court may have wanted to assure the NJSBA that it was not relentlessly pro-consumer, to the detriment of lawyers, especially when it knew that the NJSBA was still "pissed off" with the Court due to the *Saffer* decision.⁴⁵⁷ Or the Court may have wished to send that message to the legislature, which was considering shortening the statute of limitations for legal malpractice and statutorily abrogating *Saffer*. In any case, even in a state with a court that has previously adopted public-regarding laws in the face of lawyer opposition, the New Jersey Supreme Court declined to adopt strong public protection measures here.

G. TEXAS

Texas differs from the other states discussed, not only in its geographic location, but in its political culture, which is traditionalistic/individualistic.⁴⁵⁸ Moreover, unlike the previously examined courts, the nine-member Texas Supreme Court is elected through partisan elections.⁴⁵⁹ Money is especially important in those elections.⁴⁶⁰ Texas Supreme Court candidates raised more than \$4.2 million during the 2016 elections.⁴⁶¹ Lawyers are typically among the largest donors.⁴⁶² The Court has often served as a stepping stone to other important positions.⁴⁶³

456. See REPORT OF THE SUPREME COURT AD HOC COMM. ON ATTORNEY MALPRACTICE INSURANCE, *supra* note 161, at 153–55.

457. See Telephone Interview with Ad Hoc Comm. Member, *supra* note 432.

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

459. *Supreme Court of Tex.*, TEX. JUD. BRANCH, <http://www.txcourts.gov/supreme/> [<https://perma.cc/KM8N-V84L>] (last visited May 26, 2020). Justices are elected to six-year terms. *Id.* The Texas Supreme Court is the court of last resort for civil cases. *Id.* The Texas Court of Criminal Appeals is the court of last resort for criminal cases. *Court of Criminal Appeals*, TEX. JUD. BRANCH, <http://www.txcourts.gov/cca/> [<https://perma.cc/54JF-VUT9>] (last visited May 26, 2020).

460. See Mark Pulliam, *In Texas, a State Supreme Court Maintains Integrity, Despite Politics*, NAT'L REV. (June 13, 2017), <https://www.nationalreview.com/2017/06/texas-supreme-court-elected-justices-integrity-california-supreme-court-appointed-politicized/> [<https://perma.cc/4SCK-96DZ>].

461. *Election Overview*, FOLLOWTHEMONEY.ORG (2016), <https://www.followthemoney.org/tools/election-overview?s=TX&y=2016> [<https://perma.cc/GWB8-3KV3>] (last visited May 26, 2020).

462. See, e.g., Texans for Pub. Just., *Courtroom Contributions Stain Supreme Court Campaigns* 1 (2008), <http://info.tpj.org/reports/courtroomcontributions/courtroomcontributions.pdf> [<https://perma.cc/K9BM-56T2>]; Maurice Chammah, *Judicial Donations Raise Questions of Partiality*, TEX. TRIB. (March 26, 2013), <https://www.texastribune.org/2013/03/26/donations-judicial-campaigns-spur-ethics-worries/> [<https://perma.cc/FF5X-QZKZ>]; Morgan Smith, *Odor in the Court*, TEX. TRIB. (Feb. 2, 2010), <https://www.texastribune.org/2010/02/02/lawyers-biggest-donors-to-judicial-elections/> [<https://perma.cc/2WN6-VJM2>].

463. Pulliam, *supra* note 460 (noting that U.S. Senator John Cornyn previously served on the Texas Supreme Court as did U.S. Representative Lloyd Doggett, Governor Greg Abbott, and several federal court judges). Likewise, Alberto Gonzales served as a Texas Supreme Court justice for two years before becoming White House Counsel to George W. Bush and then U.S. Attorney General. *Attorney General: Alberto R.*

The Supreme Court has claimed implied inherent authority to regulate the legal profession under the Texas Constitution⁴⁶⁴ and administrative authority to regulate it under the State Bar Act.⁴⁶⁵ It has also claimed that the authority to regulate the practice of law belongs “exclusively” to the Court.⁴⁶⁶ The part-time Texas legislature, which meets in odd-numbered years, is seriously underpaid and understaffed.⁴⁶⁷ Nevertheless, the legislature exercises some oversight of the State Bar of Texas under the Texas Sunset Act, which provides for the legislature’s review of state agencies every twelve years.⁴⁶⁸ Recent reviews have focused on improving the lawyer discipline system and State Bar governance issues.⁴⁶⁹

The Texas legislature formed the State Bar of Texas as a mandatory bar in 1939.⁴⁷⁰ The State Bar has over 103,000 active members.⁴⁷¹ It is a state agency with some responsibility for the administration of lawyer discipline.⁴⁷² Its Board of Directors is comprised of up to thirty lawyers who are elected for three-year terms, six persons who are not licensed attorneys, and four at-large directors appointed by the president.⁴⁷³

In 1979, after LPL insurance premiums rose, the State Bar formed the Texas Lawyers’ Insurance Exchange as a bar-related mutual insurance company to

Gonzales (June 26, 2017), U.S. DEPT. OF JUST., <https://www.justice.gov/ag/bio/gonzales-alberto-r> [<https://perma.cc/7VGZ-W6PZ>].

464. *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994); *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398–99 (Tex. 1979).

465. *See In re State Bar of Texas*, 113 S.W.3d 730, 732 (Tex. 2003) (noting that the State Bar Act gives the Court “administrative control” over the State Bar); *Gomez*, 891 S.W.2d at 245, 246 (noting that the Court’s inherent power to regulate the practice of law is derived, in part, from the state constitution).

466. *In re Dow*, 481 S.W.3d 215, 224 (Tex. 2015).

467. The legislature meets for a maximum of 140 days that year, unless the governor calls a special session. *Frequently Asked Questions*, TEX. HOUSE OF REPRESENTATIVES, <https://house.texas.gov/resources/frequently-asked-questions/> [<https://perma.cc/23H8-S423>] (last visited May 26, 2020). Legislators earn \$7200 annually, plus a per diem. *Comparison of State Legislative Salaries*, *supra* note 271. Because it only meets biannually, it is often “so hard pressed in the closing days and hours of the session that critical business is left undone.” JILLSON, *supra* note 458, at 93–94.

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

469. *See SUNSET ADVISORY COMM’N, STAFF REPORT WITH FINAL RESULTS, STATE BAR OF TEX. A1–A3* (June 2017), https://www.sunset.texas.gov/public/uploads/files/reports/State%20Bar%20of%20Texas%20and%20Board%20of%20Law%20Examiners%20Staff%20Report%20with%20Final%20Results_6-21-17_0.pdf [<https://perma.cc/CE27-CFGK>]; John Sirman, *Sunset Commission Takes a Close Look at the State Bar*, 65 TEX. B.J. 500 (2002).

470. *Our Mission*, STATE BAR OF TEX., <https://www.texasbar.com/Content/NavigationMenu/AboutUs/OurMission/default.htm> [<https://perma.cc/D5LV-6HL3>] (last visited May 26, 2020).

471. *See supra* note 201 and accompanying text.

472. TEX. GOV’T CODE ANN. § 81.011 (a) (West 2019); *Frequently Asked Questions*, STATE BAR OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=Frequently_Asked_Questions&Template=/CM/HTMLDisplay.cfm&ContentID=42961 [<https://perma.cc/KY4K-FY77>] (last visited May 26, 2020).

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

provide lawyers with access to reasonably priced liability insurance.⁴⁷⁴ Texas lawyers, accountants, and other professionals later lobbied the state legislature in 1991 to pass the first LLP statute in the United States, which limited the vicarious liability of lawyers for tort claims so long as the LLP maintained a total of \$100,000 of malpractice insurance.⁴⁷⁵ In 1993, a Texas trial lawyer published an article in the *Texas Lawyer* calling for a requirement that all lawyers maintain professional liability insurance,⁴⁷⁶ but it does not appear that it spurred any official action.

In 2007, Austin attorney Charles Herring, Jr. wrote to the Texas Supreme Court asking it to consider forming a task force to study the 2004 ABA recommendation concerning insurance disclosure.⁴⁷⁷ He noted that a 2005 State Bar survey indicated that 63% of solo practitioners were uninsured.⁴⁷⁸ The Supreme Court then asked the State Bar president to consider whether Texas lawyers should be required to disclose the existence or non-existence of LPL insurance.⁴⁷⁹ In November 2007, the State Bar President appointed a Task Force on Insurance Disclosure.⁴⁸⁰ The Task Force conducted surveys of Bar members and found that 77% of lawyers responding to an email survey opposed an insurance disclosure rule and that 65% of lawyers responding to a phone survey believed that lawyers should not be required to disclose.⁴⁸¹ An April 2008 survey of the public revealed that 70% of respondents believed that lawyers should be required to disclose to clients whether they carry LPL insurance.⁴⁸² According to one observer, in the midst of the process, the State Bar president added two anti-disclosure members to the Task Force “to kill the deal. That’s what the Bar leaders wanted.”⁴⁸³ In June 2008, the Task Force recommended by a 6-5 vote that no insurance

474. *About TLIE*, TLIE, <http://www.tlie.org/about/> [<https://perma.cc/R67G-T5YX>] (last visited May 26, 2020).

475. See Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 364, 392 n.112 (1998).

476. Bousquet, *supra* note 148, at 11.

477. Letter from Charles Herring Jr. to Chief Justice Wallace B. Jefferson, Tex. Supreme Court (July 30, 2007) (on file with author).

478. *Id.* The survey response rate is not known.

479. See Letter from Chief Justice Wallace B. Jefferson, Tex. Supreme Court, to Roland Johnson, President, State Bar of Tex. (Apr. 14, 2010) (on file with author).

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

481. *Id.* at 3; PLI Disclosure—Attorney Survey Findings—February 2008 (on file with author). The response rate for the email survey was 6.6%. Memorandum from David J. Beck, *supra* note 480, at 3 n.2. One State Bar section reportedly campaigned to get its members to oppose disclosure before the polling was complete. See GRIEVANCE OVERSIGHT COMM., 2009 REPORT TO THE SUPREME COURT OF TEXAS 3 (2009).

482. Mary Alice Robbins, *Déjà vu All Over Again: State to Reconsider Insurance Disclosure*, TEX. LAW., Oct. 5, 2009, at 16.

483. E-mail from Texas Task Force Member to Leslie C. Levin (Apr. 17, 2018: 21:41 EDT) (on file with author).

disclosure be required.⁴⁸⁴ The State Bar Board of Directors forwarded the Task Force's report to the Supreme Court without making its own recommendation.⁴⁸⁵

Thereafter, the Grievance Oversight Committee ("GOC"), a body appointed by the Supreme Court and primarily tasked with reviewing the lawyer discipline system, spent nine months reviewing the insurance disclosure issue.⁴⁸⁶ It conferred with the Chief Disciplinary Counsel, the Commission for Lawyer Discipline, local bar leaders, bar leaders in the three states that had not adopted the ABA disclosure rule, and members of the public.⁴⁸⁷ It also looked at the cost of LPL insurance and reviewed correspondence from lawyers opposed to disclosure.⁴⁸⁸ The GOC recommended in its June 2009 report that the Supreme Court adopt a disciplinary rule requiring disclosure if lawyers did not carry LPL insurance in the amount of \$100,000/\$300,000.⁴⁸⁹ This recommendation appeared two months after Elliott Naishtat, a state representative from Austin, introduced a bill providing for the promulgation of rules requiring uninsured lawyers to provide notice to clients that they are uninsured.⁴⁹⁰

The Supreme Court then asked the State Bar Board of Directors to take a position on the disclosure issue, which prompted further Bar study.⁴⁹¹ Bar leaders held public hearings around the state, which were attended almost exclusively by lawyers.⁴⁹² Once again, they found that lawyers overwhelmingly opposed the proposal.⁴⁹³ The Board commissioned a public opinion survey of 500 Texas residents which revealed that 88% of respondents reported they would be less likely

484. Memorandum from David J. Beck, *supra* note 480, at 7. Recognizing, however, that the Texas Supreme Court might eventually decide to require some form of disclosure, the Task Force voted 6-4 to recommend that any required insurance disclosure be available only on the Texas State Bar's website and not through direct disclosure to the client. *Id.*

485. Robbins, *supra* note 482.

486. *Id.* It is unclear whether it was asked by the Supreme Court to do so. Compare Mary Alice Robbins, *Report: Counsel Without Malpractice Insurance Should Tell Clients*, TEX. LAW. (June 22, 2009), <https://www.law.com/texaslawyer/almID/1202431632489/Report-Counsel-Without-Malpractice-Insurance-Should-Tell-Clients/> [<https://perma.cc/3X85-9FDV>] with GRIEVANCE OVERSIGHT COMM., *supra* note 481, at 2.

487. GRIEVANCE OVERSIGHT COMM., *supra* note 481, at 2.

488. *Id.* at 2, 6-7.

489. Fortney, *supra* note 169, at 203-04; Mary Alice Robbins, *State Bar Board Overwhelmingly Rejects Insurance-Disclosure Rule*, TEX. LAW., Feb. 8, 2010.

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

491. See Fortney, *supra* note 169, at 204; Robbins, *supra* note 476.

492. Bruce A. Campbell, *A Viewpoint on Disclosure of Malpractice Insurance by Texas Lawyers* (July 2010), <https://www.clegal.com/wp-content/uploads/2012/10/A-Viewpoint-on-Disclosure-of-Malpractice-Insurance-by-Texas-Lawyers1.pdf> [<https://perma.cc/CX9U-D5D9>].

493. See *id.*; Fortney, *supra* note 169, at 206.

to hire a lawyer who did not carry LPL insurance and 64% believed that lawyers should be required to reveal this information.⁴⁹⁴ The Board also conducted focus groups with thirty-seven members of the public, which revealed that 70% of participants initially believed that lawyers should be required to disclose, but after hearing arguments for and against disclosure requirements and further discussion, 54% indicated there should be disclosure.⁴⁹⁵ The focus groups were subsequently criticized, however, for the way in which they were conducted.⁴⁹⁶ Two citizens' organizations wrote in support of a disclosure rule as did three former State Bar presidents.⁴⁹⁷ Nevertheless, in January 2010, the Texas State Bar Board of Directors recommended by a vote of 39-1 against requiring disclosure.⁴⁹⁸ They further recommended that if the Supreme Court decided that disclosure should be required, it should be in an administrative rule and that the information should only be posted on the State Bar website, rather than through direct disclosure to clients.⁴⁹⁹

In his letter to the Supreme Court explaining the Board's conclusion, State Bar President Roland Johnson stressed that Texas lawyers "overwhelmingly expressed their opposition to a requirement" and suggested that a disclosure requirement would confuse the public because of the intricacies of insurance.⁵⁰⁰ Johnson also emphasized that when the public was asked for things they looked for when hiring an attorney, "professional liability insurance is not even in the top 10 answers received."⁵⁰¹ He did not mention that the survey asked for open-ended responses and that many members of the public assume that lawyers carry insurance.⁵⁰² The Johnson letter and accompanying Executive Summary are striking in that—apart from referencing public support for the idea—they do not mention any of the arguments in favor of insurance disclosure.

494. *PLI Disclosure Survey of the Public - November 2009*, STATE BAR OF TEX., <https://www.texasbar.com/pliflashdrive/material/PublicSurvey.pdf> [<https://perma.cc/4PJB-BVZH>].

495. Chris Fick & Greg Liddell, *Personal Liability Insurance: Public Opinion Focus Group Study* 9, 12 (Jan. 15, 2010), https://www.texasbar.com/pliflashdrive/material/SBOT%20FG%20Report_Final_V3.pdf [<https://perma.cc/UH6G-LNZQ>].

496. See Mary Alice Robbins, *The Report Card: Grading Roland Johnson's Term as State Bar President*, TEX. LAW., June 7, 2010.

497. See Letter from Juanita Valdez-Cox, Exec. Dir. of La Union del Pueblo Entero, to Bd. of the State Bar of Tex. (Dec. 14, 2009); Letter from Tom Smith, Dir., Public Citizen, Tex. Office, to Roland K. Johnson, President, State Bar of Tex. (Dec. 30, 2009); Fortney, *supra* note 169, at 208–09.

498. See Draft Official Minutes, State Bar of Tex. Bd. of Directors Meeting (Jan. 28–29, 2010), https://www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_and_Minutes&Template=/CM/ContentDisplay.cfm&ContentFileID=319 [<https://perma.cc/G8Q9-PUP7>].

499. *Id.*

500. Letter from Roland K. Johnson, President, State Bar of Tex., to Chief Justice Wallace B. Jefferson, Tex. Supreme Court (Feb. 2, 2010).

501. *Id.* at 2.

502. See *id.* The 2009 survey asked respondents to list the factors that influenced their decision to hire a lawyer but did not provide a menu of options from which to select. STATE BAR OF TEX., *supra* note 494.

In April 2010, the Texas Supreme Court announced it would not adopt a disclosure rule.⁵⁰³ In a letter to the State Bar president, Chief Justice Wallace Jefferson wrote, “Having considered the State Bar’s recommendation and the materials supporting the recommendation, the Court will retain the status quo.”⁵⁰⁴ The Supreme Court noted “good arguments” were presented on both sides.” It added:

Of course, we should be concerned if clients are unable to recoup sums occasioned by lawyer malpractice, or if the public would view the non-existence of such insurance a critical factor in the decision to retain a lawyer. But, as your process demonstrated, there is little evidence of either circumstance.⁵⁰⁵

In fact, the State Bar did not investigate whether clients were unable to recoup from uninsured lawyers.⁵⁰⁶ Like the State Bar, the Supreme Court also did not consider that when the public was asked to give open-ended answers about the factors that were important when selecting a lawyer, they were probably unaware that lawyers were not required to maintain LPL insurance. The Supreme Court also seemingly credited the argument “that the public may assume erroneously about mandatory disclosure that past insurance coverage is an assurance of future coverage,”⁵⁰⁷ even though that problem can be readily addressed in insurance disclosure rules.⁵⁰⁸

Why did the Court defer to the Texas State Bar’s position, notwithstanding the Task Force’s close vote and the recommendation by the GOC to adopt a disclosure rule? The Texas Supreme Court has not historically been active in the area of lawyer regulation.⁵⁰⁹ Indeed, it has a history of protecting lawyers, at least in the area of lawyer malpractice.⁵¹⁰ This orientation may be due, in part, to Texas’s

503. Tex. Sup. Ct. Advisory, *Court Decides Against Mandatory Professional-Liability Insurance Disclosure* (Apr. 16, 2010), http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/CourtNewsAndAdvisories/advisories/Professional_Insurance_Disclosure_041610.htm [https://perma.cc/J599-8QVJ].

504. Letter from Chief Justice Jefferson, *supra* note 479, at 1.

505. *Id.*

506. Indeed, Charles Herring offered such evidence when he first requested that the Supreme Court look at the issue. *See* Herring, *supra* note 477 (noting that “when a lawyer shows that he has no malpractice insurance, I almost never take a case, regardless of the wrongdoing”); *see also* Bousquet, *supra* note 148, at 11 (describing instances of large default judgments against uninsured lawyers); Elder, *supra* note 26, at A1 (describing client who had an uncollectable \$10 million judgment against an uninsured lawyer).

507. Letter from Chief Justice Jefferson, *supra* note 479.

508. Any disclosure requirement could impose on lawyers an obligation to notify clients if they become uninsured during the representation and indeed, some states already impose this requirement. *See, e.g.*, PA. RULES OF PROF’L CONDUCT R. 1.4 (c) (2019); S.D. RULES OF PROF’L CONDUCT R. 1.4 (c) (2019).

509. For example, the Supreme Court declined the invitation to weigh in on the subject of mandatory pro bono. One justice noted that the Court’s primary role was adjudicating disputes, and that it preferred to leave difficult issues, such as access to justice, to the legislature. *State Bar v. Gomez*, 891 S.W. 2d 243, 247–48 (Tex. 1994) (Gonzales, J., concurring).

510. *See* Rick Casey, *The Coddled Lawyers of Our Fair State*, HOUSTON CHRON., Apr. 20, 2010 (describing two Texas Supreme Court decisions making it more difficult for plaintiffs to recover in certain types of legal malpractice cases).

traditionalistic/individualistic political culture and the fact that Supreme Court justices must raise more money for their re-election campaigns than justices in any other state.⁵¹¹ In addition, judges want to do well in the State Bar's judicial polls, which signal the strength of lawyer support for Supreme Court candidates.⁵¹² Candidates also rely on well-respected lawyers, including past Bar presidents, for endorsements that they advertise during their campaigns.⁵¹³ Texas Supreme Court justices have significant incentives to maintain good relations with the bar if they wish to retain their positions or to advance from them.

V. WHEN WILL STATES REGULATE TO PROTECT THE PUBLIC FROM UNINSURED LAWYERS?

What lessons can be drawn from these case studies? Only seven states have been examined. Each has its own institutional relationships and rulemaking process. The reasons for some key events—including the state supreme courts' decisions—are not fully known. But there are some similarities that suggest some tentative conclusions about when states will act to protect the public from uninsured lawyers. As discussed in the Conclusion, the factors identified here may also help us understand more broadly when states will regulate lawyers in ways that protect the public.

The state bar's willingness to endorse an insurance requirement seems to be crucial to the ultimate outcome. This can be seen in Oregon and Idaho—the only states that require LPL insurance—where the State Bars proposed mandatory insurance rules. In Oregon, many lawyers viewed the proposal as personally beneficial, because the PLF was expected to provide insurance at a lower price than they were paying on the open market. The legislature promptly enacted the OSB's proposal. In Idaho, the ISB's resolution to require LPL insurance barely squeaked by the membership in at 51-49% vote. The Idaho Supreme Court, which traditionally adopts the ISB's proposals, also did so in that instance. It is not always true, however, that states will adopt such rules whenever they are officially proposed by the organized bar. The Nevada Supreme Court rejected the State Bar of Nevada's proposal to adopt an insurance requirement after it heard objections from rank-and-file members. When the state bar does not endorse such initiatives, however, the case studies (e.g., in New Jersey and Texas) revealed that they do not become law.⁵¹⁴

511. Steve Miller, *Texas Tops in State Supreme Court Election Fundraising*, TEX. MONITOR, Jan. 3, 2018.

512. See STATE BAR OF TEX., 2018 Judicial Poll, Final Vote Summary (Feb. 6, 2018), <https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=39261&Template=/CM/ContentDisplay.cfm> [https://perma.cc/R9YK-J27P].

513. *Endorsements for Justice Phil Johnson*, CAMPAIGN FOR THE TEX. SUPREME COURT, [https://perma.cc/4LYN-CMEE]; *Endorsements for Justice Eva Guzman*, CAMPAIGN FOR THE TEX. SUPREME COURT, <https://www.evaguzman.com/endorsements/> [https://perma.cc/2DE4-7BFU] (last visited May 26, 2020).

514. The outcome in Washington—where the WSBA rejected mandatory insurance—was unclear at the time of publication.

A second notable feature of most of the states' experiences is that the impetus for examining the insurance issue came not from the courts, but from individual lawyers. In Nevada, New Jersey, Texas, and Washington, the most recent calls to address the issue of uninsured lawyers came from individuals who did not hold leadership positions in the bar.⁵¹⁵ In Idaho, a new ISB Commissioner raised the issue due to her personal experience with a victim of an uninsured lawyer.⁵¹⁶ In California, a lawyer-legislator put the issue back on the agenda.⁵¹⁷

It is worth pausing to ask: Where were the judges? Some courts may have failed to initiate action because they were busy with their main work—deciding cases—or because custom or law dictated such initiatives would come from the bar.⁵¹⁸ Yet this is only a partial explanation. Public choice theory suggests that judicial inaction was predictable. Judges *do* sometimes initiate changes in lawyer regulation when it is in their self-interest. For example, justices have initiated efforts to address the problem of pro se litigants, who seriously burden the courts.⁵¹⁹ But the issue of uninsured lawyers does not present a significant problem for the courts: these cases rarely make it to court at all, and they do not interfere with court administration. Nor is it a problem that has garnered much media attention. Furthermore, judges may anticipate that lawyers are likely to be divided on the issue of insurance requirements. Consequently, there is little reason for judges, as self-interested actors, to initiate steps to address it.

It is also worth considering why the state legislatures have been mostly uninvolved in these issues.⁵²⁰ Legislators may have had little interest in spending time on legislation that would almost certainly be challenged in court (and possibly invalidated) based on courts' assertion of their exclusive authority to regulate lawyers or on separation of powers grounds. It is also likely that state legislatures were not moved to take up this issue because constituents did not advocate for change and legislators did not wish to antagonize the bar. The exception is

515. See *supra* notes 342, 384, 430, 432, and 477 and accompanying text. As noted, in Washington, once the lawyer-initiated effort failed, it was taken up by a public interest group. The Nevada and Washington Supreme Courts previously initiated efforts to look at insurance disclosure, but only after the ABA adopted and recommended its Model Court Rule on Insurance Disclosure. See *supra* notes 338, 375 and accompanying text. The Texas and New Jersey Supreme Courts seemingly ignored this development and did not act until lawyers in those states raised the issue.

516. See Telephone Interview with Michelle Points, *supra* note 245 and accompanying text.

517. See *supra* text accompanying note 313. It is unclear who initiated the move to mandatory insurance in the 1970s in Oregon, but it seems to have come from within the OSB.

518. In California, the Supreme Court may not have acted because the legislature was attempting to address the issue.

519. See, e.g., Joel Stashenko, *Lippman Announces Pro Bono Requirement for Bar Admission*, LAW.COM (May 2, 2012) (describing New York Chief Judge's initiative to require all bar applicants to provide fifty hours of pro bono representation).

520. There were occasional attempts by individual lawyer-legislators to raise the need for insurance requirements in Texas and New Jersey, but they failed to garner support. See *supra* notes 425, 446, 490 and accompanying text. In fact, all of the legislators in California (Willie Brown, Lloyd Connelly, and Hannah-Beth Jackson), New Jersey (Jon Bramnick and Nicholas Scutari), and Texas (Elliott Naishtat) who introduced legislation concerning mandatory LPL insurance were lawyers.

California, where the legislature has looked periodically at the issue and in 2017, ordered the State Bar to again study mandatory LPL insurance and other insurance issues. While the legislature's top-down directive and its relatively tight time frame for the State Bar to issue a report may have contributed to the Working Group's inability to make a recommendation on mandatory insurance, it at least squarely put the issue on the agenda.

California's experience highlights the importance of a third factor—the *process* for studying and proposing lawyer regulation—to the ultimate outcome. In Idaho, the Bar has the statutory authority to propose rules, and the Idaho Supreme Court mostly waits for it to do so. Likewise, in Nevada the common practice appears to be for proposals to emanate from the State Bar. In the latter, the regular process enabled a small group of leaders to petition the Supreme Court for an insurance requirement, notwithstanding significant member opposition. Yet some state bars are required to seek a membership vote on proposed rule changes;⁵²¹ even where such votes are not required, bar leaders may put a proposed rule change to a membership vote for political cover.⁵²² Membership votes to approve rule proposals can make the passage of public-regarding rules more difficult. Lawyers opposed to the measures can organize against them and help bring out the “no” votes, which happened in Texas. Exceptions may occur, however, in states like Idaho, where the process occurred so quickly that it may have been difficult to organize against the mandatory insurance proposal.⁵²³

Where the process permitted individual lawyers to directly advocate to the state supreme court—via public hearings or written comments—this also directly affected the outcome. Lawyers had no such opportunity in Oregon and Idaho, where LPL insurance is now required. In New Jersey, where the Supreme Court has thus far adopted an approach *less* protective of the public than its Ad Hoc Committee recommended, the Court indicated this was due to the lawyer comments it received. In Nevada, after the State Bar petitioned the Supreme Court to adopt an insurance requirement, the Court held a public hearing at which it heard significant opposition from well-respected lawyers, and then rejected the Bar's proposed requirement. Cultural capture may help explain the courts' decisions, especially when lawyers' arguments were couched in terms of the impact of insurance requirements on their livelihoods.⁵²⁴

521. See Idaho State Bar, 2016 Resolution Process, *supra* note 247 and accompanying text (discussing the Idaho resolution process); TEX. GOV'T CODE §§ 81.0877, 81.0878 (West 2018) (requiring a membership vote for proposed disciplinary rule changes).

522. See, e.g., Welden, *supra* note 340 and accompanying text.

523. It also remains to be seen whether highly motivated actors can successfully circumvent the process. See, e.g., *supra* notes 350–51, 354 and accompanying text (describing Equal Justice Washington's effort to circumvent the WSBA's decision to reject mandatory insurance).

524. Courts may be more willing to disregard lawyer opposition when regulatory proposals affect the courts' work, as was the case with Washington's licensing of LLLTs and New Jersey's rules requiring greater candor to the court. See *supra* notes 320, 419–20 and accompanying text.

The case studies further indicate that *bar leadership* matters. The Oregon State Bar's leadership supported an insurance requirement, which they viewed as good for lawyers. In Idaho, the ISB Commissioners assumed responsibility for studying mandatory insurance and then shepherded their insurance proposal to a successful conclusion. In Washington, bar leaders placed a strong proponent of mandatory insurance, a federal judge, an LLLT, a member of the OSB, and two public members on the Task Force that recommended the requirement.⁵²⁵ In Nevada, the Board of Governors petitioned the Supreme Court for an insurance requirement, even though they were aware that many members opposed it. Yet bar leaders in other states effectively undercut insurance initiatives. The president of the State Bar of Texas added anti-disclosure members to the Task Force later in the process, apparently to ensure defeat of a disclosure recommendation. The NJSBA opposed insurance initiatives through its designee on the New Jersey Supreme Court's Ad Hoc Committee, subsequently wrote the Court to oppose the Committee's recommendation, and succeeded in persuading the Court to hold off on a direct disclosure requirement.

The New Jersey experience suggests that the *type of state bar association* may also have affected the outcome. In states with mandatory bars, the organizations are usually public entities, their staff often performs some regulatory functions, and their mission typically includes public protection. In some states, their boards include non-lawyer members. Mandatory bars at least nominally have some obligations to the public. Voluntary state bar associations have no official regulatory function and are freer to function in a manner more akin to guilds. Even when they include public-spirited members, their boards may have more difficulty taking controversial positions because they want to maintain their voluntary members. In contrast to the mandatory bars in Oregon, Idaho, and Nevada, no voluntary state bar has advocated for an LPL insurance requirement.

Another interest group—*malpractice insurers*—also influenced the outcome in some states. The LPL insurance market is segmented geographically due to the state-based nature of insurance regulation, and by size of firm.⁵²⁶ Both commercial insurers and bar-related mutual insurance companies provide LPL insurance to solo and small firm lawyers.⁵²⁷ In California, insurer opposition to mandatory insurance in the 1980s effectively helped to kill the legislature's mandatory insurance initiative. In that case, commercial insurers wanted to maintain their insurance programs with voluntary bar associations. In New Jersey, commercial insurers assisted the NJSBA to help put the thumb on the scale against a malpractice insurance requirement. In contrast, in Idaho, Nevada, and Washington, a

525. See WASH. STATE BAR ASS'N, MANDATORY MALPRACTICE INS. TASK FORCE, REPORT TO WSBA BOARD OF GOVERNORS, *supra* note 160, at 63–66.

526. Levin, *supra* note 142, at 565.

527. *Id.* at 565–66.

historically bar-affiliated insurer (ALPS), assisted with information gathering and supported some of the Bars' initiatives to mandate insurance.⁵²⁸

In addition, *political culture* seemingly played a role in the states' handling of the insurance issue. The mostly moralistic and moralistic/individualistic states were willing to seriously consider mandatory insurance (California, Washington) and in some states, implement the requirement (Oregon, Idaho). Nevada, which has an individualistic political culture, does not neatly fit into this pattern, because its State Bar not only considered mandatory insurance, but also recommended it to the Supreme Court. As noted, however, the Nevada Supreme Court ultimately rejected the proposal, retaining a weak disclosure requirement.⁵²⁹ Likewise, New Jersey, with its individualistic culture, only recently indicated it would adopt a disclosure requirement (for insured lawyers only) while Texas, with its traditionalistic/individualistic culture, has not acted to protect the public from uninsured lawyers. Indeed, most of the traditionalistic and traditionalistic/individualistic southern states (Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Oklahoma, South Carolina, and Tennessee)⁵³⁰ do not have any type of insurance disclosure requirement.⁵³¹

At the same time, it is unclear whether the method of judicial selection affects states' willingness to adopt laws that protect the public from uninsured lawyers. In the two states that currently offer the least protection from uninsured lawyers—Texas and New Jersey—the methods of judicial selection are very different.⁵³² In Texas, there are partisan elections and judges are highly dependent on lawyer contributions. In New Jersey, justices are appointed, and after their second term, they may remain in office until retirement age. In two states with non-partisan judicial elections, insurance is required (Idaho and Oregon) while in the three other states with non-partisan or retention elections (California, Nevada, and Washington), it is not. Closer analysis of judicial politics in these and other states may reveal that methods of judicial selection make a difference on this issue, but such differences were not apparent in this study.

It does not appear, however, that certain types of state legislatures are more likely to regulate the legal profession to protect the public from uninsured

528. See *supra* note 347 and accompanying text: Telephone interview with Michelle Points, *supra* note 245; Petition of the State Bar of Nevada, ADKT 534, *supra* note 27, at 7.

529. See Order Denying Petition for Amendment to Supreme Court Rule 79, *supra* note 401. The State Bar website does not advise the public that this information is available.

530. Morgan & Watson, *supra* note 189, at 43.

531. Only Virginia (traditionalistic) and West Virginia (traditionalistic/individualistic) are exceptions. See ABA STANDING COMM. ON CLIENT PROTECTION, STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON INSURANCE DISCLOSURE, *supra* note 137, at 5–6.

532. In 2019—fifteen years after the ABA adopted its Model Court Insurance Disclosure Rule—the New Jersey Supreme Court indicated it would require insured lawyers to disclose whether they carry insurance, but seemingly is not requiring disclosure by uninsured lawyers. See Notice to the Bar—Ad Hoc Committee on Attorney Malpractice Insurance, *supra* note 453 and accompanying text. That requirement has yet to be implemented.

lawyers.⁵³³ California is the only state studied with a full-time legislature and it wields considerable power vis-à-vis the State Bar. Indeed, the California legislature adopted the first requirement that lawyers disclose to clients whether they maintained LPL insurance, a dozen years before the ABA adopted its Model Court Rule on Insurance Disclosure. But the three other states with the most professional legislatures (New York, Pennsylvania, and Michigan)⁵³⁴ have not displayed similar interest in the insurance issue. Indeed, New York has no insurance disclosure requirement, and while Michigan and Pennsylvania have disclosure requirements, they were instituted by the state supreme courts.⁵³⁵

Finally, the case studies reflect that the public was largely absent from the decisionmaking over whether and how to regulate uninsured lawyers. This is true of most lawyer regulation efforts.⁵³⁶ In Oregon and Idaho, the State Bars recommended mandatory insurance, even though there were no non-lawyer members involved in the deliberations. Thus, mandatory insurance *can* be adopted without public involvement. Likewise, the Nevada Task Force and the Board of Governors that voted in favor of mandatory insurance included no public members. The presence of a small number of public members on decisionmaking bodies that considered the insurance issue did not guarantee success. The Washington Task Force that voted in favor of mandatory insurance included two lay members and one LLLT, but there were no lay members on the Board of Governors that ultimately voted against it.⁵³⁷ There was a single lay representative on the New Jersey Ad Hoc Committee that recommended against mandatory disclosure.⁵³⁸ Likewise in Texas, where there was one public member on the Task Force and six public members (out of forty) on the State Bar Board, insurance disclosure was rejected.⁵³⁹

533. Nor do the case studies suggest that a state legislature with statutory responsibilities to review the State Bar's activities will promote significant public-regarding regulation. In recent years, the Texas legislature has not focused attention on the issue of uninsured lawyers or other public protection measures commonly found in other states. *See, e.g.*, STANDING COMM. ON CLIENT PROTECTION, AM. BAR ASS'N REPORT: STATE BY STATE ADOPTION OF ABA CLIENT PROTECTION PROGRAMS (2015), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_by_state_cp_programs.pdf [<https://perma.cc/W5H3-YMR7>] (reflecting that Texas has not adopted most ABA-recommended client protection programs). It is possible that a state with a full-time legislature, more frequent legislative reviews of the State Bar, and a less traditionalistic political culture might adopt more public-regarding lawyer regulation.

534. *See Full- and Part-Time Legislatures*, *supra* note 114.

535. *See Disciplinary Board Makes it Easy for Public to Know if Lawyers Have Professional Liability Insurance*, PA. SUP. CT. DISCIPLINARY BD. (May 10, 2017), <https://www.padisciplinaryboard.org/news-media/news-article/3/disciplinary-board-makes-it-easy-for-public-to-know-if-lawyers-have-professional-liability-insurance> [<https://perma.cc/TTR3-DLWP>]; Mich. Sup. Ct., Administrative Order No. 2003-5 (Aug. 6, 2003).

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

537. *See supra* note 345 and accompanying text. It was only after the WSBA Board of Governors rejected the mandatory insurance proposal that Equal Justice Washington formed and proposed a rule change.

538. *See supra* note 435 and accompanying text.

539. *See supra* notes 473, 484 and accompanying text.

The public was also largely absent from the debate over this issue. In Washington, one member of the public spoke in favor of an insurance requirement in the public hearing before the Board of Governors,⁵⁴⁰ but his views were outweighed by many lawyers who spoke out in opposition to mandatory insurance. He was able to resurrect the issue after the WSBA rejected it, but whether he will achieve a rule change remains unclear. Two consumer-oriented organizations wrote the Texas Supreme Court supporting disclosure requirements, to no avail. In New Jersey, the Supreme Court invited lawyers to comment on the Ad Hoc Committee's report, but did not invite public comment. The Nevada Supreme Court invited public comment on the Task Force's recommendation, but it published its order only where lawyers would see it, and received no comments from the public.⁵⁴¹ Public choice theory suggests the initiatives in other states would have been more successful if there were more public involvement in the process, but it is very difficult to know.⁵⁴²

CONCLUSION

What does the case of LPL insurance reveal more generally about the politics of lawyer regulation? At least on certain issues, state supreme courts will wait for the organized bar to bring issues concerning lawyer regulation to their attention. Some—but not all—courts will accede to the recommendations of the bar.⁵⁴³ Bar leadership, the internal decisionmaking of bar organizations, and the process for considering new lawyer regulation can affect the outcomes. Of course, the likelihood of adopting public-regarding lawyer regulation may depend upon the states' political culture. Additional interest groups may also affect the results.

Further research is needed to explore the politics of lawyer regulation to determine the conditions under which states will adopt public-regarding laws.⁵⁴⁴ Does the size of the bar, its homogeneity, type, or location affect whether lawyers will support regulations that are not in their personal interest? Does the relative proximity of states make a difference? For example, why are Arizona, California, Utah, and Washington the only states that permit non-lawyers to provide some legal services or act as document preparers?⁵⁴⁵ Why are New York and New

540. See Public Session Minutes, WSBA Mandatory Malpractice Task Force—Special Meeting (Apr. 22, 2019), https://www.wsba.org/docs/default-source/about-wsba/governance/bog-meeting-minutes-2018-2019/board-of-governors-special-public-session-minutes-april-22-2019.pdf?sfvrsn=855a0df1_8 [<https://perma.cc/7D9V-6H97>].

541. Order Scheduling Public Hearing and Requesting Public Comment, ADKT 534, *supra* note 397; see also *supra* notes 398–99 and accompanying text.

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

543. See also Zacharias, *supra* note 49, at 1174–75; Zacharias & Green, *supra* note 11, at 94.

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

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

Jersey the only states to impose discipline sanctions on law firms?⁵⁴⁶ Likewise, how do judicial training and socialization influence judges' conception of judges' roles with respect to regulating lawyers? How do organizations such as the Conference of Chief Justices affect their views about appropriate regulation? Are there ways to measure the relations between bench and bar (such as network analysis) that might help explain justices' decisions concerning lawyer regulation? Do legislatures play a larger role in the adoption of public-regarding lawyer regulation than the case studies suggest? If so, when, why, and what role, if any, do *lawyer-legislators* play in that process? When does media attention help produce public-regarding law?⁵⁴⁷

The malpractice insurance example suggests that the public is largely dependent on the bar to pursue certain types of public-regarding lawyer regulation. The courts rarely initiated study of the question of uninsured lawyers, and sometimes considered it only reluctantly, when they were confronted by lawyers who raised the issue in the legal press. Likewise, with the exception of California, state legislatures will not step in and address this issue. This is not just true with respect to the states studied here; there has been no significant legislative initiative on this issue anywhere else in the United States.

Thus, it is worth considering whether more can be done to focus public attention on the need for lawyer regulation that better protects the public. One way might be to notify the public in some meaningful way of the issues at stake and the opportunity for public comment. But interest group theory suggests that even then, it will be difficult to mobilize the public to act. Consumers have diverse concerns, and uninsured lawyers present only one of many sources of problems for the public. Many individuals use lawyers only occasionally (if ever) and have little incentive to devote time to advocacy on complicated issues concerning lawyer regulation.

The challenge, then, is to find ways to inject greater consideration of the public interest into debates about lawyer regulation when no one—except the bar—may be paying close attention to the issues. One way to do so might be to appoint a larger number of public members to sit on mandatory state bar governing boards and state bar committees concerned with lawyer regulation. The California legislature has already done this by requiring, since 2013, that the State Bar Board of Trustees include seven lawyers and six public members.⁵⁴⁸ In states with voluntary state bars, courts should appoint several public members to court-constituted committees that consider lawyer regulatory issues. Lay appointees should not be

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

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

548. See *supra* note 269 and accompanying text.

merely symbolic “friends of lawyers”; they should have consumer rights orientations.

Alternatively, a public advocate might participate in the regulatory process, representing the public’s interests and presenting the public’s views on issues relating to lawyer regulation. Public advocates are sometimes used by states to offset the effects of regulatory capture in agencies.⁵⁴⁹ Typically, public advocates are state-funded and independent representatives empowered to intervene in certain administrative proceedings and to research and present the public’s interests.⁵⁵⁰ In light of the seeming failure of most courts or legislators to propose public-regarding lawyer regulation, public advocates should not be limited to reacting to bar proposals, but should also be encouraged to propose lawyer regulation. Courts (and in some states, legislatures) can create the public advocate positions and incorporate them into the processes that produce lawyer regulation. Procedurally, this might be as simple as seeking comment from the public advocate after a state bar or court-appointed committee has made a recommendation to the court.

As Rachel Barkow notes, the selection process for public advocates is “critically important” and should not be dominated by the regulated industry.⁵⁵¹ Public advocates should be selected who have a greater interest in consumer and public welfare than in any particular industry.⁵⁵² Steps must be taken to ensure that the public advocate is not captured by the interests that are already represented in the political process (in this case, lawyers).⁵⁵³ One way to avoid capture is to ensure that the position is adequately resourced.⁵⁵⁴ The biggest challenge may be persuading courts of the need for a public advocate, as this requires them to overrule likely bar objections. They would also need to admit (at least to themselves) that they are not sufficiently attending to the public interest when they regulate lawyers. More research on the politics of lawyer regulation may help them reach that conclusion.

549. See, e.g., Ganesh Sitaraman, *Reforming Regulation: Policies to Counteract Capture and Improve the Regulatory Process*, CTR. FOR AM. PROGRESS (Nov. 1, 2016), <https://www.americanprogress.org/issues/economy/reports/2016/11/01/291499/reforming-regulation/> [<https://perma.cc/752M-3M9Z>]; Elizabeth Warren, *Corporate Capture of the Rulemaking Process*, REGULATORY REV. (June 14, 2016), <https://www.theregreview.org/2016/06/14/warren-corporate-capture-of-the-rulemaking-process/> [<https://perma.cc/H5A6-DZRB>].

550. See, e.g., Alan M. White, *Banks as Utilities*, 90 TUL. L. REV. 1241, 1283 (2016) (discussing public advocates in the context of utility rate increase requests).

551. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 63 (2010).

552. *Id.*

553. See Neil Komesar & Wendy Wagner, *The Administrative Process from the Bottom Up: Reflections on the Role, If Any, for Judicial Review*, 69 ADMIN. L. REV. 891, 946 (2017).

554. *Id.*; Barkow, *supra* note 551, at 63.